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Dear Manager

Improving the Effectiveness of the Consumer Product Safety System

The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to respond to Treasury's Consultation Regulation Impact Statement on Improving the Effectiveness of the Consumer Product Safety System published on 8 October 2019 (**Consultation Paper**).

The Committee provides a forum through which lawyers and other interested parties can discuss competition and consumer laws affecting business, current issues and the process of law reform in Australia.

The Committee acknowledges the key problems identified and policy objectives outlined in the Consultation Paper and takes this opportunity to make a number of specific observations in relation to the following six options being considered by the Treasury:

- **Option 1** – No change to the product safety system;
- **Option 2** – More education and increased industry engagement;
- **Option 3** – A prohibition on continuing to supply unsafe products and a new enforcement instrument to issue a 'Notice of Risk';
- **Option 4** – A new protection power;
- **Option 5** – A new safety duty aligned with the existing Australian Consumer Law (**ACL**); and
- **Option 6** – A new safety duty with a higher safety threshold,

(together, the **Options**).

While the Committee considers that the existing product safety regime is comprehensive, it accepts that trading patterns have evolved over time due to globalisation and the proliferation of online retailers, and considers that the introduction of new measures to enhance the regime may now be appropriate. More specifically, the Committee supports the adoption of a combination of Option 2 and Option 3 (the **Preferred Approach**) because it:

- provides clarity and certainty for consumers and traders about their respective rights and responsibilities under the product safety regime; and

- strikes the right balance between empowering regulators to respond to product safety concerns in a timely manner (with appropriate enforcement powers in cases where traders continue to knowingly supply an unsafe product), without imposing an excessive regulatory burden on traders.

The Committee's view is that introducing one or more of Option 4, 5 or 6 is unlikely to result in any material benefits in terms of preventing unsafe products from entering or remaining on the market. The Committee considers that to the extent there are any such benefits, they will be outweighed by:

- the considerable uncertainties that traders will face in assessing what steps they are required to take to ensure compliance; and
- the increased compliance costs for traders (which are likely to be passed onto consumers).

1 The Preferred Approach delivers clarity and certainty to both consumers and traders

1.1 Clarity and certainty are important criteria when assessing the Options

The current Australian product safety framework would benefit from increased clarity and certainty, for both consumers and traders.

As noted in the Consultation Paper, there is currently a degree of confusion among consumers and businesses as to product safety standards, obligations and remedies.¹ In particular, traders frequently seek advice and guidance concerning:

- **when to submit a mandatory report:** incidents of 'death or serious injury or illness' trigger the mandatory reporting requirement, where the incident was or may have been caused by the 'use or foreseeable misuse' of goods. Despite the guidance published by the Australian Competition and Consumer Commission (ACCC),² both the definition of 'serious injury or illness' and the practical application of the 'use or foreseeable misuse' test remain unclear.
- **when to undertake a voluntary recall:** often the decision to conduct a voluntary recall is taken to avoid the risk of a compulsory recall. However, given the high-level nature of the ACCC's Consumer Product Safety Recall Guidelines (ACCC Guidelines)³ as to when voluntary recalls should be conducted, traders may be initiating voluntary recalls in situations where other action, such as issuing a safety alert, may have sufficed. This can lead to considerable costs to business (which in turn may be passed on to consumers), impose burdens on consumers and give rise to safety fears in circumstances where such actions may not have been required.
- **timing of voluntary recall notification requirement:** traders are required to notify the ACCC within two days of voluntarily taking action to recall consumer

¹ Consumer Affairs Australia and New Zealand, 'Consultation Regulation Impact Statement: Improving the effectiveness of the Consumer Product Safety System' (2019), p 26 ('*Consultation Paper*').

² Australian Competition and Consumer Commission, 'A guide to the mandatory reporting law in relation to consumer goods' (2016), available at <https://www.productsafety.gov.au/publication/a-guide-to-the-mandatory-reporting-law-in-relation-to-consumer-goods>.

³ Australian Competition and Consumer Commission, 'Consumer Product Safety Recall Guidelines' ('*ACCC Guidelines*') (2015), available at <https://www.productsafety.gov.au/system/files/Consumer%20product%20safety%20recall%20guidelines.pdf>

goods.⁴ There is no definition of what constitutes 'taking action to recall', either in the ACL or the guidance published by the ACCC.

Further, information sources such as the ACCC Guidelines present a very conservative application of the product safety framework, such that traders often adopt an approach of 'when in doubt, report'. This can be problematic as it unnecessarily increases the compliance burden on traders in circumstances where a product safety issue may not in fact exist.

Another issue is the existence of multiple state/territory-based and federal regulators with overlapping responsibilities, creating confusion for traders seeking to understand the powers and reporting requirements of each regulator. Although the relevant guidelines acknowledge this fact, inevitably they cannot give sufficiently specific guidance for traders on how to conduct a recall which complies with the requirements of all the relevant regulators without (in many cases) seeking external legal advice, contributing to increased compliance costs.

The ACCC Guidelines state:⁵

Goods that are monitored by other specialist Commonwealth regulators, such as the Therapeutic Goods Administration (TGA), the Australian Pesticides and Veterinary Medicines Authority (APVMA), Foods Standards Australia and New Zealand (FSANZ) and the Department of Infrastructure and Regional Development (DIRD), also fall within the jurisdiction of the ACCC.

However, as a matter of administration and in recognition of the mandate and specialist expertise of those agencies, goods regulated by specialist Commonwealth regulators are not normally subject to direct action under the ACL.

On occasion, the ACCC becomes involved in specialist matters when a regulator's powers are insufficient to satisfactorily address safety issues. In addition, the breadth of the definition of consumer goods under the ACL allows the ACCC to act as a 'safety net' and ensure that there are no gaps in Commonwealth regulatory coverage.

The passage above suggests that whether the ACCC will become involved in cases where another regulator also has responsibility will depend on the particular case. This means that traders have very little clarity as to whether their efforts to satisfy a specialist regulator's requirements will be sufficient, or if the ACCC will mandate that further action be taken.

The ACCC Guidelines also state:⁶

Sometimes it will be necessary to notify another organisation, such as a state or territory consumer affairs authority, of a product recall. Contact details for state and territory product safety regulators are provided on the Recalls Australia website at: [State and territory product safety regulators](#).

Where a recall relates to specific product groups, the following organisations should also be notified:

⁴ ACL s 128.

⁵ ACCC Guidelines, pp 4–5.

⁶ ACCC Guidelines, p 10.

- *Food Standards Australia New Zealand (FSANZ) (for food products)*
- *Department of Infrastructure and Regional Development and Local (DIRD) (for motor vehicles)*
- *Therapeutic Goods Administration (TGA) (for therapeutic goods)*
- *Australian Pesticides & Veterinary Medicines Authority (APVMA) (for agricultural and veterinary products)*
- *State and territory electrical regulators (for electrical products)*
- *State and territory gas regulators (for gas appliance products)*

While it is helpful that the ACCC Guidelines inform traders of co-existing obligations, there are still a number of open questions including whom to notify in the first instance, and whether or not the obligations imposed by specialist regulators are likely to be different to those of the ACCC (and if so, whose obligations prevail).

Even within a single specialised industry framework, there may be multiple regulators operating, which creates even further confusion. The Electrical Regulatory Authorities Council Recall Guidelines (**ERAC Recall Guidelines**) state:⁷

Within Australia, each State and Territory regulator administers separate electrical safety legislation and enforceable powers independently. This means that there may be some slight differences between each of the regulators concerning what actions they may require for a recall. Each jurisdiction is bound to apply their own respective legislation and may require other certain actions/information. Each State and Territory has the same desired outcome – that unsafe electrical articles are removed from the marketplace before injury to persons or damage to property occurs.

This guide has been produced to support a uniform approach to requirements for a recall so as to assist recalling entities in meeting the requirements of all jurisdictions when conducting a recall

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THIS ERAC RECALL GUIDELINE IS TO BE READ IN CONJUNCTION WITH ANY RECALL GUIDELINES PREPARED BY THE ACCC.

(www.recalls.gov.au) The ACCC guidelines covers the recall of consumer products (goods), including electrical articles that are consumer products, in accordance with the Australian Consumer Law.

Although guidelines are created to assist in navigating a complex regulatory framework, overlapping guidelines can in fact contribute to the confusion.

The Committee endorses the comments in the Consultation Paper that confusion can arise even in circumstances where there is only one regulator and one mandatory safety standard for a product, for example where a voluntary standard is updated over time.⁸

The Consultation Paper refers to previous information campaigns directed at traders having resulted in an (albeit temporary) increase to the number of voluntary recalls

⁷ Electrical Regulatory Authorities Council, "Recall Guidelines", p 2, available at <https://www.erac.gov.au/wp-content/uploads/2019/04/ERAC-Recall-guidelines-V2.0-1.pdf>.

⁸ Consultation Paper, p 27.

undertaken in the following months.⁹ Given past success, the Committee supports ongoing efforts to educate stakeholders about the product safety framework, including any changes to that framework.

1.2 The Preferred Approach promotes greater clarity and certainty

The above issues may be addressed or at least mitigated by the Preferred Approach.

Proactively increasing industry engagement under Option 2 provides greater opportunity to address both long-standing and emerging product safety challenges, by clarifying areas of confusion and expected standards of compliance.

A particular area of concern is the changing product landscape due to globalisation and ease of access to goods produced overseas (particularly through online retailers), in circumstances where the level of non-compliance with voluntary or mandatory safety standards is twice as high for goods sold online overseas compared to those sold online domestically.¹⁰ This is clearly an area that calls for an education campaign targeted at overseas manufacturers (to make them aware of their obligations) as well as importers and consumers (to enable them to make more informed purchasing decisions and raise product safety issues with the relevant regulators when they arise).

Consumer education and awareness campaigns regarding the purpose of the product safety framework and the availability of remedies under the consumer guarantees provisions in the ACL can assist in increasing consumer understanding. This is particularly relevant in the context of consumers assuming that products entering the market have been vetted by the government,¹¹ and are safe.¹² Successful campaigns are direct, clear and concise.

The proposed 'Notice of Risk' under Option 3 provides a fair and confidential warning mechanism to accelerate responses to product safety concerns. This will enable traders to reflect on their product safety practices and rectify identified issues before formal actions are taken by the regulator. Option 3 suggests a more collaborative approach, where the trader has the opportunity to discuss the regulator's concerns. As set out below, any more onerous obligations may contribute to existing confusion and lack of certainty, and discourage information sharing with regulators.

1.3 Options 4, 5 and 6 could lead to further confusion around the product safety framework

Option 4, a proposed new 'safety intervention power', would provide regulators with a broad power which is both unnecessary and undesirable. Under the ACL and other relevant state and territory legislation, regulators already have significant latitude to address the 'significant detriment' described in the Consultation Paper, particularly by way of ordering temporary product bans. In some cases, industry specific regulators also have similar powers. For example, the *Electrical Safety Act 2002* (Qld) also includes an

⁹ Ibid, pp 48-49.

¹⁰ Ibid, p 14, citing Organisation for Economic Co-Operation and Development, "Online Product Safety: Trends and Challenges" (2016), OECD Digital Economy Papers, No. 261, OECD Publishing, Paris, <http://dx.doi.org/10.1787/5jlnb5q93ilt-en>.

¹¹ Consultation Paper, p 27.

¹² For example in the UK, see Lynn Fault Wood. "UK consumer product recall: An independent review" (2016) available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/509125/ind-16-4-consumer-product-recall-review.pdf p.18.

existing power to issue an 'electrical safety protection notice', which may require that a trader stop supplying a product deemed unsafe.¹³

A further issue is that Option 4 does not provide clarity or certainty as to what is meant by 'significant detriment'. There is arguably a variety of thresholds that could be adopted to assess whether the supply of a product has caused significant detriment, and there is likely to be considerable uncertainty for traders in ascertaining the standard that they are required to meet.

Option 5 proposes to impose an obligation on traders to take reasonable steps to ensure that they do not supply unsafe products. Consequently, this introduces the concept of 'reasonableness', which is likely to be difficult for traders to assess and apply in practice. The Consultation Paper correctly notes that the scope of this obligation will be determined by a trader's role in the supply chain. However, considerable detailed guidance will be required to clarify what is 'reasonable' in the circumstances of different types and sizes of traders, and where traders may have multiple roles in the supply chain.

Without this guidance, it is likely that traders will not have a clear and certain understanding of the standard expected of them and, further, what steps are needed to be taken to ensure compliance. For example, questions such as the following may arise:

- Would the standard require a manufacturer to test all products or a sample of products to satisfy its obligation that the product is not unsafe? How will the manufacturer know whether they have tested a sufficiently large 'sample' to satisfy the reasonableness requirement?
- Where manufacturers have complied with industry specific safety obligations, would that be sufficient to meet the reasonableness requirement?
- How much information does an importer or retailer need to seek from a manufacturer in order to satisfy itself that a given product is not unsafe? Is information about the manufacturer's general safety processes sufficient, or does information need to be provided at the individual product level (which, for some retailers, could span thousands of products)?
- Would the costs associated with ensuring compliance be a relevant or determining factor in deciding what is reasonable?

Similar issues were raised by the European Parliament in relation to the General Product Safety Directive (**GPSD**), with the lack of clear and certain definitions around what constituted an unsafe product resulting in a considerable number of different interpretations of the GPSD among Member States.¹⁴ To address these concerns, significant amendments were made to the GPSD, including the introduction of a comprehensive Market Surveillance Scheme and public Consumer Protection Safety Information Database. Options 5 and 6 currently reflect an outdated version of the GPSD, and would likely encounter issues similar to those faced in Europe if implemented in the form that is currently proposed.

¹³ *Electrical Safety Act 2002* (Qld) s 147.

¹⁴ Taylor, C. & Sewell, M. "Safer products for European consumers: European Parliament adopts controversial resolution on the revision of the GPSD and market surveillance" (2011) 22(1) *Australian Product Liability Reporter* 169.

Option 6 would impose an obligation on traders to ensure that products supplied are 'safe'. There is likely to be significant confusion and uncertainty amongst traders about what constitutes a 'safe product, and the steps that they must take to ensure products are safe. The Consultation Paper notes that where no existing agreed safety standards exist, traders would need to use other ways to demonstrate compliance (such as considering codes of practice and relevant standards of technology). The lack of clarity about the actions that a trader would need to take to ensure compliance in those circumstances is evident. While guidelines may assist in providing some direction at a high level, it would be very difficult to include the level of detail required to adequately deal with these issues.

For the reasons set out above, Options 4, 5 and 6 are likely to lead to further confusion and lack of clarity in Australia's product safety framework. This will limit their ability to address the concerns with the current framework identified in the Consultation Paper.

2 The product safety system should empower regulators to respond to product safety issues in a timely manner, without imposing an excessive regulatory burden on traders

The Committee recognises the observation made in the Consultation Paper that there can be significant delays in implementing product safety regulatory interventions using existing tools, as the regulator typically does not become aware of a product safety issue until the implications are widespread or consumer harm has already occurred.¹⁵ The Committee also recognises that the regulator currently has limited powers to directly address dangerous products and often needs to rely on the misleading conduct provisions of the ACL to prosecute traders, as shown in the Thermomix case.¹⁶

The Committee agrees that product safety reform should provide regulators with the ability to directly target unsafe products and reduce the time unsafe products remain on the market when a specific product risk is identified. The Committee also considers it important, however, that any proposed reform be subject to a cost/benefit analysis. As stated in the Consultation Paper, any reforms to the existing regime should not hinder the efficient operation of the markets by imposing an unnecessary cost on traders.¹⁷ Indeed, overregulation often results in compliance costs that will inevitably be passed on to consumers, thereby limiting consumer choices or encouraging purchase of less rigorously tested overseas alternatives. In this section, the Committee assesses the desirability of the Options in light of the above criteria and explains why it considers the Preferred Approach to be the most suitable, while noting some of the shortcomings of the other Options.

2.1 The Preferred Approach strikes the right balance between effective regulatory oversight and efficient business operation

The Committee submits that the Preferred Approach is the most appropriate measure that allows regulators to target unsafe products directly without hindering efficient market operation.

¹⁵ Consultation Paper, p 47.

¹⁶ Ibid, p 25.

¹⁷ Ibid, p 28.

- (a) *The regulators will have new tools that ensure traders act promptly on product safety issues and facilitate the expedient removal of unsafe products*

The Committee considers the introduction of a Notice of Risk and prohibition on the continued supply of unsafe goods as set out in Option 3 will be a suitable tool to empower regulators to respond to product safety issues in a timely manner.

The ACL does not currently impose any obligation on traders to stop supplying products they know are unsafe. Instead, traders have the option (but are not obliged) to conduct a voluntary recall, or wait for the regulator to complete lengthy investigation into the product's safety before issuing a product safety warning notice, or compulsory recall.

One of the reasons for delays in implementing product safety regulatory interventions that is identified in the Consultation Paper is the financial incentive for a non-complying trader to continuing to sell unsafe products when complying traders decide to withdraw stock from the market.¹⁸ If Option 3 is implemented, the regulator would be able to prosecute non-complying traders directly for continuing to supply unsafe products.

Together with the enhanced ACL civil penalties regime, this provides a strong incentive for traders to actively remove unsafe products as soon as they are aware of the issue.

Further, the Notice of Risk will allow the regulator to confidentially alert traders to a potential safety defect with their product which might not otherwise have been detected, and give traders the ability to rectify the issue. The Committee considers that the ability to mitigate reputational damage, together with the potential for significant penalties under the ACL provisions, will provide an incentive for traders to engage in discussions with the regulators and initiate voluntary recalls in a timely manner.

The implementation of further targeted education campaigns for manufacturers, importers, traders and consumers as set out in Option 2 can also assist regulators to target unsafe products more effectively. Studies suggest that only a very small proportion of injuries resulting from hazardous consumer products are reported to the ACCC.¹⁹ The ACCC similarly believes that the hazardous consumer products reported to it are 'just the tip of the iceberg as many consumers don't report injuries to the product traders at all'.²⁰ It is likely that targeting consumers with education campaigns about their rights under the ACL will encourage consumers to report product safety incidents to regulators. This may go some way towards assisting regulators to quickly identify and respond to product safety issues.

Further, there is evidence to suggest that the average return rate for voluntary recalls in Australia is only 49 per cent,²¹ and the average return rate for mandatory recalls issued by the ACCC is only 39 per cent.²² While recent mandatory recalls have had high rates of success, with an approximate recall rate of 85% in the case of the Takata Airbag

¹⁸ Ibid, p 23.

¹⁹ Watson, W.L. & Ozanne-Smith, J. (2006) *Consumer Product related Injury in Australia: Hospital and Medical Costs to Government*, Monash University.

²⁰ Australian Competition and Consumer Commission, Media Release: "Half of all Australian homes affected by unsafe products" (2018), available at: <https://www.accc.gov.au/media-release/half-of-all-australian-homes-affected-by-unsafe-products>.

²¹ Organisation for Economic Co-operation and Development, "Enhancing product recall effectiveness globally" (2018) Science, Technology and Industry Policy Papers No. 58, OECD Publishing, Paris <https://doi.org/10.1787/>.

²² Australian Competition and Consumer Commission. "Review of the Australian product safety recalls system" (2010) available at: <https://www.accc.gov.au/system/files/Review%20of%20the%20Australian%20product%20safety%20recalls%20system.pdf>

recall,²³ the overall statistics demonstrate significant room for improvement in this area. The Committee considers that targeted education campaigns as set out in Option 2 will increase the responsiveness of consumers when a voluntary recall has been commenced, facilitating the expedient removal of unsafe products.

(b) *The Preferred Approach does not impose unnecessary compliance cost on traders.*

The Committee submits that Option 3 can deliver effective regulatory oversight without hindering the efficient operation of consumer product markets. By targeting non-complying traders, Option 3 does not create additional cost for complying traders that already have existing product safety processes in place. Further, Option 3 does not introduce an additional layer of pre-market obligations for traders in circumstances where mandatory industry codes already exists. As outlined by the Productivity Commission's 2006 review of the Australian Consumer Product Safety System (the **Productivity Commission Review**), inconsistent product safety standards can impose large costs on traders, make trade across State and Territory borders difficult, unnecessarily duplicate government resources and cause confusion for consumers.²⁴

The Committee considers that Option 2 operates as an effective pre-market tool that is not excessively burdensome or intrusive to traders. Traders are likely to engage at a higher rate with the regulator if they are able to obtain industry specific guidance to make the necessary changes that ensure compliance. This is particularly important for small to medium sized traders who lack the knowledge or resources to ensure compliance with the product safety standards without some additional assistance.

2.2 Options 4, 5 and 6 do not materially improve compliance and may disrupt the efficient operation of the market by imposing excessive burden on all traders

(a) *Option 4 may disrupt the efficient operation of the market*

The power proposed by Option 4 provides only a marginal benefit over Option 3 in terms of regulatory efficiency, but in doing so fails to adequately balance the potential economic detriment to consumer product markets.

Mirroring a similar provision under the *Australian Securities and Investments Commission Act 2001* (Cth), Option 4 empowers the regulator to issue temporary orders against both individual traders and/or market wide conduct for up to 24 months which could require traders to issue or modify product warnings, instructions or packaging information; comply with relevant testing requirements for a product; notify the public of an identified safety hazard; remediate a safety issue; and/or stop supplying a product.

The Committee submits that while the Australian Securities Investment Commission plays a significant role in consumer protection, it is inappropriate to mechanically replicate an industry policy (in relation to financial products) to the wider market. Given the diverse nature of the consumer product market, it is inherently difficult for regulators to have in-depth knowledge of all products across multiple industries. Consequently, by

²³ Australian Competition and Consumer Commission, Media Release: "Dangerous Takata airbag recall 85% complete" (2019) available at: <https://www.accc.gov.au/media-release/dangerous-takata-airbag-recall-85-per-cent-complete>.

²⁴ Productivity Commission, "Review of the Australian Consumer Product Safety System" (2006) p 300 ("*Productivity Commission Review*"). Available at: www.pc.gov.au/inquiries/completed/consumer-product-safety/report/productsafety.pdf.

allowing a regulator to substitute its judgment over the judgment of market participants, Option 4 could disrupt the efficient operation of the consumer product market.

This is particularly problematic as the public nature of any orders made under Option 4 can cause irreparable damage to a company's reputation, particularly if the making of the order does not require ministerial approval or the establishment of an actual or potential breach of the ACL.

(b) Options 5 and 6 are unlikely to result in a meaningful increase in compliance

The Committee considers that Options 5 and 6 will not empower regulators to quickly respond to product safety issues in practice. Despite the fact that Options 5 and 6 are intended to regulate 'pre-market' conduct by requiring traders to incorporate product safety into their decision making at the design and manufacture stage, regulators will still need to rely on post-market regulatory tools and existing investigative powers to enforce the duty through court proceedings.

For this reason, the Committee considers that introducing a duty to ensure a product is 'not unsafe' or 'safe' in the form proposed by Options 5 or 6 is unlikely to result in any meaningful increase in compliance amongst traders who do not already take safety considerations into account in the products they supply.

On the other hand, introducing a new General Safety Provision (**GSP**) under either Option 5 or 6 will significantly increase compliance costs. These costs could be potentially prohibitive for smaller start-ups, create a disincentive for producing innovative, untested products and ultimately reducing consumer choices.

(c) Options 5 and 6 would impose an excessive burden on all traders

Industry stakeholders have expressed to the Committee concerns that Options 5 and 6 introduce responsibilities for safety that go beyond the manufacturer or importer and involve the retailer.

In the Committee's view, retailers generally do not have the capacity to conduct independent product safety evaluations. It is likely that retailers will need to seek information from the manufacturer or importer to discharge their proposed obligations. Manufacturers and importers may end up providing identical information to multiple retailers and investing in further systems and processes to manage the transfer, secure storage and lifecycle management of the product safety information. This duplication of information throughout different stages of the supply chain may create excessive compliance costs for manufacturers, importers and retailers without any net gain in consumer safety. This is particularly true for smaller retailers, as they do not have sufficient resources, knowledge and expertise to evaluate such a large body of data.

At the same time, this additional level of information sharing between manufacturers and retailers could also have unintended consequences under competition law. In relation to pharmaceutical products, major retailers often also manufacture private label products that compete with branded products and generics. Under the proposed GSP in Options 5 and 6, retailers could potentially require manufacturers to provide confidential product and safety data that are competitively sensitive. The interaction between the product safety regime and competition laws is likely to further increase the complexity around

what will constitute 'reasonable steps' taken by traders under the proposed GSP, creating further compliance risks and costs for all traders.

Specific industries such as medicine, foods and electrical goods already have specialist national or international safety standards. These well-entrenched safety standards would conceivably apply simultaneously with a GSP. Consequently, there could be confusion as to what standard would satisfy traders' legal and regulatory obligations contemplated by Options 5 and 6.

It could also have the unintended consequence of placing other participants in the market in the role of de facto regulators, for example with retailers having to determine whether products being supplied by manufacturers or importers are 'not unsafe' or 'safe'. In the Committee's view, this would result in further duplication of product safety evaluation and unnecessarily increase compliance costs.

These increased compliance costs are likely to be passed on to consumers, who may, as a result, opt to purchase a 'less safe' product rather than a product at an increased price. In this respect, Options 5 and 6 are likely to make the regulatory landscape more complex, without addressing the key problems identified by the Consultation Paper.

3 Product safety reforms should provide sufficient controls and incentives to stop unsafe products from entering into or remaining on the market

In the above sections, the Committee has outlined various ways that the proposed Options will facilitate the removal of unsafe products from the market in the timely manner, including through the threat of significant civil penalties under the ACL.

In the Committee's view, while the Options can provide some controls and incentives to facilitate the removal of unsafe products, they do not provide sufficient controls and incentives for traders to stop the supply of unsafe products before a safety issue emerges or completely remove unsafe products from the market once they are identified.

3.1 Additional regulation does not stop unsafe products

Introducing further legislative tools, including a GSP, would not necessarily be an effective regulatory approach to ensure that all products on the market are safe. For larger traders, risk of media scrutiny, reputational damage, negligence claims and the existing product safety regulations may be sufficient incentives to supply safe products. However, these considerations may not have the same effect for smaller traders or importers.

Industry consultations for the 2016 independent review of the European General Product Safety and Product Recall Framework reveals that:

*Low cost, poor quality goods can be a major issue with the number of recalls. Solving this will require a change in the culture of some **small businesses that see compliance measures, testing, continuous product risk assessments as time consuming and a financial burden when their key motivation is to compete on price alone.** Trading standards reported that some low end importers will even admit (off the record) **that the cost of a compliance system is far greater than the likelihood of being caught and any penalties which might be***

imposed. Therefore they don't bother. Focus should be on those businesses that are unwilling to take adequate steps to show compliance.²⁵

For smaller traders, there is no incentive to comply with safety obligations, as doing so may price them out of competing. A similar argument was raised by the Productivity Commission Review, noting that a GSP was likely to have little impact on the behaviour of 'fly-by-night suppliers' that occupy the bottom of the market in terms of compliance with safety obligations.²⁶

While the above observation may suggest that further regulation targeting smaller traders could resolve the non-compliance issue for smaller traders, the Committee submits that this proposition overlooks the difficulties in bringing enforcement proceedings against smaller traders both domestically and from overseas.

As noted in the Productivity Commission Review, there are doubts around whether a GSP would actually increase the effectiveness of the regulator's capacity to act on the majority of unsafe products already in market:

*In the absence of a substantial boost to enforcement resources, even under a GSP, regulators would still be seriously constrained in their ability to act on unsafe products. They would no doubt continue to prioritise according to their perception of the severity of the risks and give greater emphasis to investigating the safety of products that have already caused injuries.*²⁷

Annual results from the European Commission's product safety reporting system, RAPEX, do not demonstrate any clear improvement in preventing unsafe products from entering the market, or increasing safety outcomes for consumers. After introducing the amended GPSD in 2011, the notification rate of unsafe consumer products entering the market has generally remained stable at approximately 2,200 per year.²⁸ As noted by the Committee in its 2017 response to the Australian Competition Law Interim Review, the overall benefits of a GSP are likely to be limited (among other things), because it would only change behaviour in a small subset of businesses, and would not change anything for those already complying and those that will never comply.²⁹

In the Committee's view, given the limited resources available to regulators, more effort would likely be expended by the regulator to engage larger traders to comply with safety obligations. This would mean that smaller traders are less likely to be at risk of enforcement actions from the regulators, limiting the perceived benefit of regulatory tools in encouraging compliance through the threat of civil penalties. In addition, the Committee is concerned that further regulation is unlikely to affect the actions of these smaller traders and importers as traders based overseas may not be present or have sufficient assets in Australia for regulatory or pecuniary action to be an incentive for compliance.

Given the limitations of regulatory tools outlined above, in order to address the root causes of unsafe products the Committee submits that further consideration is required to determine whether there may be other alternative options for reform that will provide a

²⁵ Lynn Fault Wood. "UK consumer product recall: An independent review"(2016) p 16.

²⁶ Productivity Commission Review, p 28.

²⁷ Consultation Paper, p 22.

²⁸ European Commission, Consumer Safety Rapid Alert System Results, Statistics and Reports. Available at: https://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/alerts/repository/content/pages/rapex/reports/index_en.htm

²⁹ Australian Law Council, *Australian Competition Law Review: Response to Interim Review* (2017) p 8.

genuine incentive for traders to take positive steps that prevent unsafe products in the market. By way of example, some of the alternative options that have been suggested to the Committee by traders include:

- (a) establishing a stakeholder advisory committee to drive any change and ensure appropriate industry input into critical decision making, including any new definitions to be introduced;
- (b) introducing a vocational training course on product safety which could upskill staff who are responsible for the design and manufacturing of the products, allowing safety issues to be identified earlier in the supply chain; and
- (c) allowing regulators to share mandatory recall reporting data on a de-identified basis with the relevant industry stakeholders with the aim to help the industry to better identify product safety trends and encourage better safety practices.

Please contact Geoff Carter, Chair of the Competition and Consumer Committee (geoff.carter@minterellison.com or 0402 891 372) in the first instance, if you require further information or clarification.

Yours sincerely,

A handwritten signature in black ink that reads "Greg Rodgers". The signature is written in a cursive, flowing style.

Greg Rodgers
Chair, Business Law Section