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Ai Group response to “*Supporting business through improvements to mandatory standards regulation under the Australian Consumer Law*” Consultation Regulatory Impact Statement December 2021.

Thank you for the opportunity to respond to the “*Supporting business through improvements to mandatory standards regulation under the Australian Consumer Law*” Consultation Regulatory Impact Statement (the Paper).

Ai Group is a peak employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for nearly 150 years.

Ai Group is representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than one million staff. Our members are small, medium and large businesses in sectors including manufacturing, construction, engineering, transport and logistics, labour hire, mining services, the defence industry, civil airlines and ICT.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government, underpinned by our respected position of policy leadership and political non-partisanship.

Ai Group is an active supporter of standards development both nationally and internationally. Locally we have in the order of 280 representatives on some 400 committees involved with 200 projects annually. We have been involved with standards development for many decades and our members representatives are known and respected nationally and internationally for their expertise. We recognise that Standards Australia plays an important role in the development and maintenance of critical technical infrastructure in Australia including consumer product standards.

Ai Group supports in principle a more responsive Australian Consumer Law (ACL) to reference “trusted” international standards as mandatory. This will solve a number of issues encountered by suppliers to the Australian market however members are concerned about the impacts on standards making for consumer products in Australia that such changes may bring.

Ai Group recommendations

Ai Group supports the ACL being modified so that the Minister can more easily declare mandatory product safety standards including “trusted” international standards subject to the following:

- i. Standards are drawn from an approved list of “trusted” international standards bodies. This list is to be developed by the Government in conjunction with stakeholders.
- ii. A set of principles are developed (in conjunction with stakeholders) and are used to select “trusted” international standards.
- iii. When a “trusted” international standard is to be made mandatory under the ACL then:
 - a. where an Australian Standards exists then the relevant Standards Australia technical committee should be engaged in the decision making process.
 - b. where an Australian Standards does not exist then Government should form a technical advisory group to assist in applying the selection principles to identify “trusted” international standards.

Ai Group recognises that an outcome from recommendation iii. (above) maybe that a mandated “trusted” international standard will coexist with a mandated Australian Standard.

- iv. Consideration to be given to mandated international and/or national voluntary standards and reference them as they exist from time-to-time.
- v. Consideration to be given for the ACL to include a “*safe harbour provision*”.

Additional recommendations

- vi. That any standard referenced in the ACL is called up in its entirety. Standards are developed with very broad and deep contexts and this is not always understood by the regulator and so partial call up can create problems of interpretation.
- vii. That the Australian Government when calling up any new standards, whether national or international into the ACL, ensures that adequate consideration is given (by consultation with industry) over transition and grandfathering periods.

1. Scope of submission

Ai Group's submission addresses "trusted" international standards to be referenced as mandatory standards for consumer goods and product related services that:

- i. do not require installation in a system (e.g. gas, water or electrical supply); and
- ii. are not subject to specialist regulatory regimes.

Note that the list of consumer products on pg 37 and 38 of the Paper fulfil these criteria.

To reinforce the point Ai Group's positions in this submission are **not** to be construed as applicable to standards in the electrical, plumbing, gas or building product sectors.

2. Issues with the current framework

The Paper identifies that there are several problems with the current ACL framework including:

- slow regulatory response to referencing new and updating existing mandatory standards,
- forcing already compliant suppliers to international markets to retest products to enter the Australian market,
- out-of-date mandatory standards.

Ai Group have identified Issues that maybe created by a more expansive "trusted" international standards regime include:

- reduced opportunity for industry/consumers to shape the development of standards; and
- government decision making processes are based on consultation rather than consensus when identifying "trusted" international standards.

We explore all of these topics below.

2.1 Slow regulatory response

The Paper argues that in situations where there are no relevant Australian Standards and/or where there are international standards with equivalent safety to Australian Standards for a given product, the ACL does not easily allow referencing. This is due to the administrative processes that have to be followed and which can take years to complete.¹

Ai Group recognises that the current regime of referencing voluntary standards under the ACL has room for improvement as regulation needs to respond quickly to

¹ Supporting business through improvements to mandatory standards and regulation under the Australian Consumer Law Ibid pg 7, third paragraph

changes in the market particularly as new products emerge. This means that international standards (ISO or IEC), either as an adoption as an Australian Standards or as standalone documents, need to be able to be referenced under the ACL when an equivalent level of safety can be demonstrated.

Ai Group's concern, as outlined elsewhere in this submission, is that the Government will require expertise from stakeholders including industry and consumers to make such assessments. We believe that if a standards committee (of experts) exist then it should be involved in this decision-making process.

2.2 Retesting of products

The Paper highlights that consumer products that are already sold into major world markets (e.g. USA and Europe) may have to undergo additional testing if entry to the Australian market is desired where non-aligned Australian Standards are mandated.²

A member commented:

Anecdotes from businesses/manufacturers indicate that local regulations are a key consideration in deciding whether to sell outside of North America and the EU (where most businesses focus their sales).

The Paper also points out that consumer products that comply with "trusted" international standards and exhibit an equivalent level of safety to the Australian Standards are not easily referenced in the ACL. This administrative failure creates a technical barrier to trade as these products cannot be imported into Australia until the mandatory standards can be updated.³

Ai Group recognises that technical trade barriers must be minimised for Australian importers and exporters to maximise trade flows and opportunities for commerce in Australia. We agree that suppliers who have invested in testing and labelling to comply with international standards with equivalent levels of safety should not be precluded from the Australian market.

This issue can potentially limit consumer choice if suppliers avoid our market in situations where the testing is expensive and the product volumes are low thus adding to the cost of the end product.

Ai Group recognises that changes to the architecture of the ACL would address these issues but may result in more than one mandated standard i.e. a "trusted" international standard would co-exist with the mandated Australian Standards where equivalent safety outcomes can be demonstrated. This means that suppliers may have choice in deciding which mandated standard to comply with for a given product.

Ai Group encourages Government to address gaps in the line-up of current mandatory standards before prioritising initiatives to reference "trusted" international standards where mandatory Australian Standards already exist.

² Ibid pg 7, second paragraph

³ Ibid pg 9, second last paragraph

2.3 Out-of-date mandatory standards

The Paper highlights that current regulatory processes “freeze” in time standards referenced in the ACL. This can create additional cost burdens for businesses that endeavour to comply with up-to-date standards.⁴

Under the ACL businesses whose products comply with the latest national or “trusted” international standards maybe disadvantaged in circumstances where the mandatory standard references an earlier version of the voluntary standard. This results in a perverse outcome for consumers where suppliers may not be able to provide the safest product to the market and if they do provide products that comply with the latest standard then they risk penalties. This limits the ability of manufacturers to innovate and create new products.

A member commented:

“... our team has surfaced a number of examples of where there is tension between more recent versions and mandated older version of Australian standards. When documentation for the most up-to-date version of an Australian standard is not sufficient to meet the letter of the Australian regulations for mandatory standards, this can cause friction for vendors who may have to obtain additional product testing to prove they comply with the older mandatory standard required for Australia. This is additionally problematic in that products complying with the up-to-date standard will most likely be safer than a product that only complies with an older, yet mandatory, version of the standard.”

There are two solutions to this problem – one involves safe-harbour inclusions and the other requires that the latest voluntary standard is always referenced.

The introduction of safe-harbour provisions in the ACL provide a legislative defence to suppliers who do not comply with the mandated standard but provide an incremental improvement in the level of safety by referencing the latest voluntary standard. It also allows the supplier choice in terms of whether they comply with the mandatory or latest voluntary standard.

The alternative is to modify the ACL to call up standards as they are published from time-to-time. Ai Group believes that this is the simplest of the two options however a safeguard (or control point) is needed to ensure that the latest standard when published is reviewed to ensure that it is suitable to reference as law.

2.4 Shaping standards

Ai Group members (the vast majority of whom are local producers and/or importers of products) value the ability to shape and contribute to the development of product standards. This can be achieved by inputting into processes that create national and/or international standards.

⁴ Ibid pg 9, third and fourth paragraph

Ai Group supports continued member involvement in shaping the development of standards. The Government must exercise caution in altering the ACL regime to ensure that there is no erosion of the capability of writing standards in Australia.

2.5 Consultation vs consensus

Standards Australia's processes ensure that the views of all stakeholders are equally considered using the principle of consensus. Consensus is defined as the:

“General agreement, characterised by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments.”⁵

This contrasts to governments who use consultative processes. However governments are not obliged to take or act on the information received from stakeholders. The following statement was made in an industry letter sent to the Federal Government regarding the GEMS regulators attempt to establish standards development capability.

The current Standards Australia consensus-based process, requiring agreement across a wide range of stakeholders, is a strong protection against this risk. By contrast, the consultation-based process proposed by the Government is much more likely to result in stakeholder concerns being missed or ignored, based on our experience with many other regulatory consultation processes.

Embracing “trusted” international standards potentially reduces Australia’s ability to influence standards development particularly if they are not drawn from ISO and/or IEC standards. Ai Group believes that the Government must involve the relevant standards committee in all decision making in terms of identifying and selecting international standards.

2.6 Other issues

2.6.1 Partial referencing of standards

That any standard referenced in the ACL is called up in its entirety. Standards are developed with very broad and deep contexts and this are not always understood by regulators particularly if they have not participated in committee deliberations. Ai Group has concerns with the “cut and paste” method historically used by the ACCC in the form of Consumer Protection Notes to call up either Australian Standards or “trusted” international standards.

A member commented:

Of enduring concern is that the ACCC modify existing standards to make mandatory standards causing unnecessary confusion and complexity and

⁵ www.standards.org.au SG1 Preparing standards

additional compliance costs, with no consumer benefit. The current approach makes it difficult for suppliers to understand the compliance requirements for their product, as they need to read both the mandatory standard and the product standard together- this is difficult for seasoned compliance professionals and would be a barrier to trade for smaller companies, The best outcome possible from this RIS would be for the ACCC to cease making standards and focus instead on declaring standards as published by an Australian Standards Committee that they are actively involved in. This will save both the ACCC and industry time and money and improve the ACCC's technical competency and industry knowledge, leading to improved safety outcomes. This approach is in line with that taken by specialist regulators in Australia, and with that taken in the EU.

2.6.2 Transition and grandfathering transitions

When ever changes to legislation, regulation and mandatory standards are made it is important that government allows manufacturers time to change product design with a reasonable transition period. Time should also be given to supply chain participants to be able to either purge old stock or allow it to sell out – this is known as grandfathering.

3. Options outlined in the Paper

Below are Ai Group's response to the options raised in the Paper.

3.1 Option 1 – Status quo

Ai Group does not support maintaining the status quo with the ACL as action is required to address the problems outlined in the Paper. Potential changes may increase consumer choice and reduce cost. However this must be balanced against the desire for stakeholders to continue to maintain and be involved in standards making in Australia.

3.2 Option 2 – Amend the ACL to allow the Commonwealth Minister to more easily declare trusted overseas standards

The Paper describes amending the ACL to allow the Minister to declare “trusted” international standards with equivalent levels to Australian Standard as a mandatory safety standards under the Act.

Ai Group supports this in principle but does not believe that the Commonwealth has sufficient expertise to make these decisions. We believe that if an Australian Standard exists and a “trusted” international standards is required then the relevant technical committee should be involved in the decision making process. The committee can provide expert opinion on whether a given international standard does provide an equivalent level of product safety to the Australian Standard.

In the absence of an equivalent Australian Standard the Government should form an advisory committee with a balanced group of stakeholders with technical expertise on the product standard under consideration.

3.2.1 Alternative 1 – Prescribing a list of trusted international standards making associations

Ai Group urges caution in decision making involving the selection of “trusted” international standards. We believe that there are three elements required in the process of selecting a “trusted” international standard.

Firstly international standards should be drawn from a list of “trusted” international standards bodies that use standards development principles similar to Standards Australia, ISO and IEC. For example we question the inclusion of the UNECE as a review of the website indicates that its primary role is not standards development.⁶

Secondly a predetermined list of selection criteria should be developed in conjunction with consumers and industry. The most important criteria is safety equivalence. The list proposed in the Paper should only be used as a starting point as it requires substantial additional guidance on the application of criteria.

Lastly and most importantly the Government must consult with expertise from consumers and industry. This means that if there is an active Australian technical committee covering the topic then they should be consulted. If a technical committee does not exist then the Government should form one based on similar principles to that used by Standards Australia.

3.2.2 Alternative 2 – Using a principles-based approach for declaring overseas standards

See our comments above.

3.3 Option 3 – Amend the ACL to more easily allow business to comply with the latest versions of voluntary Australian and overseas standards

The Paper outlines the need for businesses to be able to comply with the latest version of international and national voluntary standards that have yet to be called up into mandatory standards.

3.3.1 Alternative 1 – Allowing updated standards to apply

The Paper states that this alternative

“would add the ability for the list of mandatory standards, whether made or declared, to incorporate any changes to referenced standards (voluntary or overseas) when they are updated from time-to-time.”

⁶ <https://unece.org/>

Ai Group supports this idea however Government must provide a safeguard in the form of a review before the new standard is automatically referenced by the ACL.

3.3.2 Alternative 2 – Safe harbour provision

Ai Group supports the inclusion of a “*safe harbour provision*” in the ACL to give businesses a defence if they are using the latest voluntary standards that may not yet be mandated but would yield better incremental safety outcomes for consumers. This would apply to both Australian Standards and “trusted” international standards where prior versions have been mandated.

Members have stated:

“... the safe-harbour proposal would likely give business more scope to make judgement calls on compliance with up-to-date standards. Particularly where an international business has global compliance teams who are both familiar with global standards improvements, and are in frequent contact with testing laboratories, and would be in a position to make these judgement calls.”

Ai Group supports both alternatives although the referencing as they exist from time-to-time with safeguards is likely to provide a more workable regulatory outcome.

Feel free to contact the undersigned if there are questions with this submission.

Yours sincerely

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