



Law Council
OF AUSTRALIA

Business Law Section

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Director
Consumer Safety and Sustainability Unit
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Treasury
Langton Cres
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By email: productsafety@treasury.gov.au

Dear Sir/Madam

Consultation Regulation Impact Statement: Supporting business through improvements to mandatory standards regulation under the Australian Consumer Law - (December 2021)

1. The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to respond to Treasury's Consultation Regulation Impact Statement on Supporting Business through Improvements to Mandatory Standards Regulation under the Australian Consumer Law, published on 1 December 2021 (**Consultation Paper**).
2. The Committee acknowledges the Problem and Policy Objectives identified in pages 6 to 13 of the Consultation Paper. The Committee takes this opportunity to provide comment on the questions raised in the Consultation Paper, as well as the following options explored in the Consultation Paper (at pages 13 to 22):
 - a) **Option 1** - Status quo;
 - b) **Option 2** - Amend the Australian Consumer Law (**ACL**) to allow the Commonwealth Minister to more easily declare trusted overseas standards;
 - c) **Option 3** - Amend the ACL to more easily allow businesses to comply with the latest versions of voluntary Australian and overseas standards;
or
 - d) possible combination of **Options 2 and 3**.
3. Having regard to those options, the Committee's preferred approach is **Option 3**. Together with the ACCC's broad range of investigation and enforcement tools under the ACL, the common law of negligence and other statutory provisions governing or affecting product safety, amendments to mandatory standards set under the ACL should provide a baseline for consumer goods of particular kinds. Compliance with

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improved standards ("up-to-date" or otherwise altered, e.g. due to advances in technology) should be permitted to be selected by a manufacturer or supplier where such compliance supports consumer protection in Australia.

4. Based on the information provided in the Consultation Paper, the Committee does not support a general broadening of the standards which may be made or declared by the ACCC.
5. Further, any changes to the regime which enable a manufacturer or supplier to comply with "mandatory standards" by some other means should also be "flowed through" to the compulsory recall and voluntary recall notification provisions, and the defence to actions for a safety defect.

Consultation questions 1 to 3: "The Problem"

6. The Committee agrees that the ACL and mandatory standards (including safety standards and information standards) provide important protections for the Australian community. With the benefit of now more than ten years' experience since the ACL was imposed (and the Trade Practices Act for many years prior), it is important to ensure that the regulation remains fit for purpose and does not impose unnecessary costs on consumers, business and the broader economy.
7. The Consultation Paper identifies as part of "the Problem", the length of time requisite internal (federal and state/territory) government and consultation processes take to bring about change to existing standards or introduce new standards (page 7). This is, of itself, not reason enough to justify change to the *status quo*, since any change to design, testing or informational obligations (both mandated and voluntary) will take further time for the supply chain to implement. Even apparently small changes to mandatory statements or design features may take manufacturers time to introduce (particularly in circumstances where the same product is supplied in other international markets).
8. However, as the Consultation Paper makes clear, some mandatory standards may be 10 - 20 years behind updated voluntary standards (page 9) and the ACCC's process of review and updating the 48 current mandatory standards will take an estimated 10 years (page 13) by which time further review and update will be needed. In the Committee's view, "the Problem" should be addressed (i.e. the *status quo* (option 1) should be disturbed).
9. On any view, current approaches which, by their application, limit innovation or arguably permit a lower safety standard to be met, are inappropriate. Similarly (as suggested by the portable pool example in the Consultation Paper at page 9), it is a strange result that requires substantial recall action to be taken for minor technical non-compliance with a safety standard, especially where attendant risk (if any) can be managed through other means. In the sphere of product recalls, the ACCC already wields substantial power outside of the statutory regime in its management of voluntary recall action (see further below).
10. While it can be agreed that introducing changes which clarify manufacturer and supplier obligations is a positive development, caution should be taken in considering any changes which will permit the Commonwealth Minister to introduce more (or more detailed) mandatory requirements on manufacturers and suppliers which supply extremely diverse products.

Consultation questions 4 to 6: The Policy Objectives

11. The Committee agrees with the policy objectives of the proposed amendments to the ACL. Such policy objectives (pages 11 to 12) include the laudable aims of simplicity, reduction in compliance costs (and consequent reduction in cost of goods to consumers), while maintaining appropriate guardrails on consumer safety.
12. Mandatory standards exist because the government (by the Minister or its agencies) has determined that, for certain products, minimum requirements must be mandated to ensure that goods will not cause injury to any person. They are made or declared in respect of particular types of (unsafe or high-risk) products where it becomes apparent that particular design, manufacturing or informational issues may create an increased risk to consumer safety (see page 14, Consultation Paper). For example, the safety standards relating to button and coin batteries and products which contain those batteries were introduced following reports of horrific injury to children and infants that swallowed the batteries.
13. The Consultation Paper (at page 12) observes that the proposed amendments to the ACL would not change the process for developing new mandatory standards under the ACL. This will need to be carefully considered in view of any proposed changes to the legislation. In particular, any suggestion of broadening the range of products to which mandatory standards apply should be the subject of separate and specific consultation. Addressing perceived administrative difficulties with the mandatory standards regime should not be used as a kind of "stalking horse" in lieu of an "unsafe goods" provision as has been previously promoted by the ACCC.
14. Importantly, mandatory standards are but one piece of the statutory product liability regime which governs the safety of consumer goods supplied in Australia. Product recall provisions (including compulsory recall powers and mandatory notification of voluntary recall action), mandatory reporting of serious injury, illness and death, safety defect provisions, the consumer guarantees and prohibitions on misleading or deceptive conduct and false or misleading representations provide a multi-faceted approach to consumer protection. Actions may be threatened or commenced by regulators or persons, whether or not any individual has in fact been harmed. Regulators also have broad powers to require the production of evidence, information or documents in respect of potential breaches.
15. Recognising that most consumer goods supplied in Australia are manufactured overseas, one of the primary policy objectives must be to permit compliance with overseas standards to remove duplicative testing and compliance measures (page 11, Consultation Paper). As seems to be acknowledged by the Consultation Paper, it is a rare circumstance in which Australian-specific requirements are likely to require an alternative approach to minimum safety standards (e.g. the sunglasses standard).
16. A further issue arises in relation to the product recall provisions of the ACL. Non-compliance with a safety standard for goods is a trigger for the compulsory recall provisions (section 122, ACL) or the requirement to notify the Minister of action taken voluntarily to recall goods (section 128, ACL). Any changes to the mandatory standard regime must "flow-on" those changes to the recall provisions (to sections 122(b)(iii) and 128(1)(c) of the ACL).

17. While the ACL does not specify the circumstances in which consumer goods are required to be recalled, the notification requirements and the compulsory recall powers are instructive in making those decisions. If, for example, the regulatory regime is changed to permit compliance with voluntary standards (whether Australian standards or other overseas standards), it would be a strange result to encourage or require recall action for a technical breach of the mandatory standard (see the portable pools example above).
18. In addition, nothing in the Consultation Paper addresses whether it is intended that any relevant amendments proposed by the consultation will "flow-on" to section 9(4) of the ACL providing a defence for "Commonwealth mandatory standards" in relation to goods. If changes are made to the regulatory regime to permit appropriate compliance with an overseas, updated or voluntary standard in lieu of the current mandatory standards, the defences in section 9 should also be revisited.

Consultation questions 7 to 9; questions 26 to 28: The Status Quo (Option 1)

19. It may be accepted that the status quo achieves the policy objectives set out in the Consultation Paper; however, since it requires in-depth analysis by the ACCC and consultation with relevant stakeholders, introducing new mandatory standards or updating existing standards is resource intensive and ill-equipped to respond in a timely way to developments in knowledge and technology.
20. Further, as set out in the Consultation Paper, the current regulatory framework often requires additional testing to local specifications or technical labelling amendments, which make no discernible or measurable difference to consumer safety (see e.g. Example 1: Bunk Beds - pages 7 to 8). These examples support the position that the current framework imposes unnecessary costs and compliance burdens.
21. The Committee agrees with the overview of potential benefits and costs of Option 1 as set out in pages 22 to 23 of the Consultation Paper.
22. The Committee submits that changes to the regulatory regime are appropriate.

Consultation questions 10 to 15; questions 26 to 28: Amend the ACL - Declaration of "trusted" overseas standards (Option 2)

23. The Consultation Paper seems to suggest that the ACL should be amended to permit the Commonwealth Minister to more readily declare trusted overseas standards as local mandatory standards, perhaps well beyond the current list of 48 standards (see also comments at page 22 of the Consultation Paper). If that is the proposal, the Committee cannot support Option 2 on the basis of the current information contained in the Consultation Paper. In particular, although it is understood that many manufacturers and suppliers rely on voluntary standards as a guide to general law and product liability obligations, there is a substantial difference between that approach and mandating strict compliance with potentially significant consequences for even minor technical breaches.
24. Subject to that, and acknowledging the matters set out in this part of the Consultation Paper, the Committee's preferred approach (if Option 2 is nonetheless pursued) is Alternative 2. That is, ACL amendments which would permit the Commonwealth Minister to declare trusted overseas or Australian voluntary

standards using a principles-based approach provided the standard meets certain criteria. Of the criteria proposed, at least the following are critical:

- a) the standard is widely used and accepted by manufacturers (of consumer goods of the relevant kind);
 - b) there is no evidence that the standard is inappropriate to the Australian context; and
 - c) the standard offers at least a comparable level of safety to any applicable Australian standard (if such a standard exists).
25. In addition to the criteria proposed in the Consultation Paper, the Committee proposes a further principle - namely, that the standard is not equivalent to an appropriate Australian standard. That is, the default position should be that an overseas standard should not be declared unless there is a 'gap' in the Australian standard landscape. This is because, where there are differences between any existing Australian standard and overseas standard, these differences are generally to account for Australia-specific issues or concerns and should be retained.
26. Such an approach would permit manufacturers which supply their products globally to use a single design, testing and evaluation process in the production of goods to be supplied in Australia. However, choosing a particular overseas standard to declare as mandatory may differentially affect companies and may itself lead to complex questions about application as well as financial burden because of the need to purchase and consider voluntary or overseas standards. One option could be to permit manufacturers to choose from a number of "deemed equivalent" mandatory standards, or to propose an "equivalent" standard if one they comply with has not been declared. A similar approach is taken with ANCAP vehicle testing where compliance with the equivalent European regime is accepted here.
27. The Committee agrees with the overview of potential benefits and costs of Option 2 as set out in pages 23 to 25 of the Consultation Paper.

Consultation questions 16 to 20; questions 26 to 28: Amend the ACL - Compliance with latest versions of voluntary Australian and overseas standards (Option 3)

28. The Committee agrees that Option 3 should be pursued - a permissive approach whereby manufacturers and suppliers can comply with the latest versions of a particular standard that is already referenced in or declared as a mandatory standard. In the Committee's submission, permitting standards to apply as they exist from time to time would not pose additional safety risks to consumers, because (as outlined above) nothing in these proposals detracts from the general law obligations or other provisions of the ACL applying to the supply of consumer goods in Australia.
29. In relation to the alternatives proposed:
- a) Option 3, Alternative 1 likely requires more substantive change to the ACL, particularly in view of the "safeguards" proposed. In particular, this alternative proposes that the ACL be amended to *require* updated versions of standards referenced within a particular mandatory standard to be met, after a transitional period has passed and subject to the

ACCC's exercise of a veto power. While it may be true to say that this proposed change enables businesses to automatically alter their practices to comply with the most up-to-date standards, it may also lead to some inconsistencies or confusion in interpretation; for example, where the local mandatory standard has proposed changes to a voluntary or overseas standard referenced therein (which later changes). Processes would also need to be put into place to ensure that relevant suppliers become aware of mandatory changes with appropriate notice. Choosing an appropriate transitional period for implementation to apply across product categories may be difficult.

- b) Option 3, Alternative 2 likely involves only a minor change to the statute, to introduce a "safe harbour" provision on which manufacturers or suppliers can rely if they choose to rely on an updated voluntary or overseas standard that is referenced in a mandatory standard. It provides a more up-to-date approach to be taken (if chosen); however, since it would effectively operate as a defence, there will still be some uncertainty for manufacturers or suppliers seeking to rely on the safe harbour. On the other hand, it is more consistent with a "status quo" approach, where the ACCC has already reviewed and considered the substantive requirements of the standard in declaring or making the mandatory standard in which the voluntary or overseas standard/s is referenced.

30. Having regard to the two alternatives proposed by the Consultation Paper, the Committee prefers Alternative 2. It retains the existing emphasis on the mandatory standards which have been carefully considered by the ACCC, including any voluntary or overseas standards referenced therein. It also permits businesses some flexibility in considering both the minimum standard set by the regulator and whether updates to the particular standards provide additional safeguards or improvements in efficiency that can and ought properly be implemented.
31. The Committee agrees with the overview of potential benefits and costs of Option 3 as set out in pages 25 to 26 of the Consultation Paper.

Consultation questions 21 to 23: Other potential alternatives to regulatory amendments

32. The Committee agrees with proposed amendments to the ACL to permit up-to-date and best practice standards (whether voluntary or overseas) to be met, where the ACCC has determined that a mandatory standard should be in force for a particular kind of consumer good. The status quo already permits companies to rely on voluntary or overseas standards where there is no applicable mandatory standard in place. That should continue. Standards, together with the general law and other ACL obligations, provide a consumer protection regime which includes a combination of regulatory oversight and commercial responsibility.
33. Other regulatory regimes similarly allow for reliance, where appropriate, on overseas regulatory standards and approvals - for example, therapeutic goods regimes for medical devices. Local laws recognise the "trustworthiness" of particular overseas regimes as well as the specific needs of the Australian market (including by regulating labelling and promotion).

34. Since the primary issues identified by the Consultation Paper relate to addressing limited resources and administrative burden, it may be that changes to the consultation process and regulatory impact assessment may be streamlined. However, it is difficult to assess the extent of any such proposals based on the information in the Consultation Paper. It may be, for example, that a tiered approach could be adopted. As noted elsewhere in the paper, the range of consumer goods to which mandatory standards applies is very broad - from, e.g. specific product categories such as portable aerosol fire extinguishers on the one hand, to much broader categories such as button and coin batteries and products which use such batteries. It would not be appropriate for new or amended mandatory standards to be introduced to the latter category without appropriate and detailed consultation.

Consultation questions 24 to 25: Combining Options 2 and 3

35. The Committee does not support combining Options 2 and 3. The Committee's preferred approach is Option 3. This option (particularly Alternative 2) will provide added flexibility to manufacturers and suppliers in complying with the most current versions of standards referenced in those mandatory standards already made or declared by the ACCC through its thorough review and consultation process. In the Committee's submission, this option, together with other parts of the product liability legal framework (including statute and the general law) provide appropriate levels of consumer protection.
36. Finally, and having regard to question 13 (which is under the heading "Option 2", but equally applies to Option 3), in addition to sections 108 and 196 of the ACL (relating to nominating safety standards), implementing Option 2 or Option 3 will also require amendments to the definition of "Commonwealth mandatory standard", sections 9(4), 122(b)(iii), 128(1)(c) and 148 of the ACL, depending on the nature of other amendments to the mandatory standard regime under the ACL.

Consultation questions - Summary

No.	Consultation Questions (extract)	Comment
	Do you agree or disagree with the identified problems?	Yes.
	Are there any other problems that you think should be considered?	None identified.
	Do you have any specific information, analysis or data that will help measure the impact of the problems identified?	Not applicable.
	Do you agree that changes to the regulatory framework are required to address the problem?	Yes. The Committee prefers Option 3.
	Do you agree with the policy objectives as outlined?	Yes.
	Are there any other policy objectives you think the Commonwealth, state and territory governments should be considering in addressing the problem?	Commonwealth, state and territory governments should consider the limited role of mandatory standards in providing minimum standards for certain types of consumer goods. They should also be considered in the context of the Australian product liability regime both at common law and statute, and having regard to regulatory investigation and enforcement powers, together with actions which may be brought by or on behalf of consumers.
	Does the status quo achieve the policy objectives?	Yes; however, the current regime is inflexible, resource intensive and may lead to added cost and administrative burden for many stakeholders.
	Is the current regulatory framework for developing mandatory standards under the ACL sufficient to address the problem?	No, given the above.

No.	Consultation Questions (extract)	Comment
	<p>Does the current regulatory framework impose unnecessary costs or compliance burdens?</p>	<p>Yes, at least for those manufacturers who supply product for multiple markets, for the ACCC which manages a limited budget and for consumers who may miss out on access to innovative products or pay higher prices due to the higher costs within the supply chain.</p>
	<p>Two alternatives have been presented to make it easier to comply with overseas standards: prescribing a list of trusted standards making associations whose standards may be declared; or taking a principles-based approach to declaring overseas standards.</p> <p>a. Which alternative is preferable?</p> <p>b. Are there other alternatives to make it easier to comply that haven't been considered?</p>	<p>Of these two options, the principles-based approach to declaring overseas standards is preferred. However, insufficient information has been provided about the need to improve flexibility for the regulator in declaring voluntary or overseas standards, having regard to the products for which standards are currently declared.</p>
	<p>Are the standards making associations on the proposed list acceptable?</p>	<p>These appear to be acceptable; however, this question is more appropriately answered by commercial stakeholders.</p>
	<p>Do you have any comments on the high-level criteria for a principles-based approach to declaring overseas standards, or any additional criteria?</p>	<p>A principles-based approach to declaring overseas standards should focus on whether a comparative Australian standard is available, whether the overseas standard provides an improvement on the Australian standard and whether there is any feature unique to Australia which means that the standard is inappropriate. Overseas standards should only be mandated where there is no appropriate Australian standard. A manufacturer should be able to identify and obtain a declaration of "equivalency" for an alternative standard with which it complies for the same goods sold in other western countries.</p>

No.	Consultation Questions (extract)	Comment
	<p>Are there related provisions in the ACL that should be updated at the same time, for example section 108?</p>	<p>Yes. In addition to sections 108 and 196 of the ACL, implementing Option 2 or Option 3 will also require amendments to the definition of "Commonwealth mandatory standard", sections 9(4), 122(b)(iii), 128(1)(c) and 148 of the ACL, depending on the nature of other amendments to the ACL.</p>
	<p>If adopted, what would the likely impacts be on affected businesses (large and small), consumers, consumer law regulators, or accredited conformance and testing authorities?</p> <p>Have any impacted stakeholders been missed? What would the likely impacts be on these stakeholders?</p>	<p>This question will be better addressed by direct stakeholders, such as industry participants. It is anticipated that stakeholders will be affected differentially, depending on the products supplied and whether the ACCC intends to declare further overseas or voluntary standards as mandatory standards under changes to the legislation.</p>
	<p>Have any impacted stakeholders been missed? What would the likely impacts be on these stakeholders?</p>	<p>None identified.</p>
	<p>Two alternatives have been presented to make it easier to comply with the latest standards: permitting standards to apply as they exist from time-to-time; or including a safe harbour provision.</p> <p>a. In your opinion, which alternative is preferable?</p> <p>b. Are there other alternatives to make it easier to comply with the latest standards that haven't been considered?</p>	<p>Both alternatives carry risks compared with the status quo, because they will introduce flexibility to the interpretation and application of standards. However, the Committee prefers Alternative 2.</p>
	<p>If suppliers were required to comply with the latest standards as they exist from time-to time, what would be a reasonable transition period? Why? How should updates to standards and transition periods be communicated to suppliers?</p>	<p>This question will be better addressed by direct stakeholders, such as industry participants. It is anticipated that stakeholders will be affected differentially, depending on the products supplied and the scope of changes.</p>

No.	Consultation Questions (extract)	Comment
	Do you support the proposal for the update of existing standards (voluntary Australian or overseas) that have previously been reviewed and incorporated into mandatory standards or declared as a mandatory standard without requiring further consultation and regulatory impact analysis?	Yes; however, there may be particular circumstances where detailed review and consultation is required - e.g. if there is a substantial change or re-work to a standard.
	Would permitting standards to apply as they exist from time-to-time as described pose any additional safety risks to consumers?	Unknown, although it is anticipated such risk is low, given other safeguards in the product regulatory regime in Australia.
	Do you think the safeguards for disallowing updates if they are reviewed and demonstrated to be unsafe or unsuitable are sufficient to achieve the goal of consumer protection? What factors needs to be considered in triggering a review of an update? Are alternate or additional safeguards needed?	As noted above, this is not the Committee's preferred approach. Amending the ACL to include both an automatic process by which updated standards are adopted and made mandatory, as well as providing the ACCC with a "veto right" (potentially without a detailed consultation process) may lead to uncertainty about the interpretation and application of a particular standard (or part thereof).
	How can the current process for reviewing and updating mandatory standards to capture updates to referenced voluntary Australian and overseas standards be improved?	One option may be to create a tiered approach to the review and update of mandatory standards. For example, categorising by complexity or risk.
	Are the benefits from streamlining the current process for updating standards likely to be the same or greater than the proposed amendments to the ACL?	Unknown. However, transparency of approach is critical.
	Are there any other ways that achieve the policy objective of more efficiently capturing updates to voluntary Australian and overseas standards without making amendments to the ACL?	None identified.

No.	Consultation Questions (extract)	Comment
	Do you agree that Options 2 and 3 should be combined and implemented?	No.
	Are there any options not presented in this consultation RIS that could be combined with Options 2 and/or 3 to address the identified problem?	None identified.
	For each of the options do you agree with the preliminary assessment and with the benefits and costs outlined?	Yes.
	Are there other costs and benefits that have not been considered that should be?	None identified.
	Do you have any specific information, analysis or data in support of the benefits or costs for each option?	None identified.

37. The Committee would be pleased to discuss any aspect of this submission. Please contact the chair of the Committee, Jacqueline Downes at if you would like to do so.

Yours faithfully

Philip Argy
Chairman, Business Law Section