

**COMMUNICATIONS
ALLIANCE LTD**



**SUPPORTING BUSINESS THROUGH IMPROVEMENTS
TO MANDATORY STANDARDS REGULATION UNDER
THE AUSTRALIAN CONSUMER LAW
Australian Government – The Treasury**

COMMUNICATIONS ALLIANCE SUBMISSION
4 FEBRUARY 2022

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EXECUTIVE SUMMARY

Communications Alliance welcomes the opportunity to provide this submission in response to the Australian Government's consultation on supporting business through improvements to mandatory standards regulation under the Australian Consumer Law.

In summary, Communications Alliance:

- believes that Option 1 of *no change* to the regulatory framework for mandatory Standards set under the ACL is a less safe option. We consider that Option 3, to amend the ACL to more easily allow businesses to comply with the latest versions of voluntary Australian and overseas Standards, aligns with the principles of other regulatory frameworks in Australia and overseas, and is the most responsive to updates and range of overseas products.
- considers that an implementation of safe harbour provisions is the most practical approach, allowing for flexibility and responsiveness to changing market demands and product designs.
- shares the consultation paper's concern in prescribing 'trusted overseas Standards bodies.' There are several aspects to such an approach which can result in the selection of Standards that are not suitable for the Australian market.
- suggests that developing mandatory Standards under the ACL should be seen as a mechanism to be employed as a last resort, in situations where specific regulatory arrangements are not in place or where industry self-regulation is unable to provide the desired consumer protections.
- cautions when considering to allow the Commonwealth Minister for Consumer Affairs to declare trusted overseas Standards. Communications Alliance promotes, to the greatest extent possible, industry self/co-regulation for CE, with regulatory oversight by Government only where there is evidentiary failure.
- suggests consideration of including additional Australian SDOs in the event of extending the declaration to other international standards bodies.
- highlights the need to address national variations when international Standards are referenced, to take into account specific Australian conditions.
- highlights that transition periods need to be adequate to permit the changes to cascade through the market non-disruptively when a Standard is amended or replaced by a new edition.
- notes that fair access to voluntary Standards that are called up in mandatory Standards is an important aspect for stakeholders.

About Communications Alliance

Communications Alliance is the primary communications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, platform providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to be the most influential association in Australian communications, co-operatively initiating programs that promote sustainable industry development, innovation and growth, while generating positive outcomes for customers and society.

The prime mission of Communications Alliance is to create a co-operative stakeholder environment that allows the industry to take the lead on initiatives which grow the Australian communications industry, enhance the connectivity of all Australians and foster the highest standards of business behaviour.

For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

1. Introduction

Communications Alliance, as an accredited Standards Development Organisation (SDO), has had over twenty years of experience in the development and maintenance of technical Standards for telecommunications Customer Equipment (CE) and cable, which are legislated under the *Telecommunications Act 1997*.

It is with this knowledge and experience that we would like to share our views on the proposed options being considered by Treasury for the regulation of consumer safety Standards under the Australia Consumer Law (ACL).

To provide context when reading this submission, the following overview has been included, describing the regulatory arrangements for the *making* of industry CE Standards that are developed by Communications Alliance and Standards Australia, so parallels can be drawn to the options being proposed in the consultation paper as appropriate.

Telecommunications sector standardisation

Under the *Telecommunications Act* and *Radiocommunications Act*, technical standards addressing safety, integrity and interoperability are developed by industry and mandated via technical standards¹ managed by the Australian Communications and Media Authority (ACMA). These national and international industry safety Standards cover the following areas:

- telecommunications (Communications Alliance AS/CA CE Standards and the Standards Australia AS/NZS ICT equipment safety Standard)
- radiocommunications (EME Standards)
- electromagnetic compatibility (the ACMA Radiocommunications (Electromagnetic Compatibility) Standard which calls up various EMC Standards – CISPR, IEC, EN, AS/NZS)
- electromagnetic energy (Schedule 4 of the *Radiocommunications Equipment (General) Rules 2021*, which calls up the ARPANSA EMR Standard for exposure to radiofrequency radiation²)

The ACMA is the communications and media regulator and is responsible for the regulation of the broadcasting, telecommunications, radiocommunications and internet sectors. It reports to the Federal Minister for Communications, Urban Infrastructure, Cities and the Arts, at the time of this consultation, the Hon Paul Fletcher MP.

The ACL addresses product safety issues of consumer items which are not considered to be CE. CE safety issues are under the responsibility of the ACMA via technical standards made under the *Telecommunications Labelling Notice*³. However, the EMC Labelling Notice⁴ and *Radiocommunications Equipment (General) Rules 2021*⁵ apply to CE as well as other consumer items.

¹ ACMA technical standards <https://www.acma.gov.au/technical-standards>

² ARPANSA *Radiation Protection Standard for Limiting Exposure to Radiofrequency Fields – 100 kHz to 300 GHz (2021)* standard

³ Telecommunications (Labelling Notice for Customer Equipment and Customer Cabling) Instrument 2015 <https://www.legislation.gov.au/Series/F2015L00190>

⁴ Radiocommunications Labelling (Electromagnetic Compatibility) Notice 2017 <https://www.legislation.gov.au/Series/F2018L00028>

⁵ Radiocommunications Equipment (General) Rules 2021 <https://www.legislation.gov.au/Series/F2021L00661>

Communications Alliance as an SDO

Communications Alliance has been an accredited Standardisation Development Organisation (SDO) since 1999, fulfilling the *Requirements for the Accreditation of a Standards Development Organisation* set by the *Standards Development and Accreditation Committee* (SDAC) under Standards Australia. The requirements to be met to be able to develop Australian Standards include continuity of operations, competencies, legal responsibilities, records and documentation and Standards development processes of openness, transparency, representational balance, consensus, access equality and appeal processes. These requirements reflect the same conditions that Standards Australia, as Australia's peak non-government, not-for-profit standards organisation, develops Australian Standards.

Communications Alliance develops and maintains telecommunications CE and cabling Standards that are required by suppliers to be able to demonstrate compliance prior to allowing their product to be connected to Telecommunications Networks⁶. These Standards are given force under the *Telecommunications Act 1997*.

Communications Alliance maintains several advisory groups to assist in the delivery of the Communications Alliance work program, including four industry-led reference panels, one of which, the Customer Equipment and Cable Reference Panel (CECRP)⁷, has the responsibility to advise on the need for the CE and cable Standards (AS/CA Standards). In addition to maintaining the suite of AS/CA Standards, the CECRP works closely with the ACMA and provides recommendations on how these Standards are called up under regulations. A case in point is the work currently being undertaken by the CECRP in reviewing how applicable CE Standards are identified under the ACMA Telecommunications Labelling Notice for the expanding assortment of network enabled devices, including Internet of Things (IoT) devices.

2. General comments

Standardisation Development Organisations (SDOs)

The consultation paper notes that there are no associations currently prescribed by regulation and that only voluntary standards developed or approved by Standards Australia may be declared by the relevant Commonwealth Minister for consumer affairs under the ACL.

Under Options 2 and 3, the consultation paper proposes to extend the declaration to other international standards bodies as well, but misses the opportunity to include additional Australian SDOs⁸. In addition, there are other standards setting bodies such as ARPANSA⁹. While right now there's not a need for these Australian SDO standards to be associated with mandatory standards under the ACL (see the list in Appendix B of the consultation paper), Page 17 hints at a new area 'A potential emerging area where this could be particularly relevant is interconnected and smart devices, where relevant standards which define security and safety measures expected in connected devices are an emerging issue internationally'. In the near future, therefore, other Australian SDOs might be required and

⁶ Defined in Section 7 of the *Telecommunications Act 1997*.

⁷ The Customer and Equipment Reference Panel (CECRP)
<https://www.commsalliance.com.au/Activities/committees-and-groups/cecrp>

⁸ Standards Australia Accredited Standards Development Organisations (SDOs)
<https://www.standards.org.au/standards-development/accreditation>

⁹ Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) <https://www.arpansa.gov.au/>

potentially preferred – and/or the remit of existing SDOs, such as Communications Alliance, might need to be broadened.

Choosing which Standard

The consultation paper does not indicate the threshold criteria to determine what voluntary Standard could be picked up by the ACCC as a mandatory Standard.

Communications Alliance recognises that developing mandatory Standards under the ACL should be seen as a mechanism to be employed as a last resort, in situations where specific regulatory arrangements are not in place or where the industry self-regulation has not yet provided the desired consumer protections, e.g. where the timeframe for developing an industry Standard is taking too long and impacting supply of CE to the market.

As a case in point, the AS/NZS 62368.1 ICT CE safety Standard¹⁰ is a part of a mandatory regime under the *Telecommunications Act* administered by the ACMA and should remain outside the ACCC ACL processes to avoid potential duplication of requirements and potential confusion for the users.

On Page 17 of the consultation paper, it notes the potential emerging area to define security and safety measures for interconnected and smart devices. Communications Alliance recognises that the work of Standards Australia IT-042 *Internet of Things and Related Technologies* is working in this space. When international Standards become available, these Standards will be reviewed and considered for adoption as Australian Standards.

Nevertheless, when considering whether to mandate a new Standard, a net-benefit analysis would need to be undertaken to determine whether a mandatory instrument is the correct course of action, including a Regulation Impact Statement (RIS), to establish the extent of non-compliance in the existing market and to identify the benefits and costs of such an approach.

Addressing Australian conditions

Under the World Trade Organisation's *Agreement on Technical Barriers to Trade*, one of the Articles is for an SDO to use international standards or the relevant parts of them where they exist as a basis for their technical regulations.

When international Standards are referenced, national variations are developed where needed to take into account specific Australian conditions. This is an important aspect of Standards development which makes a standard fit-for-purpose for national conditions, and which has to be carefully managed under standards development processes. If this ability were circumvented, for instance by Ministerial declaration, what provisions are being proposed to be put in place to address specific Australian conditions?

Export opportunities

The consultation paper clearly identifies the unnecessary costs and confusion concerning supplier obligations when importing goods regulated under the ACL¹¹ and the prospect of improving these arrangements. For completeness, Communications Alliance wishes to add that improving the arrangements for referencing current overseas Standards will also provide benefits to exporters as well as to importers, providing expanded export opportunities.

¹⁰ AS/NZS 62368.1:2018 <https://www.standards.org.au/standards-catalogue/sa-snz/communication/te-001/as-slash-nzs-62368-dot-1-colon-2018>

¹¹ Consultation Paper, *The Problem*. Page 6

Australian manufacturers who use overseas Standards for their domestic production will find it much easier to chase export opportunities with the overseas regulatory jurisdiction as well and thus expand their market potential significantly, with potential benefits for Australia's balance of trade.

Costs to stakeholders

Under the preliminary impact analysis on Page 23 of the consultation paper, it notes that there will 'continue to be a cost for businesses that must pay to access the technical details contained in voluntary Australian and overseas Standards referenced within a mandatory Standard'. This does not recognise the general public need to access mandatory Standards to check what kind of things make their product safe and how can they make approaches to the SDOs to have comments considered for review of the standards. Not all SDOs charge a fee for accessing their Standards e.g. AS/CA Standards are available for download free of cost from the Communications Alliance website¹² and similarly ETSI 3GPP and ITU Standards can be download free of cost from ETSI 3GPP and ITU websites.

Fair access to voluntary Standards that are called up in mandatory Standards is an important aspect for stakeholders. It is understood that there used to be a system in Australia where any member of the public could inspect Australian Standards for free (but not copy them) at many public libraries. The paper also details Standard Australia's efforts to take all reasonable action to ensure fair and equitable access to voluntary Australian Standards for all users, include online access and a commitment to providing free access to content for personal, domestic and household use by December 2023¹³. The ACCC also allows in person inspection of voluntary Australian Standards developed by Standards Australia where they are referenced in mandatory Standards, at its offices, located in capital cities and in Townsville. It is noted that this is restricted to only Australian Standards.

3. Status quo (option 1)

Communications Alliance considers Option 1 of *no change* to the regulatory framework for mandatory Standards set under the ACL to be a less safe option, as mandatory Standards may not be referencing the most up-to-date international safety Standards.

The consultation paper states that 'Consumers would continue to be protected by the mandatory standards which regulate higher risk products to minimise the risk of injury to consumers.' Communications Alliance would like to point out that this is not always the case. Consumers might continue to be protected to old Standards requirements but fail to have the safety protections against newly identified risks that are safeguarded against under the more recent editions of Standards. So Option 1 is considered to have the highest risk of the three options that are being proposed.

4. Declaration of trusted overseas standards (option 2)

Picking winners

The consultation paper discusses the implications of 'picking winners', to develop a list of trusted overseas Standards organisations, under the first alternative of Option 2.

¹² Communications Alliance Customer Equipment Standards
<https://www.commsalliance.com.au/Documents/all/Standards>

¹³ Consultation Paper. *Access to voluntary Australian standards*. Page 35

Communications Alliance shares the consultation paper's concern at the prospect of prescribing 'trusted overseas Standards bodies.' There are several aspects to such an approach, which can result in selecting Standards that are not suitable for the Australian market. An overseas Standards developer would be required to meet the generally accepted principles that an SDO meets, including openness, transparency, balanced representation and consensus outcomes. It is also evident that a number of the bodies identified in the list in the consultation paper do not have Australian representation or involvement. Without this input, Standards outcomes may not be fit-for-purpose for Australian conditions.

Ministerial declarations

From a principle-based regulatory perspective, Communications Alliance promotes, to the greatest extent possible, a self/co-regulatory regime for CE. This means that, where possible, industry will develop codes, standards and guidelines for CE (as applicable) with regulatory oversight.

Communications Alliance's role in the communications industry lies in leading the development of self/co-regulatory initiatives through collaborative working of all stakeholders. We are of the firm belief that only through a self/co-regulatory process it is possible to appropriately gather the requisite technical expertise from all required stakeholders and to aggregate their views, which often require further expert research, into a consistent and practical piece of regulation.

Consequently, we raise concern with the proposed approach to allow the Commonwealth Minister for Consumer Affairs to declare trusted overseas Standards 'using a principles-based approach provided the Standard meets certain criteria. Communications Alliance also suggests, if this proposal indeed goes ahead, that the Commonwealth Minister for Consumer Affairs consult with the Commonwealth Minister for Communications prior to considering to declare any overseas Standards for CE covered by the TLN and other consumer items covered by the Radiocommunications, EME and EMR Labelling Notices and Rules.

Ministerial powers ought to be accompanied by the appropriate consultation and review processes, employing consensus outcomes. Typically, such powers should only be enacted under emergency situations, i.e. where there have been evident failures that cannot be remedied through any other course of action in an appropriate timeframe. Exercising Ministerial powers often run the risk of limited visibility and transparency of the decision-making processes, including what advice has been sought and incorporated to arrive at the final decision. Importantly, as highlighted above, they cannot benefit from the deep technical expertise that the industry-led self/co-regulation development processes (over several months or even years) entail.

If such powers were enacted, then at a minimum, industry and consumers ought to be given the opportunity to review the operation of the mandatory Standard in the market once the Standard has been operational for a certain period of time.

Other issues

It is not clear whether the introduction of the term 'Standards making association' (in place of 'Standardisation Development Organisation') is in fact a recognition of differences between the processes of organisations discussed under Option 2. The introduction of new terminology should be avoided where possible to avoid any unnecessary confusion.

5. Compliance with the latest Standards (option 3)

Option 3, to amend the ACL to more easily allow businesses to comply with the latest versions of voluntary Australian and overseas Standards, aligns with the principles of other regulatory frameworks in Australia and overseas, and is the most responsive to updates and range of overseas products. It minimises costs for the regulator as well by the way of reduced RIS reviews going forward.

One difficulty in this approach is to establish equivalency among the different Standards and editions and the standards making bodies. Further flexibility might be needed when choosing alternative Standards.

Transition periods

When a Standard is amended or replaced by a new edition, the transition periods need to be adequate to permit the changes to cascade through the market non-disruptively (e.g., for research and development, manufacturing, testing and certification). One exception to this is where critical endangerment exists that requires to be urgently corrected.

In addition, if a product is already on the market under an older version of a mandated Standard without any alleged safety incidents or recalls or bans, the product should be permitted to continue to be supplied to the market under that legacy Standard unless the product modified in a material way.

Permitting Standards updated time-to-time

Communications Alliance recognises the mechanism of referencing Standards (voluntary Australian or international) when they are updated from time-to-time, as a practical approach to maintain currency with references in our AS/CA CE and cable Standards under specific situations. These Standards appear in our AS/CA Standards as undated references.

As noted in the consultation paper, this practice is only suitable when the risk of non-compliance is assessed to be low for the Standards in question, because they are updated from time-to-time. Nevertheless, as Customer Equipment Standards developed by Communications Alliance are periodically revised by industry stakeholders, this allows for the ongoing review of all dated and undated references in each of these Standards. This ensures that both dated and undated references are periodically reviewed to ensure that they remain appropriate.

Standard replacements

In the situation where a voluntary Standard has not simply been revised but replaced by a different Standard, there should be a process which allows the replacement Standard to be mandated with minimum disruption. For example, in the telecommunication sector, regulatory arrangements were carefully put in place for the two equipment safety Standards, AS/NZS 60065 and AS/NZS 60950.1, to be replaced by the new AS/NZS 62368.1 equipment safety Standard whose scope cover both of the former Standards.

Safe harbour provisions

Communications Alliance considers that the implementation of safe harbour provisions is the most practical approach, allowing for flexibility and responsiveness to changing market demands and product designs.

In implementing safe harbour provision, certain criteria need to be established. For instance, when suppliers have multiple Standards and multiple editions or amendments of Standards to choose from, they should not be permitted to mix and match different clauses between different Standards or editions when claiming compliance. A standard and edition, together with any amendments, must be chosen and compliance sought against that particular Standard. Selecting different clauses between similar Standards for compliance can lead to unreliable outcomes.



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**COMMUNICATIONS
ALLIANCE LTD**

Level 12
75 Miller Street
North Sydney
NSW 2060 Australia

Correspondence
PO Box 444
Milsons Point
NSW 1565

T 61 2 9959 9111
F 61 2 9954 6136
E info@commsalliance.com.au
www.commsalliance.com.au
ABN 56 078 026 507