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By email:

productsafety@treasury.gov.au

Re: Submission to Australia's Treasury Consultation on 'Supporting business through improvements to mandatory standards regulation under the Australian Consumer Law' (ACL)¹

1. I have researched, lectured and published on consumer law for over thirty years.² I am presently completing a third consultancy project for the ASEAN Secretariat on consumer product safety law and practice,³ and an Australian Research Council (ARC) funded joint research project comparing Australian and US patterns in child product safety regulation and hospital ER injuries.⁴
2. Including such wider comparative perspectives on the Australian situation, I agree with the proposed Option 2 (Amend the ACL to allow the Commonwealth Minister to more easily *declare* trusted overseas standards) in combination with Option 3 (Amend the ACL to more easily allow businesses to comply with the latest versions of voluntary Australian and overseas standards).
3. However, this should not detract from Australia amending the ACL to include a general safety provision (GSP) requiring suppliers to put only safe consumer products onto the marketplace (even if no mandatory safety standard has been implemented for a particular type of product). To address growing problems around product safety, such as GSP has been enacted in Europe since 1992, then across our Asia-Pacific region for example in Hong Kong, Malaysia (1999), Canada (2010), Singapore

¹ <https://treasury.gov.au/consultation/c2021-223344>

² CV at <https://www.sydney.edu.au/law/about/our-people/academic-staff/luke-nottage.html>

³ <https://c-tif.ca/portfolio/projects/strengthening-consumer-protection-in-asean/>

⁴ See eg <https://eprints.qut.edu.au/197226/> and <https://japaneselaw.sydney.edu.au/2020/10/consumer-product-safety-system/>

(2011, partially – as mentioned further below) and Thailand (2019).⁵ My empirical analysis comparing OECD Global Recalls data shows that Australia has high and rising levels of voluntary recalls, suggesting that suppliers here not taking as pro-active an approach to product risk assessment, but rather reacting to complaints by consumers or regulators or trading partners about safety incidents or risks by belatedly recalling products.⁶ Improving the ACL provisions around safety standards, by adding a GSP for all consumer products, in addition to the proposals now being considering around mandatory standards for (only several dozen) specific types of products, should prompt Australian suppliers to adopt a more pro-active approach – as in many of our major trading partners.

4. Regarding Option 2, I further propose a *combination* of:
 - a. Alternative 1 (Prescribing a list of ‘trusted’ overseas of standards making associations), to be set by Regulation after public consultation; and
 - b. Alternative 2 (Using a principles-based approach for *declaring* overseas standards), including criteria that would apply both to listing of associations by Regulation as well as to their specific standards being declared by the Australian Minister as mandatory, such as the criteria set out in the Consultation RIS (p16).⁷
5. The list of 12 potential ‘trusted’ associations globally or from some of Australia’s major trading partners (EU, USA, Japan, NZ) are a good start. However the UNECE develops far fewer standards than most of the others. It also seems incongruous tentatively list just the CPSC – as a

⁵ <https://www.inhousecommunity.com/article/amendment-consumer-protection-act/>

⁶ Nottage, Luke R., Improving the Effectiveness of the Consumer Product Safety System: Australian Law Reform in Asia-Pacific Context (February 3, 2020). Journal of Consumer Policy (2020) 43:829-850, Sydney Law School Research Paper No. 20/05, Available at SSRN: <https://ssrn.com/abstract=3530671>

⁷ Such as, in addition to ‘trust’ on behalf of consumer groups not just business groups, both generally for the association and specifically for the overseas standard being considered as mandatory for Australia:

- ‘The standard is available in English.
- The standard is widely used and accepted by manufacturers.
- There is no evidence that the standard is inappropriate to the Australian context.
- The standard offers at least a comparable level of safety to any applicable Australian standards (where an Australian standard exists).
- The standard is made by a trusted or competent association.’

government agency mandating standards, alongside two non-governmental bodies setting voluntary standards (ASME, UL) in the US; shouldn't government agencies for other listed countries be included? And how about the ASTM from the US? The latter (not ASME) is listed by the Singapore 2011 Regulation, along with ISO or European Standards, as being available as recognised associations whose standards must be complied with by suppliers of consumer products into Singapore. (This makes the 2011 Regulation a partial GSP, as most but not all products will be covered by at least one of these three associations' voluntary standards.⁸)

6. The Singaporean experience with mandating supplier compliance with ASTM, ISO or European standards seems to be working adequately, although there is little public data. Australia could therefore begin by amending the ACL to list at least these three associations, and see how their standards compare with each other (and any from Standards Australia) when the Minister looks to declare new mandatory standards for Australia. If those three associations prove trustworthy, Australia could go the next step of requiring suppliers of all consumer products to comply with a standard set by any of the three, as in Singapore since the 2011 Regulation. However, there might still be some consumer products not covered by any of the associations or one may have lower standards that suppliers might favour, my recommendation would still be for Australia to enact a wider EU-style GSP. Suppliers here would still likely consider carefully any standards set by these three associations, but if missing or of low standard have to pro-actively consider any standards from further associations.
7. I have long had difficulty with the preferred status given to Standards Australia in the ACL (or its predecessor TPA legislation), given for example that the publication of such standards is through a listed company (SAI) generating profits for its shareholders.⁹ Amending the ACL

⁸ See further: Nottage, Luke R., ASEAN Consumer Product Safety Law: Fragmented Regulation and Emergent Product Liability Regimes in Southeast Asia (March 10, 2020). "ASEAN Consumer Law Harmonisation and Cooperation: Achievements and Challenges", Cambridge University Press (2019), Sydney Law School Research Paper No. 20/13, Available at SSRN: <https://ssrn.com/abstract=3551793>

⁹ See my 2005 Submission 52 for the Productivity Commission's Inquiry into Standards and Accreditation, available via <https://www.pc.gov.au/inquiries/completed/standards/submissions>

to allow the Minister to declare instead standards of other organisations should encourage Standards Australia and SAI to become more efficient, for the benefit of the wider consumer and business communities.

8. Next, when adopting as well Option 3, rather than its Alternative 1 (Allowing updated standards to apply, ie automatically), I prefer Alternative 2 (Alternative 2 - Safe harbour provision). The latter would require Australian suppliers to more pro-actively check whether any ACL standard is now improved on by some better, safer overseas standard.
9. I am very happy to provide further information or advice on any of the above.

Yours sincerely,

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