



# The Treasury's Consultation Regulation Impact Statement: *Supporting business through improvements to mandatory standards regulation under the Australian Consumer Law*

Australian Competition and Consumer Commission Submission

7 February 2022

## 1. Introduction

The Australian Competition and Consumer Commission (**ACCC**) welcomes the opportunity to make a submission to Treasury in response to its consultation regulation impact statement (**CRIS**) on proposed improvements to mandatory standards regulation under the Australian Consumer Law (**ACL**).

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (**CCA**), regulate national infrastructure and undertake market studies.

Product safety mandatory standards play an important role in protecting Australian consumers by setting out safety and information requirements for certain products which may otherwise pose safety risks to consumers. The ACCC provides advice to the Commonwealth Minister with responsibility for product safety about the need for and, suitability of, mandatory standards to address consumer product safety risks.

## 2. Executive Summary

The ACCC supports proposed improvements to mandatory standards regulation under the ACL. In our view, there are opportunities for changes to the product safety framework to increase efficiencies for the benefit of consumers, to promote competition and support businesses to comply with their regulatory obligations.

The ACCC supports in principle the following CRIS options as a combined program of reform:

- Option 2 (alternative 1): prescribing a list of ‘trusted’ overseas standards making associations. In our view this would enable overseas product safety requirements to be more efficiently included in Australian mandatory standards where necessary to protect Australian consumers. This also has the potential to increase competition, provide consumers with a greater product choice and decrease business compliance costs particularly where products already meet an existing overseas product safety standard.
- Option 3 (alternative 1): allowing updates to standards referenced in Australian mandatory standards when they are updated from time to time. We understand this may include safeguards such as a transition time and an option for disallowance. This would enable mandatory standards to be responsive to changes in applicable voluntary standards. This benefits consumers by ensuring mandatory standards remain up to date, including in relation to the latest product safety best practices and provides greater certainty for businesses on their compliance obligations.
- Option 3 (alternative 2): a safe harbour provision for businesses that want to comply with the most up to date version of a voluntary or overseas standard provided this is combined with Option 3 (alternative 1). The ACCC does not support a safe harbour provision as a standalone option. Our view is that ambulatory referencing needs to be provided in the ACL. However, the ACCC understands the benefit of statutory relief for businesses, such as a safe harbour provision. Additionally, the ACCC recommends considering the option for businesses to apply to the ACCC or Commonwealth Minister for a compliance permit to provide greater flexibility to respond to unforeseen circumstances and address certain matters of technical non-compliance.

The ACCC does not support Option 2 (alternative 2) a principles-based approach for declaring overseas standards being set out in the ACL as in our view it would not address the problem and may instead exacerbate it.

Further details are in our submission below.

### 3. The need for reform

It is essential that the ACL's product safety framework is responsive to new and emerging issues, can address safety concerns for consumers, and supports regulatory compliance by businesses in an efficient and timely way and does not diminish the likelihood of enforcement action being taken for serious or sustained non-compliance.

The reforms in this CRIS are an important step to achieving this. We also support Treasury considering (among other reforms) the introduction of a general safety provision and changes to recall provisions following the CRIS [Improving the Effectiveness of the Consumer Product Safety System](#).

### 4. The policy objectives

We understand the policy objectives of these proposed amendments are to:

- make it easier for suppliers and importers to comply with product safety requirements set under the ACL
- reduce compliance costs for business and barriers to trade by removing duplicative testing and compliance measures where a product has been manufactured overseas to the requirements of an equivalent trusted overseas standard, and
- provide benefits for Australian consumers and for the Australian market by increasing product availability and consumer choice, and decreasing the cost of consumer goods, without compromising consumer safety.

### 5. The problem

The ACCC agrees with the description of the problem set out in the CRIS, which identifies two broad issues: barriers to compliance with trusted overseas standards (Issue 1); and inefficiencies in the process for updating mandatory standards (Issue 2).

We consider the current regulatory framework for mandatory standards is time and resource intensive and inefficient. It involves several administrative and legislative processes. These inefficiencies adversely impact both consumers and businesses. Our comments on the two issues are outlined below.

#### **Issue 1 - Barriers to compliance with trusted overseas standards**

Based on the ACCC's experience in making recommendations to the Minister regarding mandatory safety and information standards (together mandatory standards), we agree, as described in the CRIS, that trusted overseas standards that provide at least an equivalent level of safety as Australian voluntary standards, cannot currently be efficiently incorporated into mandatory standards under the ACL.

A mechanism to recognise overseas standards is available under sections 105 and 135 of the ACL. The Minister is empowered to declare a standard made or approved by Standards Australia or an association listed in the Competition and Consumer Regulations 2010 (the Regulations). This provides a mechanism for the Minister to draw on approaches to setting standards that have

developed over time through a range of expert organisations. When the ACL commenced in 2011 the Government did not propose any associations and other than Standards Australia, no other Australian or overseas standards making bodies are currently prescribed in the Regulations. Instead, to reference an overseas standard within a mandatory standard, a standard must be made under sections 104 and 134 of the ACL.

As outlined in the CRIS, making a standard is a more resource intensive and less flexible process than *declaring* a standard due to its increased threshold test and because it is a more indirect method of referencing a standard.

For example, the threshold test under section 104 for *making* a mandatory safety requires the Minister to consider matters that are 'reasonably necessary to prevent or reduce risk of injury to any person.' Whereas, under section 105, *declaring* an existing standard does not require the same threshold test. Instead, declaration enables an existing standard to be recognised more directly, because the rigorous processes and expertise which forms part of developing a voluntary standard is recognised.

The current limited scope of the option to *declare* a standard under the ACL means a more time consuming and inefficient approach must be adopted when making recommendations to the Minister on any overseas standards to be referenced within an Australian mandatory standard to protect Australian consumers.

### ***Impact in Australia***

For businesses trading over multiple jurisdictions or importing products into Australia, barriers to compliance with overseas standards may lead to increased business confusion and cost. This can include further testing and labelling of products to meet Australian requirements for products that comply with a trusted overseas standard which offers an equivalent or better level of safety for Australian consumers.

Increased compliance costs to businesses can impact Australian consumers. Some global suppliers with products that comply with overseas standards may decide not to supply to the Australian market which may reduce competition and limit consumer choice. For those suppliers that do supply the Australian market, they may pass on increased compliance costs to consumers. Additionally, for consumers, mandatory standards that have not been updated may not reflect current best practice on product safety and/or lead to consumer confusion about whether the product complies with the mandatory standard.

### ***International harmonisation***

Australian businesses participate in global markets. Several mechanisms exist to facilitate this participation, many of which would benefit from greater consistency between Australian and international standards.

In making recommendations to the Commonwealth Minister concerning mandatory standards, the ACCC has regard to Australian government policy and seeks to adopt international trusted standards without imposing additional requirements, unless there is a good and demonstrable reason to do so.<sup>1</sup>

There is also a degree of harmonisation that currently occurs as Australian and overseas voluntary standards often seek to align with internationally recognised standards from the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC).

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<sup>1</sup> Department of Prime Minister and Cabinet (2014) [Industry Innovation and Competitiveness Agenda](#), Australian Government 31.

This approach is consistent with Australia's commitment as a member of the World Trade Organization (WTO) *Agreement on Technical Barriers to Trade* which aims to provide global harmonisation through mutual recognition of technical standards, except where such international standards would be an ineffective or inappropriate means for achieving legitimate objectives (for example, where there are fundamental climatic, geographic factors or technological problems).<sup>2</sup>

In line with Australian government policy, the ACCC seeks to adopt overseas standards within mandatory standards where they offer an equivalent or greater level of safety. The ACCC has a program for reviewing all existing mandatory standards under the ACL to consider overseas standards. However, this is a slow process as each review must satisfy time consuming legislative and administrative requirements. The majority<sup>3</sup> of mandatory standards under the ACL do not currently recognise overseas standards.

With Australia's participation in increasingly globalised markets, in our view, it is important that we do not create unnecessary trading barriers and ensure Australian mandatory standards keep pace with evolving global marketplaces, adopt best practice in relation to consumer product safety and continue to promote competition in the Australian market.

## **Issue 2 - Inefficient regulatory architecture for updating mandatory standards**

Currently, when a mandatory standard is developed, it is frozen at the point in time it is made or declared by the Commonwealth Minister.

Globally, standards can change quickly in response to technological, scientific and safety advancements. However, currently under the ACL, updates to voluntary standards referenced in mandatory standards (including those that are minor or may provide a higher level of safety) cannot be efficiently incorporated. As a result of the complex and time-consuming process to amend, mandatory standards can quickly become outdated.

### ***Impact in Australia***

The inability of mandatory standards to efficiently capture updates to standards leads to increased regulatory costs for businesses. In the ACCC's six recent reviews of mandatory standards under the ACL, the average conservative estimated benefit to business from updating out of date references in the mandatory standards is \$2,842,000 per annum. This benefit is attributable to the cost of accessing the superseded voluntary standard and the compliance cost of ensuring the product is tested and complies with the standard (for example, relabelling products to meet the out-of-date requirements). This is likely to be a significant underestimate of the cost as it does not include lost opportunities to supply products (such as new toys) for Australian or overseas markets.

If businesses comply with the most up-to-date version of a voluntary or overseas standard, even if it provides improved safety requirements, they may breach mandatory standards that prescribe superseded safety requirements. In our view, it is important that businesses can operate in a trading environment where they do not face unnecessary obstacles or unintended legal consequences in complying with their product safety obligations.

An example of the practical issues facing businesses arose in the ACCC's consultation on the bunk bed mandatory standard. Businesses may be in technical non-compliance with the mandatory standard (which references a voluntary standard from 1994) (AS/NZS 4220:1994) if they comply with specifications of the updated 2010 standard.<sup>4</sup>

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<sup>2</sup> World Trade Organisation, [Agreement on Technical Barriers to Trade](#).

<sup>3</sup> A total of 33 out of 48 mandatory standards.

<sup>4</sup> *Trade Practices Act 1974* Consumer Protection Notice No 1 of 2003 – Consumer Product Safety Standard: Bunk Beds.

A further example is the mandatory stroller standard. The ACCC is aware of industry and supplier concerns in relation to the operation of this in practice.<sup>5</sup> Subtle differences in the warning notice between the mandatory standard and the updated 2013 voluntary standard (AS/NZS 2088) has resulted in some suppliers providing products with two warning labels to satisfy both the mandatory and voluntary standards. They do so as many large chain stores require conformance to the newer voluntary standard based on consumer demand and for their own compliance purposes. A revised draft of the voluntary standard has been the subject of extensive public and industry consultation and is likely to be finalised by Standards Australia in early 2022.

The time it takes for mandatory standards to be updated can have an impact on Australian consumers. Products tested to current Australian mandatory standards may quickly become out of date and not reflect the latest Australian and/or global safety advancements. Additionally, some consumers actively seek products which conform with the latest standards, particularly in relation to children's products. However, this can lead to confusion when standards are out of date or there are multiple warning labels (as outlined in stroller standard example above).

## 6. Proposed options: ACCC comments

We strongly support having a prescribed list of trusted overseas standard bodies and mechanism to allow mandatory standards to be updated more efficiently. The ACCC's comments on each of the options as described in the CRIS is below.

### **Option 1: Status Quo**

The ACCC does not support this option as it considers reforms to the product safety regulatory framework for mandatory standards are necessary to increase efficiencies and effectiveness for Australian consumers and businesses.

### **Option 2 (alternative 1): prescribe a list of 'trusted' overseas standard bodies**

The ACCC supports the proposal to prescribe a list of 'trusted' overseas standards making bodies (as associations) in the Regulations.

The current architecture is intended for the Commonwealth Minister to be able to declare all or part of a standard developed or approved by Standards Australia, or an association in the safety standards (section 105) and information standards (section 135) provisions under the ACL. The purpose of these provisions is to allow for mandatory standards to leverage from the technical expertise and rigorous standards development processes of existing standards making associations whether they are located overseas or in Australia.

However, the Regulations do not currently list any other 'associations' that make standards including internationally recognised standards-making bodies (such as ISO and IEC). Consequently, mandatory safety standards cannot efficiently incorporate safety requirements from overseas standards. The CRIS has suggested a list of potentially suitable standards making associations for consideration which include the ISO and IEC, as well as other associations from countries such as the United Kingdom, the European Union and Germany<sup>6</sup>. If this option is to be progressed, significant further consideration must be given to finalise the list of suitable standards making associations included in the Regulations to provide clarity, as well as the provision of comprehensive guidance to industry regarding its operation. The ACCC welcomes the opportunity to provide further feedback to The Treasury in relation to this proposed reform.

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<sup>5</sup> *Competition and Consumer Act 2010* Consumer Product Safety Notice No 8 of 2007- Standard for Prams and Strollers.

<sup>6</sup> The Treasury CRIS, 2021, 14.



This option would allow trusted overseas standards to be incorporated into a mandatory standard following a regulatory impact assessment if required by the Office of Best Practice Regulation to assess the safety outcomes and costs to business.

If a list of trusted overseas standards bodies is determined, the ACCC supports the 'opt-in' approach outlined in the CRIS, in which specific standards from trusted overseas standards associations are incorporated under the ACL following a review process. The 'opt-in' approach enables the ACCC to assess every standard considered for incorporation into law and consider whether it has been suitably developed and provides an appropriate level of safety for Australian consumers.

Such an option, if implemented, would facilitate a more responsive product safety regulatory regime to deal with emerging consumer product safety risks, particularly in circumstances where an overseas jurisdiction is a global leader in addressing a particular product safety issue.

## **Option 2 (alternative 2): principles-based approach**

The ACCC does not support the option of a principles-based approach for declaring overseas standards as we consider that this option would not address the problem and may exacerbate it.

By including an option to *declare* a standard, we consider the intent of sections 105 and 135 of the ACL is to recognise the expertise of standards making bodies and to leverage the detailed and lengthy processes that these bodies undertake to develop a voluntary standard. A declaration offers the Minister the option to recognise the standards development processes undertaken by standard making associations.

The ACCC, currently undertakes an investigation to obtain detailed evidence on the safety problem and alternative solutions when recommending that the Minister declare a standard under these sections. The ACCC considers a range of matters when determining whether overseas standards are appropriate for use in mandatory standards under the ACL.<sup>7</sup>

Adding a subset of these criteria into sections 105 and 135 reduces flexibility. Instead of recognising the expertise of standard making bodies, it would make this more cumbersome than sections 104 and 134. These criteria, if listed as legislative principles in the ACL, would not increase efficiencies or enable mandatory standards to readily call upon existing standards that are developed by overseas standards making bodies.

In our view, the problem is best addressed by listing trusted overseas standards making bodies as set out in option 2 (alternative 1) which is the ACCC's preferred option.

## **Option 3 (alternative 1): allowing updated standards**

The ACCC supports the option to amend the mandatory standard regime to allow updated standards to apply as they exist from time to time.

We understand that the power to reference relevant documents made by reputable associations as updated from time to time is an established feature of other Commonwealth regimes for safety standards made under Australian laws for human therapeutic goods<sup>8</sup> pesticides and veterinary medicines, as well as agricultural chemicals applied to human foodstuffs.<sup>9</sup>

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<sup>7</sup> ACCC (2015) [International standards for the safety of consumer products: criteria for acceptance](#).

<sup>8</sup> *Therapeutic Goods Act 1989* (Cth) section 10(4)

<sup>9</sup> *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) sections 6(3)(a), 6E

We recognise that allowing updates of mandatory standards to the latest version of an overseas or Australian standard may raise concerns as to whether the update is appropriate. The ACCC considers legislative safeguards as is contemplated in the CRIS are a precaution that could be put in place to address this.

Currently, when a new standard is developed or an existing standard is manually reviewed to include new overseas standards, the Minister makes the decision to do so. As this would not be the case for these updates, the ACCC supports a mechanism where there is:

- a transition period to allow businesses to adjust to any updated requirements following an update before it comes into operation.
- a window of time following an automatic update to enable the ACCC to decide whether to conduct a review and disallow updates within a set period.

This mechanism would be possible in practice as the ACCC has forewarning of a new standard, as either member of a technical committee creating the standard, or as stakeholder as part of the consultation process. It would apply to the sub-set of products covered by a mandatory standard (there are currently 48 mandatory standards).

This approach would overcome the timely and complex regulatory processes required to update mandatory standards and allow businesses to comply with the latest version of Australian and overseas standards sooner than would otherwise be possible based on the operation of the current regulations under the ACL.

### **Option 3 (alternative 2): safe harbour provision**

The ACCC does not support the option of a safe harbour provision as a stand-alone option but recognises it could be included with Option 3 (alternative 1). The ACCC's view is that ambulatory referencing needs to be provided in the ACL. This provides important statutory relief to businesses that seek to comply with the latest updates, rather than a defence to non-compliance.

A safe harbour provision may provide greater certainty to businesses that they are not in breach of a mandatory standard when they comply with the latest version of an Australian or overseas standard referenced within a mandatory standard. However, the ACCC considers this option will not address the underlying inefficient regulatory architecture for updating mandatory standards and is likely to increase regulatory confusion for businesses. A safe harbour defence could widen the gap between Australian and overseas standards and best product safety practices globally.

This also may have the unintended consequence of creating a compliance divide where some businesses comply with updated standards and some with the superseded version. To promote regulatory consistency, regulatory obligations should be clear and apply equally. Overall, in our view, the regulatory framework should provide incentives to adopt the latest and strongest safety standards.

The ACCC also suggests considering a compliance permit to provide increased flexibility to respond to unforeseen circumstances and address technical non-compliance, particularly where there are not adverse safety implications for Australian consumers. These options could potentially be combined with Option 3 (alternative 1).

We would welcome further discussion as to how this would operate in practice, particularly if combined with Option 3 (alternative 1) as we suggest.



## 7. Other problems for consideration

The ACCC has identified two areas for further consideration in relation to mandatory standards.

### ***Nominating safety standards***

The ACCC considers there may be scope to include further complementary amendments to section 108 of the ACL, which allows regulators to require suppliers to nominate the safety standard they intend to comply with where alternative methods of compliance are available.

Under section 108, a regulator may require a business to nominate in writing which standard they intend to comply with. This provision presents challenges in practice as it is a point-in-time requirement and does not set out a timeframe for the period of compliance, or a clear mechanism for businesses to advise a regulator of an intention to change the safety requirements they intend to comply with. Amendments to section 108 to clarify these issues would provide greater certainty to assist businesses in meeting their obligations. Such changes would be consistent with the broader policy objectives of the CRIS.

### ***Access to voluntary standards***

Mandatory standards are often based on, or reference, voluntary standards. Currently, there is a fee to access these voluntary standards, which is a barrier to compliance. The fee can vary depending on the standard and business/licensing arrangement to access the relevant standard(s). The lack of free access to standards referenced in legislation leads to increased compliance costs for business (particularly small businesses and sole operators) and risks poorer product safety outcomes for consumers.

The ACCC supports further industry initiatives and policy measures to improve the accessibility of standards referenced in law, including existing mandatory standards under the ACL. This will reduce costs to businesses, reduce costs to consumers and provide greater clarity for businesses about their regulatory obligations. This will also support informed consumer choice about products regulated by mandatory standards.

## 8. Concluding comments

The ACCC welcomes the opportunity to further discuss the proposed amendments as The Treasury progresses its consideration of proposed reforms.