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The Treasury

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Supporting business through improvements to mandatory standards regulation under the Australian Consumer Law

The National Retail Association welcomes the opportunity to make a submission to Treasury on mandatory standards regulation under the Australian Consumer Law (ACL).

About the National Retail Association

The National Retail Association (NRA) is Australia's most representative retail industry organisation, servicing more than 42,000 retail and fast-food outlets nationwide. Our members cover all types of retail including fast food, cafes, restaurants, fashion, groceries, department stores, household goods, hardware, auto, and services. Our membership includes the majority of national retail chains and thousands of small businesses, independent retailers, franchisees and other service sector employers.

The NRA helps retail businesses succeed and grow within an ever-changing regulatory environment. Our role is to influence government policy towards more commercially aware outcomes and keep public debate focused on important issues that retail businesses face.

National Retail Association Technical Standards Committee

The NRA Technical Standards Committee is a group of quality assurance and product compliance specialists who come together from many of Australia's retail businesses to discuss the challenges of product safety and compliance.

The Committee is an important forum for the development of retail industry policy. It communicates regularly, on behalf of the industry, with government decision-makers and agencies, including Standards Australia, the ACCC, offices of Fair Trading and Consumer Affairs, the National Measurement Institute, and others, conveying the issues and concerns of the retail sector.

General Questions

Q1 > Do you agree or disagree with the identified problems? Please provide any evidence to support your position.

The NRA agrees with the identified problems. Product standards often struggle to keep pace with marketplace developments, but when regulations lag still further behind, the problems are multiplied. Adopting the most current version of national or overseas standards can improve the reduction of injuries, as these take new product developments and consumer behaviour insights into account.

NRA members have experienced difficulties and additional costs in relation to each of the examples provided in the CRIS. Especially if products are developed for other markets, and then introduced into Australia, local parties may need to conduct additional testing, even though the product is already tested to a relevant and equivalent international standard. That increases cost and complexity, but often does not make the product any safer.

A more efficient regulatory architecture for updating mandatory standards will reduce complexity to achieve safety and compliance.

Q2 > Are there any other problems that you think should be considered? If so, please set out what they are, what effect you think these problems could have and how the problems should be addressed.

The way in which compliance with the ACL's standards and bans are managed by the regulatory agencies could be revised to improve compliance. While the regulatory policy process includes consultation, not all issues associated with putting the technical specifications into practice can be identified prior to their implementation. And during the life of a regulation, new products and variants that fall within scope can go onto the market. This means that regulations may not remain fit-for-purpose (for either consumer safety or supplier compliance). Ways to facilitate ongoing compliance are needed in consumer product safety. The NRA would welcome improvements to how regulations are managed by ACL regulators once introduced.

The three objectives listed in the CRIS are also dependent on good regulatory practice post-implementation:

- 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.

Q3 > Do you have any specific information, analysis or data that will help measure the impact of the problems identified? For example:

- What costs have you incurred from complying with an Australian mandatory standard where you were unable to rely on demonstrating compliance with a comparable overseas standard?

Though actual figures will vary per business, the NRATSC notes that current policy settings present significant business costs for additional testing, delays to market and confusion across the whole supply chain.

- Has not being able to comply with the most recent voluntary Australian or overseas standards impacted your business in terms of cost, time and number of products you are able to bring to market? If so, please provide details.

NRA members have had issues with the bunk beds and toys for children up to and including 36 months of age and prams and strollers' mandatory standards. The new bunk bed standard has been out since 2010 but industry is still using the 1994 standard, as amended by the CPN in 2003. Overseas factories and test labs are confused as to why Australia has not yet adopted the new standard, or at least parts of the new standard. Manufacturers and importers often resort to testing to both the mandatory for compliance, and the most recent standard to ensure the product is safe. Problems arise where the test results conflict with each other.

Minor amendments are occasionally made to published Australian Standards which are referenced in an ACL mandatory standard. These are usually done to fix errors or anomalies identified in the implementation process, then published following Standards Australia technical committee decisions. It is unclear why such amendments have not been adopted into the mandatory standards. One specific example is the mandatory standard for children's nightwear flammability. Three amendments to the 2014 edition have been published (in 2014, 2017 and 2020) but only the first one has been referenced in the mandatory standard. This means the standard with two known errors remains in place. Suppliers adhering to the unamended version are unduly constrained in the garment range; suppliers selling nightwear garments that take account of the amendments risk the consequences of non-compliance.

- Have you decided against supplying particular consumer goods in Australia so that you could avoid duplicative compliance costs under the current mandatory standards framework? If so, please provide details around the factors that influenced this decision and the consumer goods affected.

When selecting products developed for other markets and tested to international standards, buyers often consider whether the additional cost of testing to a mandatory standard that sets out different requirements is of value. If the cost is greater than the benefit, they may choose not to select such a product.

Q4 > Do you agree that changes to the regulatory framework are required to address the problem? If not, why not?

Yes, some changes in the legislation to address the problems are required.

Q5 > Do you agree with the policy objectives as outlined? If not, why not?

The NRA supports the three stated objectives. Improved consumer safety has been omitted and should be added. As discussed elsewhere in the CRIS, the current situation in which out-of-date standards without later standards' improvements is detrimental to consumer safety, especially in the many children's products subject to regulation.

Q6 > Are there any other policy objectives you think the Commonwealth, state and territory governments should be considering in addressing the problem?

No.

Policy Options

To address the problem defined above, this consultation RIS explores one non-regulatory option and two regulatory options:

- **Option 1** – Status quo
 - **Option 2** – Amend the ACL to allow the Commonwealth Minister to more easily *declare* trusted overseas standards
 - **Option 3** – Amend the ACL to more easily allow businesses to comply with the latest versions of voluntary Australian and overseas standards
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OPTION 1: Status quo

Q7 > Does the status quo achieve the policy objectives?

Allowing the system to remain unchanged would not address the existing problems and would compound the difficulties experienced across the consumer market.

One example that highlights several of the problems is the mandatory standard for children's nightwear. The 2014 published Australian Standard was made mandatory in 2017. (New Zealand wanted to keep their regulation harmonised but in 2016 gave up waiting for Australia and so suppliers had to juggle two complex versions of the standard for a year). And as mentioned above, amendments made to the AS in 2017 and 2021, both correcting minor technical, but significant fixes have not been adopted under the mandatory standard

Q8 > Is the current regulatory framework for developing mandatory standards under the ACL sufficient to address the problem?

Minor amendments to published Australian Standards that are referenced in an ACL mandatory standard should be able to be adopted without detailed stakeholder consultation or impact analysis. The ACL provisions themselves don't appear to preclude such changes being expedited, so some amendments could be made to the ACL Intergovernmental Agreement, or to the Federal Government rules on regulatory policy.

The NRA questions the parts of the regulatory framework that impose unnecessary hurdles for allowing minor amendments to regulations. The administrative system that supports good regulation ought to facilitate easy updates of a minor nature. Such processes should be able to be easily changed and without the need for detailed review.

Unless this happens, it appears that some legislative changes are required.

Q9 > Does the current regulatory framework impose unnecessary costs or compliance burdens? If so, could you provide examples or evidence.

Yes, whilst we do not have precise data on the unnecessary cost, these include:

- Businesses may need to purchase the mandated versions and the most current version of the standard.
- Suppliers may have to test to the mandated and most recent version of a standard.
- A business' compliance management system will be more complex and costly.
- Extra costs are also incurred by requiring Australia-specific and out-of-date variations to products at design and production.
- Choice of products for import is restricted either by the Australia-specific product requirements or by the additional testing costs
- Compliance with both is often not possible and this reduces product choice

OPTION 2: Amend the ACL to allow the Commonwealth Minister to more easily *declare* trusted overseas standards

Q10 > 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.

a. Which alternative is preferable?

The NRA acknowledges that the minister's ability to declare a standard is much faster than having to make one. Clarity in understanding a set of trusted standards-making organisations is also desirable. Alternative 1 would provide some confidence and clarity around standards-making organisations, but could only be viable with the Opt-in mechanism. The NRA would support this measure, if the list of

standards-making associations is strictly vetted, to align with the principles of standards making in Australia.

Alternative 2 provides a similar model to Alternative 1 Opt-in, but with less clarity. (The arguments for Alternative 2 over Alternative 1 rest on the prospect of specific standards or clauses not being available from a list of trusted standards-makers. In such relatively rare cases, the ACL's standards making provisions s104 & 134, could be used, but the delays in this process are best avoided).

b. Are there other alternatives to make it easier to comply that haven't been considered?

Perhaps a combination of Alternatives 1 and 2 could be introduced: Require specific standards to be nominated (Opt-in), provide minimum principles-based criteria for choosing which standards-making organisations they come from, but also list the 14 potentially trusted organisations as prescribed within the ACL (demonstrating that these meet the criteria).

Q11 > Are the standards making associations on the proposed list acceptable?

- a. If not, please describe why.
- b. Should any other standards making associations be included?

The list of proposed organisations is acceptable.

The listed organisations go through a process that ensures sufficient rigour and availability of technical expertise, and community consultation.

It may be useful to consider ASTM CEN, IEC, and ISO in the development of 'declared' standards, and their processes are comparable to those of Standards Australia.

- c. Once a list of trusted overseas standards organisations is set, which approach ('opt-in' or 'opt-out') would achieve the best outcomes for consumers and businesses and why?

The Alternative 1 Opt-in mechanism appears to be the only viable of the two. It is vital for businesses to have specific nominated standards with which they need to comply.

If the Opt-out mechanism option means to simply allow standards from any of the standards-making organisations and not specified standards, this would not provide enough clarity in which to confidently proceed to market. Careful analysis of whether and how various standards' technical specifications are comparable is essential to achieve both compliance in practice and consumer protection.

With children's nightwear for example, the Standards Australia Technical Committee specifically assessed leading overseas standards and ruled them out when writing AS/NZS 1249:2014. If the CPSC and British standards for example were allowed by default, these are so different that it would be impossible for retailers and regulators to manage compliance and confusing for consumers.

Selective parts of standards (and bans) – The RIS does not discuss instances in which a mandatory standard nominates only certain parts of a published voluntary standard. Individual clauses of nominated standards are typically cited in the legislative instrument. This would need to be considered and assessed if the Opt-out approach is adopted.

Q12 > Do you have any comments on the high-level criteria for a principles-based approach to *declaring overseas standards*, or any additional criteria?

- a. Could these same criteria be adapted to determining 'trusted' standards making associations?

The same criteria should be applied to the list of standards-making organisations.

The suggested criteria listed under Alternative 2 do not include requirements for reliable standards development such as balanced cross-sectoral committee membership, public comment opportunities, consensus-based decision-making, and preferably government participation. Several of these criteria are cited in Appendix A of the CRIS. Such rigour, transparency and balance are important criteria for a 'principles-based approach' to declaring standards mandatory.

Standards and their publishing organisations that do not meet each and every criterion may be assessed as suitable from time to time. These could be adopted through the provision to make a mandatory standard (s. 104/134), but a combination of Alternatives 1 and 2 as described above would avoid having to go down this slower route.

Q13 > Are there related provisions in the ACL that should be updated at the same time, for example section 108 (refer to the Introduction and Appendix A)?

The ACCC, as the primary body responsible for managing product safety regulations, should be given the power to provide informal regulatory policy. As well as the mandatory standards and bans instruments themselves, the Product Safety Australia website should be used to clarify the requirements contained within them.

Product regulations need to be workable to both secure consumer safety and limit the burden of compliance. Suppliers have an opportunity to identify any potential problems in applying specifications before mandatory standards are made or declared. However, as mentioned above, it is usual that additional issues only emerge as the technical specifications are applied across all the various products that fall within a regulation's scope. These issues may be that the performance or design specifications don't work with individual products; or perhaps the wording in the standard has an unexpected or unclear meaning. Sometimes, the regulation's scope itself captures unintended products, or fails to capture intended ones (which may or may not have been in the market when the standard was declared).

The costs to consumers and suppliers outlined in the CRIS of out-of-date regulation also apply throughout the life of each mandatory standard and ban.

Marketplace uncertainty is highly problematic and causes significant unnecessary costs to businesses. The costs to consumers and suppliers of out-of-date regulations outlined in the CRIS. Noting that there is a time lag in standards-making bodies publishing amendments or revising voluntary standards, provision should be made in the ACL (if deemed necessary to so legislate) for the ACCC to publish statements of policy and interpretations in certain circumstances.

Q14 > If adopted, what would the likely impacts be on affected businesses (large and small), consumers, consumer law regulators, or accredited conformance and testing authorities?

Allowing overseas standards to be declared as part of mandatory standards would expedite both introduction and revision of mandatory standards, which will enhance consumer safety and streamline compliance for suppliers. Products made overseas to meet the standards of other nations and regions could more easily be sold in Australia, with the advantage of less importer and retailer complexity, shorter timeframes, more choice and lower prices.

The NRA holds some concerns around the overall impact of decreased reliance on Australian Standards. While not many products have unique uses or conditions for Australian consumers, it is important for the ongoing safety framework that Australian stakeholders retain a level of input and influence in standards-making.

Already, online sales via retail platforms and direct overseas B2C is placing pressure on NRA members' ability to maintain product safety knowledge and expertise.

Q15 > Have any impacted stakeholders been missed? What would the likely impacts be on these stakeholders?

We are not aware of any stakeholders that may have been missed.

OPTION 3: Amend the ACL to more easily allow businesses to comply with the latest versions of voluntary Australian and overseas standards

Q16 > 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.

- a. In your opinion, which alternative is preferable?
- b. Are there other alternatives to make it easier to comply with the latest standards that haven't been considered?

It is disappointing that Australian retailers and others in the supply chain have been and remain at risk of criminal action for complying with out-of-date and less safe mandated standards. The NRA strongly believes this situation is no longer tenable and must be fixed. Either of the two alternatives would effectively remedy the main problem.

Whilst Alternative 1 gives more detail and may with that give more confidence, it seems to add unnecessary complexity. A safe harbour provision would achieve much the same outcome but with more flexibility. Alternative 2 looks clearer.

The current process gives businesses the opportunity to be aware of what is to come. Whereas automatic up-dates may take some parties by surprise.

Q17 > 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?

18 months will generally be a suitable amount of time for transitions – allowing for design/production adjustments and supply periods.

The ACCC needs to communicate with affected stakeholders using as many mediums as possible. Current notification practices are inconsistently used and awareness even by the most diligent NRA members can be ad hoc. Methods should include the following: via email to mailing lists; email to anyone participating in consultations; social media such as Facebook, LinkedIn, Twitter (repeated after say 4 weeks); direct correspondence with all relevant industry associations.

Q18 > 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, the NRA supports this proposal in principle and in practice.

Q19 > Would permitting standards to apply as they exist from time-to-time as described pose any additional safety risks to consumers?

Adverse effects on consumers would likely be rare.

Q20 > 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?

The safeguards appear suitable on face value. The NRA would appreciate an opportunity to participate in further deliberations on these aspects.

Other alternatives for more efficiently capturing updates to standards

Q21 > How can the current process for reviewing and updating mandatory standards to capture updates to referenced voluntary Australian and overseas standards be improved?

The ACCC should provide a status report for all mandatory standards and bans on the PSA website, indicating whether they are current or under review and the review's timeframe. The NRA and many of our individual members respond diligently and conscientiously to consultations on new and revised mandatory standards. In many instances, reviews commence with a consultation RIS and no further action is apparent for months or more often years (for example, toys small parts 2017 RIS; care labelling 2019 RIS, to name a few).

Q22 > 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?

Any proposed ideas to streamline the process of updating mandatory standard will still need to be supported with changes to the ACL.

Q23 > 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?

See Q 22 – there appear to be no other options.

Possible Combination of Options 2 and 3

Q24 > Do you agree that Options 2 and 3 should be combined and implemented?

- a. If so, which elements should be combined? And if not, why not?

The NRA strongly supports the dual objectives of allowing prompt acceptance of the latest versions of standard and allowing options to comply with comparable overseas standards. We urge the government to implement measures that will address the current regulatory failure.

Q25 > 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?

Evidence of compliance - With both Options 2 and 3, the objective to reduce compliance costs for business and barriers to trade by removing *duplicative* testing may need some further consideration. At present, if an importer holds a test pass to an identical *clause* in a standard other than that referenced in a mandatory standard, the test pass may not be accepted by the regulatory agency or domestic trade customers. Test companies may not be willing to state that the pass to one standard equates directly to the clause in the

mandated standard. In this case, the importer is obliged to arrange, await and pay for a test to the same clause in the referenced standard.

In this common situation, the proposed options alone would not remove the need for duplicative testing. Provision in the ACL could be made to allow a test report to be acceptable evidence where equivalence can be demonstrated.

Product bans - Notably product bans that are declared by ministers under separate ACL provisions are not subject to the same public consultation processes. This CRIS does not cover product bans, however, bans can be introduced as de facto standards - while some bans simply prohibit a defined product outright, other bans are conditional.

One example is candles with lead wicks, by which candles are only banned if they have a wick comprised of a certain amount of lead. Bans that are de facto mandatory standards include the one for Pools and Spas with unsafe design features. This ban exempts those products that comply with one of two Australian Standards, and three American standards. The mandatory standard for mini motorcycles was originally declared as a ban.

As well as not being subject to consultation processes, bans may also not be reviewed as necessary. The pool and spa product ban was made in 2011 and is likely to be in need of review.

This review should consider the ACL banning provisions in this context.

Preliminary Impact Analysis

Q26 > For each of the options do you agree with the preliminary assessment and with the benefits and costs outlined?

Yes

Q27 > Are there other costs and benefits that have not been considered that should be?

The potential costs for Option 2 list extra administrative burden on regulators to review the increased number of standards. A proportion of this burden would also be borne by suppliers including NRA members as part of consultations and ongoing compliance management.

Q28 > Do you have any specific information, analysis or data in support of the benefits or costs for each option? Examples of costs could include testing costs, labelling costs and other compliance related administrative costs. Examples of benefits could include the number and value of additional products that could be supplied to the Australian market under Options 2 and 3, and any time and cost savings.

Due to the variety of members, we do not have access to specific data.

Conclusion

In conclusion the NRATSC supports an option 4 - the implementation of option 2 *and* option 3.

These are both essential to achieving the policy objectives of the CRIS and enhance safety outcomes for consumers.

To accommodate the realities of supply chain operations and lead times, certainty and clarity of requirements is essential, with clear transitional and safe harbour provisions a must.

We thank you for the opportunity to provide feedback and applaud Treasury for its approach to public consultation. I may be contacted on _____ or by email _____ if you wish to discuss further.

Yours faithfully,

David Stout

Director Policy