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

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The Treasury CRIS represents potentially significant policy change. I think the paper is well written and covers most of the considerations in some detail. Thank you for the opportunity to provide comments.

The options listed will at least partially address what the paper acknowledges are 'regulatory failures'. The most significant failure is of course the slow pace of reviews which leaves many mandatory standards imposing compliance with out of date and less safe standards. The paper acknowledges the cost to business in terms of extra testing, delays to market and confusion. I think there's a few aspects the paper hasn't covered and I have made comments under relevant headings.

One overarching point is the risk of Australia losing expertise in standards-making and product safety - across several sectors including industry, government, consumers, consultants and testers. Also, reduced business for domestic test companies could result in their loss of expertise and resources, eg. test equipment. This may impact the quality of local guidance and may also compromise local businesses' and regulators' ability to provide timely evidence that may be needed to assess compliance and/or safety of a product.

General Questions

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

I agree that the problems outlined in the CRIS are as stated and are a significant impediment to business efficiency, and in some cases, consumer safety.

A more efficient regulatory system for updating mandatory standards will reduce complexity and facilitate safety and compliance.



Folding cots may be the most egregious example of regulations not referencing improved version of a voluntary standard. The mandatory standard references the 1999 edition of AS/NZS 2195. A revised version of that standard was published in 2010 (12 years ago), in which a change was made to address breathability for children that roll to sleep with their face against the fabric cot side. The mandatory standard still stipulates that this safety measure is not required.

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.

A number of general issues are tied up in consumer safety regulatory policy. I have outlined several of these in my answers to the questions, but would like to make the following points on the overall system.

Governments often underestimate the level of impact that mandatory standards have on individual businesses (and market sectors more broadly). While the number of regulated product categories under the ACL is relatively small, compliance can involve substantial costs for any business that supplies products subject to a mandatory standard (or conditional ban). When a regulation is complex, outdated and/or lacks clarity the cost increases, often with little or no relationship to the regulation's objectives.

Current regulations (sometimes unhelpfully termed 'legacy' regulations) can be deprioritised to accommodate new and emerging issues. This appears to be the case with the current backlog of reviews. The process for justifying revisions of mandatory standards has also become more onerous in the past decade. Presumably these rules are designed to help limit economic burden, but in the case of product safety regulations, they seem to have had the opposite effect.

Compliance requires a considerable level of technical understanding across many elements. These include the product's design, materials, labelling, marketing, intended and potential users and environments; its production and handling logistics; quality assurance; pricing, and more. Achieving and maintaining compliance with detailed technical specifications across all aspects does require a degree of expertise. Testing and inspection companies (on a fee for service basis) can provide some but not all the necessary expertise.

Compliance must be and remain workable for the manufacturers, importers and retailers that design, make and supply goods to the Australian public. In addition to the legislative provisions, 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 development 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. I have outlined a number of ways to do so in this submission.



Meeting the three objectives listed in the CRIS are also dependent on good regulatory practice post-declaration.

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?**

I don't hold any such data, but can outline one example. Certain styles of playpens are captured in the mandatory standard for folding cots. In late 2020 one ACL regulator made an interpretation of the mandatory standard that one importer's playpen was covered and non-compliant. This ran contrary to prevailing industry and testers' interpretation of the scope. There was no demonstrable hazard associated with the technical non-compliance and the importer held test certificates to at least one comparable playpen standard. Although the ACCC was able to resolve this issue with a practical solution, the importer lost a substantial amount of Christmas and summer sales.

- **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.**

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 a Standards Australia technical committee decision. There should be no impediments to such amendments being easily 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.

- **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.**

Suppliers adhering to the unamended version of the mandatory children's nightwear standard (described in the previous question response, for example) are unduly constrained in their garment range; suppliers selling nightwear garments that take account of the amendments risk the consequences of non-compliance.

Importantly, it is not just cost duplication involved with varying standards. It is often simply not feasible to meet both versions of an updated or overseas standard - either it is not



technically achievable due to clashing specifications, or two sets of labels with conflicting wording would be required.

The situation with the playpen cited above is an example of this, where strict compliance insisted on by the regulatory agency entailed attaching two labels with conflicting consumer safety instructions.

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. Changes are also needed in how the regulations are administered.

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

I support the three stated objectives, but note that improved consumer safety has been omitted and should be added.

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

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 not made mandatory until 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, with many describing it as a 'nightmare'). And as mentioned above, amendments



made to the AS in 2017 and 2021, both correcting minor technical but significant error 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 (via OBPR) to allow simple minor fixes to be made responsively.

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

Yes. Examples are given in responses to other questions.

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?

I acknowledge 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 list of standards-making associations needs to be 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?

The list of proposed organisations is acceptable.

The listed organisations use processes that ensure sufficient rigour and availability of technical expertise, and community consultation.

b. Should any other standards making associations be included?

ASTM, and ANSI should be considered. Many products globally are made and tested to these two American standards-making organisations.

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 for suppliers to confidently proceed to market. Careful analysis of whether and how various standards' technical specifications are comparable is essential to achieve compliance in practice as well as effective 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 trying to understand contradictory label wording).

Another example is that of child restraints for motor vehicles where differences in the Australian standard flow through to vehicle design rules and overseas restraints may be unsafe to instal in Australian cars.

Selective parts of standards (and bans) – The CRIS 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 has been common regulatory practice for ACL mandatory standards (and some conditional bans) and would need to be considered and assessed if the Opt-out approach is adopted. (The wording of the conditional ban for pools and spas is interesting in this regard).

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



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.

Care needs to be taken when determining whether a standard is ‘inappropriate to the Australian context’. Requiring evidence may be an unsuitable criterion and could unduly impact the options to remedy a safety problem. Perhaps ‘reason to believe’ or similar wording would be better.

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.

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)?

As well as the mandatory standards and bans instruments themselves, the Product Safety Australia website should be used where necessary to clarify the requirements contained within them.

The ACCC, as the primary body responsible for managing product safety regulations, should (if legally necessary) be given the power to provide informal regulatory policy. (If not legally necessary, then the ACCC’s role in this regard needs to be clarified and adopted). For example, safe harbour.

Product regulations need to be workable to both secure consumer safety and limit the burden of compliance. Suppliers do 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, after a regulation has been in place for a while, it is realised that the scope itself captures unintended products, or fails to capture intended ones (which may or may not have been on the market when the regulation was made).

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



Marketplace uncertainty is highly problematic and causes significant unnecessary costs to businesses. 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. The need for such interpretations and policies would apply not to individual products or suppliers, but instances of issues that impact across the market. In other words, the same issue is affecting and adding to the burden of many businesses across the sector and its supply chains. Major contribution to the effectiveness of standard setting. In line with the *Regulator Performance Guide* published by PM&C in 2021 and the need to respond flexibly as listed on page 7 of this CRIS .

Some level of consultation with key stakeholders should be incorporated into such actions. Subsequent editions of voluntary standards could then consider and clarify the ACCC's interpretation.

One example of the need for interim policy is with convertible tricycles for young children. As with many children's products, the market for these products grew significantly in the past decade. Some products with adult handles crossed into the scope of the mandatory stroller standard, while others could be regarded just as tricycles. Lack of clarity in the form of an ACCC policy statement caused substantial headaches and costs for several companies from 2017 to 2020. The Australian Standard committee for strollers will provide clarity in its expected 2022 edition of AS 2088 – too long a wait for this growing market.

I see that the ACCC appears to have now included such guidance on the PSA website, but this was not done until after concerns grew at the end of 2020. Nevertheless, this addition to the PSA website is very welcome.

Another example is where policy could be placed on the PSA website noting that compliance with the 2010 version of the folding cot standard, especially the breathability measure as mentioned above, would be considered acceptable for meeting obligations under the ACL – a kind of safe harbour policy.

Changing the ACL's making and declaring provisions to allow the latest published version of a standard mandatory (with a transition time), would not alone make the system sufficiently flexible to maximise safety or eliminate unjustified compliance burdens. Providing for the regulator to make clear compliance policy statements, especially where standards are in the process of revision, should be available to the ACCC.

Safe harbour could also be given when the lead time (eg. 18 months) is insufficient for suppliers to sell through existing stock and the earlier version of the standard is not significantly less safe.

Section 108 also needs additional specifications to address the practical shortcomings listed in Appendix A of the CRIS.

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.

I do however have 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.

Treasury's review of other aspects of ACL product safety should address this issue, along with the general safety provision considerations.

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

I am not aware of any.

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?

That suppliers have been and remain at risk of criminal action for complying with out-of-date and less safe mandated standards is a serious situation.

Of the two, Alternative 2 is preferable. Alternative 1 gives more detail so may give more confidence, but in doing so seems to add complexity and more onerous timeframes. It may impose requirements before suppliers are aware of and ready to achieve compliance with the different version of the standard. (Current review processes at least give businesses and associations in Australia a chance to hear of pending potential changes in advance of the actual declaration).

Safe harbour would achieve the same outcome, but with more flexibility.

Safe harbour will need to be defined, and explained on the PSA website.

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



I don't know of any others.

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. (There may also need to be reference to 'later' standards in some instances where there's been more than one revision published since the one that's referenced by the mandatory standard).

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 suppliers can be ad hoc. Methods should include: 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. This is especially so if updates aren't preceded by a review consultation.

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, I support 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 need to be considered in triggering a review of an update? Are alternate or additional safeguards needed?

The safeguards appear suitable on face value. The CRIS states that automatic updates will be permitted without further regulatory impact analysis provided an update to the standard is judged not to be unsafe or unsuitable. While this is desirable and I support the principle, I believe there will need to be a clear statement on the PSA website about how such judgement will be made, and whether and how stakeholders can be involved in the decision. There may be a need to consult further on these aspects, using specific examples.

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?



Many stakeholders respond diligently and conscientiously to consultations on new and revised mandatory standards, with some disruption to everyday workloads. 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, prams and strollers 2017 RIS, bicycles 2016 RIS and folding cots 2008 RIS). This kind of impost needs to be minimised.

It would be very helpful (both before and possibly after the proposed ACL changes) if the ACCC were to 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. Some reviews result in no change and this too should be noted in the report.

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?

Amendments to the ACL are required. Several other measures to enhance the regulated community's understanding of regulations should complement the ACL changes. Some could be implemented straight away. One suggestion is for detailed comparisons between standards being considered by the ACCC for and adopted as mandatory be made publicly available on the PSA website for reference once the mandatory standard is declared. This would be a very useful reference tool to aid compliance.

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?

I am not aware of other options.

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

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

I strongly support the dual objectives of allowing prompt acceptance of the latest versions of standard, and allowing options to comply with comparable overseas standards.

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?

Nominating which of the optional standards a product complies with – The current ability of a regulator to ask a supplier to nominate which standard their product meets (s. 108) may be helpful in some circumstances. However, I believe that it is necessary that suppliers be legally accountable to comply with that nominated standard. This will increasingly be so if multiple standard options are available to meet declared mandatory ACL standards.

Unless a supplier can be held to compliance with the nominated standard option, the regulators' ability to demonstrate non-compliance with the mandatory standard can be significantly compromised. For example, there could be a scenario in which the regulation



allows compliance with any of an Australian, a British and a European standard. The supplier claims to meet the BS and provides a test report from an unaccredited laboratory to that effect. The product is assessed as very hazardous and a test against the AS shows a clear failure. The regulator could commission a further test to the BS which demonstrates a fail. The regulator cannot prove non-compliance with the mandatory standard unless it has evidence that the product also fails the BS and EN standards. This could hamper enforcement action for breaching the mandatory standard, but also prevent effective remedial action such as obtaining a compulsory recall order or injunction in cases where the supplier is uncooperative (I am aware of at least one such instance).

As well as holding suppliers to their nominated standard for enforcement purposes, doing so would also help importers and retailers manage compliance with the correct standard.

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 consideration of further legal provisions. 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.

With 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. Notably this ban does not nominate the year of the standards' publication, not the referenced clauses.

This Treasury 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, testers, consumer groups and consultants 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.

No, I don't hold such information.

