

9 December 2021

The Director  
Consumer Safety and Sustainability Unit  
Market Conduct Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

**Response to: *Supporting business through improvements to mandatory standards regulation under the Australian Consumer Law - Consultation Regulation Impact Statement***

## **1. General comments**

Overall, I support Option 2 *Amend the ACL to allow the Commonwealth Minister to more easily declare trusted overseas standards*, coupled with the opt-in approach described in the discussion paper. This option strikes a reasonable balance between efficiency of regulation and business certainty.

In my experience, spanning some 40 years in standards and compliance, reputable businesses are on the whole supportive of product safety regulation. All they ask is that there is certainty about the rules, and a level playing field for everyone in the market, whereby all suppliers have to meet the same "standard", i.e. the regulatory burden is equal for all.

Reputable businesses are motivated to comply with mandatory standards and supply safe products; because, apart from anything else, they have reputational damage to consider. By contrast, less reputable suppliers will seek to obtain a short-term price advantage by cutting corners, and seeking to do as little as they can in terms of compliance, regardless of the consequences for the public. If there is no legal impediment to prevent this from happening, the level playing field disappears and the price differential will eventually force the more reputable suppliers to join a "race to the bottom" with their *fly-by-night* competitors.

I'm afraid that Option 3 opens the door to such a scenario by allowing a supplier to adopt a tick and flick mentality, based on an attitude of *any old standard will do*. That message is not consistent with the intent of the ACL, which seeks to improve supplier culture towards safety and compliance through best practice consumer safety regulation.

Option 3 is therefore unacceptable, in my opinion.

I can also see that Option 1 is no longer sustainable in the longer term, without a substantial injection of resources into the ACCC, which seems unlikely. The standards development environment within Australia has changed over time, and there is no longer the same certainty about things that could once have been left to the national standards body to autonomously manage, such as the timely revision of those Australian Standards that form the basis of mandatory standards. These days, Standards Australia maintains

accountability for executing its committee-based process, but exerts little control over which standards are developed and revised through that process. That hands-off approach is, of course, Standards Australia's prerogative to choose, it being an independent organisation that operates outside of government control.

In my comments below, I've tried to expand on these themes and identify some of the pitfalls associated with Option 3, and also some things to be avoided when implementing Option 2.

## 2. Declaring overseas standards

A voluntary standard may address one or more aspects of a product, not just the sort of safety aspects normally addressed under the ACL. Other issues covered in a particular standard might include product performance, useability, electromagnetic compatibility, or environmental aspects, to name a few. The point is that a standard that's applicable to *widgits*, doesn't necessarily address the safety of *widgits*.

In many cases, consumer products are sold in Australia that claim certification to an overseas standard, but on closer examination, that quoted standard only covers something like the risk of electrocution when charging the product's battery, but not physical safety when using the product. I'm referring specifically to products not currently covered by mandatory standards, where this reference to a foreign standard is simply a piece of marketing information meant to reassure the standards-conscious consumer, even if that reassurance can be somewhat misleading.

The current mandatory standards under the ACL were all developed to address well-documented safety issues occurring in Australia, identified in injury and mortality data. In another country, that same issue may be less prevalent for economic, climatic, cultural or lifestyle reasons.

For example, few other countries have the same number of backyard pools that Australia does, so children's flotation aids in a place like the UK are generally only required when going on the annual family holiday, or visiting a public pool, where a child may spend a relatively short time in proximity to deep water. The drowning statistics amply demonstrate that 365 days of annual exposure to the family pool means the chance that a parent is not supervising is much greater in Australia, and the flotation aid must support the child more effectively and for a longer period. That dictates the need for a more comprehensive set of requirements in the Australian Standard.

Simply identifying that a standard comes from a reputable standards body is not enough, the scope of the specific standard, and how it addresses the safety issue of concern in Australia, need to be examined before it becomes a *declared standard* in Australia.

The paper raises a potential issue with *picking winners*, and distorting the market, if we are more selective about which standards Australia declares. However, all regulated standards will distort the market to some extent; and regulating the supply of products to protect the safety of a nation's citizens is recognised in the WTO TBT Agreement as a legitimate and necessary distortion of the market. Thus the listing of certain overseas standards, and not others, is easy to justify.

In addition, the recognition of overseas standards needs to be done in such a way that will not hamper enforcement and prosecution. A good example of the right way to do this is contained within the *National Standard for The Australian Builders Plate for Recreational Boats*. A specific list of acceptable and equivalent overseas standards, as is the case with this example, is essential.

Whenever multiple standards are deemed to be acceptable, there must also be a requirement that the Australian supplier nominates which of those standards their product

in claimed to meet. The default, where no standard is nominated, must also be identified in the regulatory instrument. Normally this would be the relevant Australian Standard.

The reason is that every national standard addresses safety issues in its own way, and for the most part, that involves destructive testing. This means that in order for effective enforcement, a product suspected of being unsafe must be assessed against one specific standard.

Let me explain what I mean. Imagine if a car jack is tested and fails the repetitive operation test in the Australian Standard, so that it stops working after 200 repetitions. You have no option to subsequently test that particular jack against, say, the German standard; because the tests in the German standard are only valid if performed on an undamaged specimen.

Testing other specimens of the suspect jack against other listed overseas standards for jacks, in the hope that it might meet one of them, is simply not feasible from an enforcement perspective, because of the way the ACL is written. The breach occurs when a consumer purchases a non-compliant product. Whether or not the next, seemingly identical, product on the shelf is compliant is irrelevant to the legal action. So, if Specimen A fails when tested against the Australian Standard, and Specimen B fails when tested against the German Standard, the supplier has a legal defence that Specimen A might have complied with the German Standard; but we'll never know, because Specimen A was not tested against the German Standard.

### **3. The List of Overseas Standards Bodies**

In terms of the standards development organisations listed under Option 2, with the exception of the CPSC, they are all private bodies that rely on certification services, and other money-making activities, to pay for their running costs. Standards Australia is perhaps unique amongst the world's standards development bodies in that it is self-funded from its investments; and since 2003, it no longer has a commercial arm. Standards Australia is thus able to adopt more of a purist approach to standards development, free of commercial influence. The same cannot be said for all of the bodies on the list.

In some other countries, notably in North America, not all standards issued by one of the listed standards development organisations will have the status of being a national standard.

As an example, CSA will develop a standard that covers a certain product on a fee-for-service basis for the manufacturer or for an industry group, without going through the full transparency process, and without using a properly balanced committee. Something similar could also be done to assist CSA's certification branch if it has had an application from a potential client who manufactures the subject product. This typically occurs with a product that's new to the market, say a hover-board.

This type of standardisation process is outside of the scope of CSA's accreditation by the Standards Council of Canada (SCC), so the resulting standard would not be recognised as a Canadian National Standard (CAN/CSA), it would simply be a CSA standard; and it would not be acceptable for reference under Canadian statute law.

One also needs to understand that, in North America, market entry for a product is governed in part by statute law, but perhaps even more so by the potential for civil litigation and the supplier's ability to obtain product liability insurance. Unless a standard is in place, it may be very hard to get product liability insurance for a novel product. As a result, a product safety standard may not necessarily be developed with the objective of mitigating the risk to the consumer posed by the product down to an minimal level. A standard could also be developed using input from industry-alone to provide a publicly-available set of

parameters that define a type of high-risk product, so that potential insurers can estimate the expected payout from civil claims for deaths and injuries caused by the product, and set a premium for public liability insurance.

There are many more reasons for developing standards that lack the same sort of broad community consensus, compared to what we are used to with Standards Australia. There is nothing wrong with this, it's just an aspect of a different type of standards and conformance system to the one used in Australia.

These realities mean that we cannot assume that all overseas product safety standards from reputable bodies mitigate risk down to a level that's acceptable to the Australian public, they may serve a quite different purpose and set the bar much lower, for reasons that make sense in the country of origin. If Australia was to take on an *opt-out* approach, as described in the paper, devolving responsibility to an overseas standards-making body for providing designated safety standards to be used in Australia, and to take those standards at face value, without further examination, we would be taking a rather large leap into the dark, based on the false assumption that these bodies always operate in an identical manner to Standards Australia. They do not.

There would not, however, be the same concerns if we took an *opt-in* approach, with a proper review process of each designated standard on a case-by-case basis.

There is another reason for reviewing the current list of recognised standards bodies. Continuing with the Canadian example, there are multiple nationally-accredited Canadian standards development organisations, and something like 200 such bodies in the USA. In the case of potting mix, the relevant Canadian National Standard was developed by BNQ, not CSA. So the list of bodies in the discussion paper would effectively exclude Canadian-sourced potting mix, even though the CAN/BNQ standard is very well-respected.

One approach would be to put SCC on the list, in place of CSA. Unfortunately, it's not as simple as that. For a start, SCC is a government agency, not a standards development organisation, and its role is simply to accredit standards development organisations, so it would sit oddly with the standards development associations on the list. SCC is more comparable to JAS-ANZ.

Even in Canada, their national and provincial governments would not automatically mandate a Canadian National Standard (CAN) under statute law. They have their own processes in addition to requiring it to be a CAN standard.

As well, every country that has gone down this accreditation pathway has its own unique accreditation system. For example, the American National Standards Institute (ANSI) is a private, industry-funded body, not a US government agency. You couldn't put the same reliance on ANSI, as you could on SCC. ANSI accreditation doesn't appear to be a determining factor when standards are selected for listing on the US Federal Register.

The selection of which bodies should be on the list, really comes down to whether the list of standards bodies is to be used with an opt-in, or an opt-out model. Whichever model is chosen, the Australian Government needs to be clear about the criteria it relied on for inclusion of a standards development organisation on the list. There is no Commonwealth MoU with these bodies; and they each operate within their own standards and conformance environment, which may be very different to that in Australia.

The best that could be said is that the present list represents bodies that, in the past, have developed safety standards that have been found to meet the objectives of s105 of the ACL; but you couldn't say that about every standard they publish.

## 4. Keeping mandatory and declared standards up to date

Referencing the latest editions of standards is a complicated issue, and one that the Australian Building Codes Board has been wrestling with for many years. The ability to update the primary referenced standard to quickly and seamlessly encompass the latest edition is supported; however, there's more to it than that.

Most product standards reference secondary standards, for example, the bicycle helmets standard (AS/NZS 2063) references multiple test method standards; and any one of those test method standards might potentially be applied to several different types of helmets: bicycle helmets, motor cycle helmets, cricket helmets, etc, via their respective product standards. New editions of each test method standard are published by Standards Australia at various intervals, as the revision task for each is completed. Meanwhile, new editions of the product standards (for sports helmets, bicycle helmets and motor cycle helmets) that reference the test methods are published according to a separate schedule.

At present, this is manageable, because the versions of the secondary reference standards that were current at the time the mandatory standard was made are effectively frozen in time and encompassed into the mandatory standard. Also, Australia is somewhat unique in that few of our mandatory standards depend heavily on secondary references for key requirements. The reverse is more typically the case with overseas standards, especially ISO standards, where it's the secondary standards that provide most of the important details, including test methods and pass-fail criteria.

If one were to adopt an "as amended from time to time" approach, it would mean that the latest version of the test method standard would replace the earlier one for the purpose of the declared standard. In principle, this is a good idea, but as was evident in the BMW helmet case, there are many nuances to this simple solution. Does this mean the latest version of the secondary reference standard on the day the product was manufactured in China, or the latest version on the day the product was supplied in Australia? What sort of period of grace should be applied to allow manufacturers to upgrade to the new edition of the standard after it is published?

The approach taken by the Australian Building Codes Board is to issue a schedule of standards twice a year, that lists which edition of both the primary and secondary standards is deemed to be the currently regulated standard. They have also adopted a common policy on the period of grace for compliance.

My suggestion is that the ACL could issue a similar list annually, and allow a 24 month period of grace, commencing when the new edition is first listed in the schedule. So, if AS 1234-2015 is the old edition, and a new edition is published in September 2021, the list of acceptable standards issued in June 2022 would include both the 2015 and 2021 editions. The same would apply to the list issued in June 2023; however, the list issued in June 2024 would no longer include the 2015 edition of the standard, just the 2021 edition.

If you add the complexity due to "as amended from time to time" to the complexity of having multiple overseas designated standards, each of which has its own secondary referenced standards that are periodically revised in the country of its origin, that's quite a lot for industry to get its collective heads around. It is therefore recommended that the updating issue be tackled by a separate amendment to the legislation, vis-a-vis *the declaration of standards* change; and the two issues are tackled some time apart to allow one change to bed-in before tackling the other one. Again, this goes to my point about the need for clarity of requirements to provide regulatory certainty. Any ambiguity only benefits those seeking to avoid their responsibilities.

## **5. Other issues**

The issue of overlapping mandatory product supply and usage standards is raised, in passing, in the paper. While this may appear to the casual observer to be a duplication of regulation, it is not.

If a consumer buys a regulated product through a reputable source, they have a reasonable expectation that they can legally use that product. For instance, if a consumer buys a dishwasher from a local appliance store, they have a reasonable expectation that they can legally connect the appliance to their home's electricity and water supply.

The opposite situation is amply illustrated in the case of lifejackets, where the mandatory point of sale standard has been withdrawn. As a result, consumers can currently buy an imported kayaking lifejacket from an outdoor recreation store in Australia bearing a US standards compliance label, but they cannot legally use the lifejacket when kayaking on a waterway in Australia. Hence, people have paid good money for something they cannot use. This, I would submit, is a failure of consumer protection regulation, a regulatory trap for unwitting consumers to fall into.

I hope that my comments are helpful to the review.

**John Henry**  
**Manager**  
**Waterview Bay Consulting**