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22 October 2024

Treasury, Consumer Policy Unit, Competition and Consumer Branch
e:

Re: Improving mandatory standards under the Australian Consumer Law – Decision Regulation Impact Statement:

https://treasury.gov.au/publication/p2024-582678

I am pleased to make this further submission, although I find the window (25 October 2024 deadline two weeks after the consultation was announced) to be very tight. As with my Submission re the Consultation RIS in 2021, I broadly favour the proposal to make it easier for the Minister (advised by regulators) to adopt safety standards for specific consumer products from overseas bodies. However, I do have some concerns that this good intention leaves much discretion to the Minister and regulators, with little of the accountability that we expect for good governance in our democratic system. In Part A below I outline what I think are some key points and conclusions from the Decision RIS (with emphasis added). In Part B I raise accordingly some concerns.

A. Background

As the "Decision RIS" notes under Policy Context from p12, currently under the ACL the:

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"Minister can make or declare a mandatory safety standard or a mandatory information standard. Mandatory standards set out requirements which must be complied with to supply products in Australia, including requirements relating to performance, composition, methods of manufacture or processing, design, construction, finish, packaging or labelling. Key provisions include powers to:

- ***Make*** a safety standard to prevent or reduce the risk of injury (s 104) or an information standard (s 134); and
- ***Declare*** all or part of a standard developed or approved by Standards Australia, or an association prescribed by regulation, as a safety standard (s 105) or an information standard (s 135).

Where a mandatory safety or information standard allows two or more alternatives for compliance, the regulator may request that a supplier nominate which alternative they intend to comply with (s 108).

The process for *making* a safety or information standard is resource intensive and typically takes at least 18-36 months. A regulation impact statement may be required and public consultation is undertaken on a proposal to make a mandatory standard which is followed by ministerial decision, and the creation and registration of a legislative instrument if approved.

The Commonwealth Minister may also *declare* all or part of a voluntary standard as a mandatory safety or information standard. While the ACCC still undertakes stakeholder consultation and any required regulatory impact analysis before recommending declaration, the process is more direct than making a standard. Importantly, declaring an existing standard can be done more quickly than making a standard, as the rigorous processes and expertise which forms part of the

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voluntary standards development process can be recognised and does not need to be replicated.

The threshold test for declaring (s 105) a mandatory safety standard is also different, with the Commonwealth Minister not required to specifically consider matters that are 'reasonably necessary to prevent or reduce risk of injury to any person' when declaring a safety standard, which potentially allows a more responsive approach to broader safety issues. However, the utility of section 105 is greatly limited because there are no overseas standards-making organisations prescribed in the regulations. This restricts the utility of sections 105 and 135, and means only standards developed or approved by Standards Australia may currently be declared by the Commonwealth Minister."

Per p15 of the Decision RIS the Governments has considered

- (a) "prescribing a list of standards making associations in the regulations, to complete the existing intention of section 105 and permit the Commonwealth Minister to declare a standard developed or published by overseas associations in addition to Standards Australia, this included:
    - an 'opt-in' approach where specific standards from overseas standards associations are recognised under the ACL following a review process, or
    - an 'opt-out' approach that automatically incorporates relevant standards from equivalent international and overseas standards associations, without a review by the regulator, unless it is demonstrated to be unsafe for Australia.

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- (b) using a principles-based approach for declaring overseas standards."

Per p25 of the Decision RIS:

"In 2016, the ACCC consulted on a proposed list of nine overseas standards making associations to be prescribed in the ACL regulations.[1] In the Consultation RIS, a further five standards making associations were identified as potentially suitable, for a total of 14 potentially suitable associations. During the ACCC's 2016 consultation, stakeholders expressed concern that establishing a list would allow overseas standards to be introduced without appropriate consideration of safety and the Australian context. Concern was also expressed that prescribing a list of standards making associations could be viewed as 'picking winners' which could have potential trade implications.

As a result, Option 2(a) will not be pursued for the purposes of this Decision RIS.

The preferred policy approach is to amend sections 105 and 135 of the ACL to allow the Commonwealth Minister to declare suitable standards from any Australian or overseas standards making association, rather than being limited to a pre-determined list of associations that would require regular updating. In taking this approach the suitability of overseas standards would be based on whether an overseas standard provides an appropriate level of safety in the Australian context. This policy approach enables the Commonwealth Minister, under sections 105 and 135 of the ACL to consider standards from any standards-making association without the need for a prescriptive list. In addition to this, declared standards may also be recognised in their entirety, thereby reducing regulatory burden for businesses.

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Importantly, this would be achieved through existing review and consultative processes conducted by the ACCC. This policy approach does not seek to implement the 'opt-out' approach as presented in the Consultation RIS to automatically adopt overseas standards by default and without review.Nominating standards under section 108

In addition to these proposed amendments, submissions to the Consultation RIS also indicated that subsequent changes to section 108 of the ACL should be considered to provide clarity around suppliers nominating which standard they intend to comply with, where more than one option is available to them. Currently under section 108, the regulator may only require a 'supplier' to nominate which standard they intend to comply with when more than option is available to them, but this obligation does not extend to 'manufacturers'. In addition to this, section 108 does not provide a mechanism for the regulator to require a supplier to provide information such as test reports to substantiate a claim of compliance with the nominated standard.

[1] ACCC, *'Consultation paper – International standards associations: Consumer Product Safety'*, 9 May 2016."

B. Concerns and Comments

I remain of the view that it long overdue for Standards Australia (which has a listed company making money from publishing its standards and undertaking certifications) not to have a monopoly of providing standards that the Minister can declare under s105. However, I am not convinced that adding by regulation a list

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of trusted overseas standards associations eg ISO or EU American main associations risks any complaint against Australia based on the WTO's Technical Barriers to Trade Agreement (see https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm). Article 2 gives considerable scope to national regulators to introduce safety measures provided they do not create unnecessary obstacles to trade. Even if an international standard exists or is immanent (eg from the ISO), states can decide not to use them if inappropriate in light of legitimate objectives such as protecting human health. Australia has not been subject to any complaints from WTO members, to my knowledge, for prioritising only Australian standards under s105. Nor has Singapore which since 2011 even mandates all consumer products should comply with any standard developed by several overseas standard setting bodies (thereby adding a partial General Safety Provision as in EU law requiring all products to be safe, which reform for the ACL Treasury also consulted about but seems is not proceeding with: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3530671).

Accordingly, listing 14 or more trusted overseas organisations seems better than giving carte blanche to the Minister (who will be heavily influenced by advice from our regulators), as to which standards abroad to declare. This is especially true given that the Decision RIS proposes no legislative criteria specified to guide the exercise of discretion. There is not even, as mentioned above, a legislative requirement under s105 to be guided (as when making own ACL standards under 104) by what is "reasonably necessary to prevent or reduce risk of injury to any person". At the least, the latter provision should be added to s105 as well.

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It does seem appropriate that, unlike the Singaporean regulations from 2011, if the Australian Minister declares alternative foreign standards the supplier (and of course any manufacturer) should have to identify which one they believe they are complying with. Adding now a requirement for test reports may seem burdensome for business, but is broadly consistent with the recently revised EU General Product Safety Regulation requirements for suppliers etc to maintain risk assessment documentation (albeit in the context of a wider General Product Safety requirement for all types of consumer products). That Regulation could be consulted for similar wording (https://commission.europa.eu/business-economy-euro/doing-business-eu/eu-product-safety-and-labelling/product-safety/general-product-safety-regulation_en).

I also do not have major problems with the proposal to allow newer versions of overseas standards to be automatically in Australia, although per p35 the:

"Decision RIS acknowledges these concerns about time-to-time updates. However, under this policy option the ACCC would maintain administrative responsibility of all mandatory standards including responsibility to ensure time-to-time updates to referenced Australian and overseas standards are suitable for the Australian context. The ACCC would monitor the effect of updates to Australian and overseas standards, so that action could be taken by the Minister to

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stop any unsuitable update being incorporated into a mandatory standard if required (such as amending or repealing that mandatory standard)."

However the implementation would need to be closely monitored as various stakeholders were worried that any newer version of the overseas standards referenced might not necessarily improve consumer safety outcomes in Australia. (This is especially so given the s105 declaration route does not explicitly require a focus on what is reasonably necessary to secure consumer safety.)

There is also a broader rule of law consideration described eg broadly here by my colleague Prof Andrew Edgar: https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/AIAdminLawF/2021/3.html. Although the intention again may be laudable, the process proposed envisages maximum discretion to the Minister (and regulators) with minimal democratic accountability (eg via parliamentary committee reviewing formal regulations).

Please let me know if you need any further information.

Yours sincerely,