



9 June 2016

Aidan Storer
Manager, ACL Review Secretariat
Market and Competition Policy Division
The Treasury, Langton Crescent
Parkes ACT 2600

Dear Aidan

RE: Australian Consumer Law Review – Issues Paper

On behalf of Standards Australia, thank you for the opportunity to provide comment on the Australian Consumer Law Review Issues Paper. We support the existing objectives within the Australian Consumer Law (ACL); yet recognise that implementation of those objectives might be improved.

Australia has a very strong and well developed regulatory framework through which the use of standards and other technical documents can be assessed. We believe that the use of technical standards should be a first principle question in relation to how the ACL framework operates.

Standards Australia supports the good use of technical standards, including Australian Standards in regulatory arrangements. This includes appropriate and rigorous assessment of specifications adopted by and developed through our process. The appropriate use of standards can facilitate trade, improve competitiveness and promote competition.

We strongly encourage the ACCC to continue working with Treasury on the ACL Review, as we see this as an important opportunity to ensure the appropriate use of technical standards from a consumer safety perspective.

As always, we look forward to working with you and would welcome any further discussions.

Yours sincerely

A handwritten signature in black ink, appearing to read "Alison Scotland". The signature is fluid and cursive, written over a light grey background.

Alison Scotland
National Sector Manager
Consumer Products, Services and Safety

Executive Summary

Standards Australia welcomes the opportunity to provide a submission to Treasury's Review of the Australian Consumer Law (ACL). The national approach provided through the ACL provides the basis for a harmonised national system which is complemented by the good use of referenced technical specifications.

The system whereby the Australian Competition and Consumer Commission (ACCC) on behalf of all governments references Australian consumer product standards works in providing a clear set of expectations through the supply chain to end consumers; however, there are different ways that this could be achieved.

Introduction

Every economy needs a sound standards and conformance infrastructure to achieve its societal and economic goals. Everyday commercial transactions and international trade could not take place without the support of technical standards and regulations. They give confidence to consumers, certainty to business and clarity to the scientific community. Technical standards have long been utilised by Australia in various forms of stringency. Voluntary standards can range from self-regulation, to quasi-regulation, through to co-regulation, where standards are made mandatory.

Adherence to standards can be mandated in law (explicitly or through delegated decision making) or by voluntary adoption.

The 2015 Competition Policy Review highlighted potential competition issues, impacts and consequences of implementing Mandatory Product Standards. When compliance with a standard is mandatory, there is a greater need to review competition policy as it relates to the development of technical standards.

Standards Australia has invested heavily in establishing a working relationship with the ACCC that allows for Australian Standards to be developed in a way that is consistent with their use within the ACL framework through engagement with the ACCC. This also allows for industry and community interests to participate in an open process consistent with Australia's WTO obligations.

Our Memorandum of Understanding (MOU) with the ACCC:

- provides the basis for cooperation between the ACCC and SA in the development of Australian Standards and supporting documents;
- promotes a close working relationship between the ACCC and SA which is responsible for developing and maintaining Australian Standard® brand standards which may form the basis of mandatory standards or may be implemented on a voluntary basis to assist industry in meeting its broader obligations under the Act; and
- establishes measures to promote the sharing of knowledge, skills and experience between SA and the ACCC.

Good regulatory practices

Existing guidance on the use of standards and risk assessments in policy and regulation is available and should be considered thoroughly in the ACL Review; and not reinvented.

The Commonwealth has a very clear set of criteria on which it assesses the development and implementation of regulation in *The Australian Government Guide to Regulation*. This is in addition to the COAG Guide for Ministerial Councils and National Standards Setting Bodies.

The recommended Australian framework allows for the use of standards as a means of demonstrating compliance with the policy objectives. Policy objectives set the desired safety and performance measures. Technical standards and specifications are a useful way to demonstrate compliance with an overall safety aspiration.

The Australian Government has generally attempted to avoid regulators developing a Regulatory Impact Statement (RIS) at the end of a policy process, just before the proposal is sent to Cabinet or another decision maker. The ACCC still operates under an earlier precedent; whereby RIS questions are addressed after a technical standard has been amended – not as the starting point of their policy journey.

Policy officers should always search for and use the latest (or amended) version of a technical standard, and have the means and commitment towards doing this. They need a transparent process for reviewing technical specifications as “deemed to comply” methods of proving compliance with overarching safety obligation. The case studies below include policy and standards referencing approaches both within Australian intergovernmental agencies.

In the review of the ACL framework, we encourage the Treasury to continue to ask the following questions:

1. Will the framework be performance based?

A performance based framework would allow for no mandatory referencing of technical standards. The framework would see the ACL policy owners set performance requirements and then determine how compliance should be demonstrated.

2. If the framework is performance based, what mechanisms will be put in place to assess compliance? What evidence of compliance will be required?

Demonstration of compliance could be by way of the use of a technical standard, expert determination or by assessment through government processes. Examples of how the ABCB and Safe Work Australia have adopted this model are referenced below.

3. If the framework contains prescriptive provisions, will the framework develop its own technical specifications or will the framework reference third party specifications?

Developing a framework which allows for multiple technical specifications to be referenced would allow choice in the way compliance is demonstrated. Following an

assessment in a particular area, it may be that the policy owners deem that an Australian Standard and a European Standard meet the requirements as an example, and both could be referenced as a means of demonstrating compliance. This would need to be undertaken on a case by case basis with consultation through the supply chain.

4. If the framework proposes to reference third party specifications, what, if any, process will be put in place for engagement/ assessment / development of the specifications with third parties?
5. What process and measures will be put in place for the consideration and acceptance of third party material?
6. How will the regulatory assessment and impact process account for the use of third party material from both community and business cost perspectives?

Case Study – Australian Building Codes Board

Our work with the Australian Building Codes Board (ABCB) through its National Construction Code (NCC) is a good example of how performance-based regulation can work. The Performance Requirements are the minimum level that buildings, building elements, and plumbing and drainage systems must meet. A building, plumbing or drainage solution will comply with the NCC if it satisfies the Performance Requirements, which are the legal requirements of the NCC. The Performance Requirements can be met using either a Performance Solution (an Alternative Solution) or a Deemed-to-Satisfy Solution, which may include NCC referenced documents (most of which are technical standards).

Case Study – Workplace Health and Safety

In the Workplace Health and Safety (WHS) regulatory framework, Australian Standards are used in a variety of ways, ranging from reference in Acts and Regulations to the administrative application of a Standard by a WHS regulator for compliance purposes. Standardisation Guide SG-017: *Drafting of Standards that may be referenced under WHS Legislation* outlines a framework of referencing Australian standards that supports best practice.

Standards that may be referenced in WHS legislation must not repeat requirements that are already covered in legislation. Where overlapping is considered unavoidable for the sake of completeness of the Standard, the extent of duplication and compatibility with legislation must be referred to the regulator for specific attention. Technical committees are reminded that the purpose of a technical standard is not to write the law, but rather determine the minimum technical solutions.

Case Study - Electrical Technical and Safety Standards

In Australia, technical and safety electrical regulatory functions are largely the responsibility of state and territory governments. In order to ensure coordination activities in respect to regulatory strategies, the Electrical Regulatory Authority Council (ERAC) was formed. ERAC is made up of representatives of the regulatory authorities responsible for electrical safety,

supply and energy efficiency in New Zealand and the Australian states, territories and commonwealth.

Electrical safety legislation (including regulations and codes of practice) in all Australian jurisdictions and New Zealand call up Australian and/or New Zealand Standards as ways safety obligation holders must follow to comply with the law. In some instances these standards are cited in legislation as a way obligation holders may follow to be deemed to comply with the law or choose another way which is equal to or better to the standard in terms of safety outcomes.

ERAC Members now recognise the importance of Australian Standards underpinning their Regulatory framework and are a lot more open to work with our organisation to maintain those documents.

Examples of overseas consumer policy frameworks

Europe

- The EU has an active standardisation policy that promotes standards as a way to better regulation and enhance the competitiveness of European industry.
- The European Commission realised early on that it was very difficult to update regulations every time a referenced technical standard changed.
- The European Commission issues standardization requests to standards development bodies in the EU. Once the references are published, products manufactured in accordance with the harmonized standard receive a presumption of conformity with the relevant essential requirements of the legislation.
- The presumption of conformity is the crucial element in this co-regulatory approach that links the public interest (i.e. protecting public health and safety, consumer and environmental protection) and the interest of private business.
- Manufacturers are nevertheless free to choose any other technical solution that can demonstrate compliance with the essential requirements of the law. Compliance with standards is therefore still voluntary, even though their use brings advantages in terms of simplicity and cost effectiveness.

For example:

Regulation

Directive 2009/48/EC, Safety of Toys (Note: this is an example of a European 'New Approach Directive' that meets the requirements of the New Legislative Framework.)

Extract from the technical regulation

Article 13 of the Directive states that "Toys which are in conformity with harmonised standards or parts thereof, the references of which have been published in the Official Journal of the European Union, shall be presumed to be in conformity with the [essential requirements of the Directive]"

Lists of the harmonised standards that have been published in the Official Journal of the European Union are available via the Harmonised standards (HAS) database, see for example, http://ec.europa.eu/enterprise/policies/europeanstandards/harmonised-standards/toys/index_en.htm

Comparison to current ACCC processes:

- The ACCC does not have a “presumption of conformity” process and instead chooses to make a full technical standard “mandatory”. This results in two issues; the first being control over the technical content of a standard developed through the consensus process and the second is a limitation in how the ACCC can use content developed through the Standards Australia process.
- Making one technical standard mandatory removes the option for alternative (and comparable in safety) modes of compliance. It may be appropriate for the ACCC to allow the use of multiple standards in order, for example, to permit greater flexibility for producers and service providers in meeting program, procurement, or regulatory requirements, enhance competition in the marketplace, provide greater choice to consumers, and enable new innovative solutions to be developed.
- Having a Mandatory Standard that is prescriptive in nature and that combines both performance and policy language with technical content means that the ACCC is defining a limited and inflexible way of conforming to basic product safety principles. This reduces and possibly eliminates room for innovation, and can contribute towards confusion in the industry if the Mandatory Standard references an older iteration of a technical standard.

United States

- The Office of the Federal Regulator (OFR) recognises the importance of technical standards and has come up with a mechanism to address the issue of standards incorporated by reference into law
- The OFR sets out rules for agencies about working with standards development organisations, such that the agency:
 - works to ensure that materials (technical standards) are reasonably available to interested parties, and
 - summarises the content of the material they wish to incorporate via reference.
- Regulators, in prescribing the technical specifications for the levels of safety they require, are instructed to:
 - set out the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics; and

- base the technical specification on international standards, where such exist; otherwise, on national technical regulations, recognised national standards or building codes .
- To promote efficiency, US agencies are encouraged to consolidate proposals to update or substitute standards, rather than conducting separate rulemakings for each standard the agency wants to update or substitute.

Comparison to current ACCC processes:

- By making particular Australian technical standards mandatory, the ACCC ends up binding into law a document to which it does not own IP. This is not good regulatory practice and it reduces the power of the ACCC to effect necessary change.
- Historically, the ACCC has relied on the content of Standards Australia technical standards to feed the content of its mandatory safety standards. Should the ACCC move to a model that allows for the conversion of technical specification to performance outcomes, it would need to work closely with Standards Australia on some strong protocols for conversion. Standards Australia is committed to working with the ACCC to set up these relationships and processes if it was the decision of the ACCC to do so.
- The ACCC has not set up a clear process to ensure that materials (technical standards) are reasonably available to the public. Due to the nature of the publishing licence arrangement between Standards Australia and SAI Global, the ACCC would need to apply and pay for a licence fee to use SA content.
- Unlike the US, the ACCC has to establish a separate proposal to update a Mandatory Standard every time. This is costly and time consuming. If the ACCC moved to a model of principle-based product safety legislation with a register of "deemed to comply" product standards, it would remove the need for this costly exercise, as law would not be changing every time a new technical standard became available.

Dutch Government

Aware of the issues around referencing of technical standards in legislation, the Dutch government took action to:

- redraft legislation to remove unnecessary mandatory references
- make mandatory standard freely available to the public by pre-paying for public access/viewing
- work closely with the national standards body, NEN, to ensure that the development of technical standards is closely aligned with policy objectives, including financial contribution for assistance with information provision and stakeholder consultation.

Comparison to current ACCC processes:

- Despite being an active participant in the standards development process, the ACCC does not recognise the nine weeks' public comment process as adequate consultation; nor does it use this opportunity to solicit feedback from the community in relation to the technical standard. It then has to duplicate this consultation mechanism in its own Regulatory Impact Assessment activity (which may occur years after a technical standard is published).
- In 2014, the ACCC initiated a conversation with Standards Australia, requesting to cite the relevant clauses of the Australian Standard rather than replicate the full language of these clauses. The basis of this request referred to the problem for suppliers requiring gaining access to both the legal instrument as well as the Australian Standard to fully understand their regulatory requirements.
 - This is a legitimate concern, and came about due to poor regulatory practice. However, Standards Australia could not acquiesce to this request for two reasons:
 - the use of Standards Australia's intellectual property and the requirement of an agreement between the ACCC and Standards Australia's publishing partner, SAI Global
 - the potential to diminish the value of Australian contributions to the consensus driven standards development process and its integrity.
 - If the ACCC modelled its approach on the Dutch framework, it could work with Standards Australia to "pre pay" for consumer access to important technical content, demonstrating its commitment to aligning policy objectives with a best practice standards and conformance approach.
- For Standards Australia, as the national standards body, to agree to allow for technical content to be taken and potentially changed in the way that is proposed would require strong protocols in place.
- Of course, government is able to vary regulatory requirements in the way that it has done previously and we understand why it is more efficient and effective from the perspective of the Commission to vary the practice. Standards Australia must balance this with our commitment to our process and contributors.

Scenario Analysis

Scenario 1: Status Quo

The ACCC and SA share common objectives in developing and promoting quality product safety standards (as specified in our Memorandum of Understanding). The current process of the ACCC participating in standards development committees and the referencing of technical standards as a "Mandatory Standard" is flawed. Concerns include:

- Best Practice Regulation guidelines expect the ACCC to changes to legislation only with a proper review and consultation process. This process is usually generated by

a predetermined review mechanism time period rather than the publication of a technical standard.

- Despite the ACCC actively participating in the development of a technical standard, there is no automatic uptake of the technical standard as a Mandatory Standard.
- Once the review process for a Mandatory Standard occurs, there is no guarantee that the Minister for Small Business will approve the change to the legislation.
- If approval is not forthcoming, a consequence is that the mandatory requirements are not compatible with the most up-to-date technical standard.
- In fact, some Mandatory Standards might reference a superseded technical standard that may be 3-4 iterations out of date.

The most pertinent example of the above issue is the motorcycle helmets Consumer Protection Notice. Despite participating in the technical committee that developed the 2006 version of AS/NZS 1698 *Protective helmets for vehicle users*, the ACCC review determined that the 2006 standard would not be referenced. This meant that the 2006 version of the Australian Standard was technically different to the version of the Australian Standard with which suppliers were required to comply with under the Australian Consumer Law safety standard. This inconsistency created stakeholder confusion, and conflicted with state and territory road use laws that were referencing the more current 2006 version.

If this arrangement was to continue, Standards Australia recommends that the ACCC plays a stronger role in the development of technical standards and ensures that the RIS process aligns with standards development process.

Scenario 2: No Mandatory Standards; reliance on ACL provisions for “acceptable level of safety”

Removing the existence of Mandatory Standards would have both positive and negative impacts. This scenario shifts the onus of risk onto the supplier to prove that their products contain adequate levels of safety. One consideration would be the definition of “acceptable safety”; this would need to be robust and grant the ACCC the legislative strength to enforce this effectively.

PROS:

- Less regulatory burden on the ACCC and less resources required in the RIS process, as the safety obligations are contained within the “acceptable level of safety” provision in the ACL.
- Resources currently allocated to the upkeep of the Mandatory Standards framework could be shifted towards the enforcement section of the ACCC.
- The ACCC could theoretically divest itself of risk and let the consumer products market work it out.

CONS:

- “Acceptable safety” may be a term highly debated and could result in the consumer products market becoming flooded with inappropriate levels of safety.

- Enforcement of this provision may prove to be time-consuming and costly, either for the ACCC or the state/territory bodies having to conduct the work.

Scenario 3: No Mandatory Standards; regulatory principles developed on safety objectives and third party standards and specifications can be referenced in a “deemed to comply” capacity

According to the Australian Government Guide to Regulation, a regulatory impact assessment is not required for non-Cabinet decision makers if the proposal is non-regulatory or the regulatory impact is of a minor or machinery nature. In this scenario, the specified safety obligations would remain consistent for the Australian community. However, each time a new edition of a technical standard was established, the work required to ensure the document is still applicable to the overarching safety obligations. This process can be more condensed than a RIS; as long as it meets OBPR principles (for reference, the ABCB’s “Preliminary Impact Analysis” is used to assess updates to “deemed to satisfy” technical standards).

This scenario would also allow the use of ACCC’s “trusted international standards” approach. This approach is already supported by the existing MOU and arrangements between Standards Australia and the ACCC. For example, the ACCC participated in the international development and has proposed the adoption of:

- ISO 10393 Consumer product recall – Guidelines for suppliers; and
- ISO 10377: Consumer product safety – Guidelines for suppliers

The ACCC can utilise Standards Australia’s relationship with ISO and the IEC so that international technical standards can be used effectively in Australia (as per the requirements under the MOU with the Department of Infrastructure, Innovation and Science).

Scenario 4: The ACCC develops its own technical specifications to a level of “acceptable safety”

In this scenario, the ACCC would move away from the referencing of technical standards and develop its own set of technical specifications which could establish a minimum set of requirements.

Conclusion

As the peak non-government national standards body, we are conscious of ensuring that the standards developed by us are necessary, provide the right solution and are supported by industries and governments. In this context, Standards Australia supports best practice regulatory development based on Office of Best Practice Regulation (OBPR) principles.

Whichever framework is chosen by Treasury, Standards Australia commits to supporting the intent of the process.