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ACCC submission to Standards Australia's discussion paper on the Distribution and Licensing Policy Framework

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to comment on Standards Australia's discussion paper on the *Distribution and Licensing Policy Framework* (the discussion paper).

The ACCC's primary concern, consistent with other recent public inquiries, is any continuation of a distribution and licencing policy that requires payment for standards referenced in legislation.

We hold the fundamental view that all people should be able to engage with all parts of the law. This includes free and unfiltered access by consumers and businesses to Australian Standards referenced in mandatory safety and information standards administered by the ACCC.

Role of the ACCC

The ACCC is a whole of economy regulator that promotes competition and fair trading in markets to benefit consumers, businesses and the Australian community. Our primary responsibility is to ensure that individuals and businesses comply with the *Competition and Consumer Act 2010* (the CCA), which includes the Australian Consumer Law (ACL).

One of the ACCC's key roles in administering the CCA is seeking to ensure that consumers can confidently participate in markets. Through the application of the ACL, the ACCC aims to prevent misleading behaviour and unconscionable conduct, minimise the risk posed by unsafe consumer products and ensure consumers are fully informed about safety risks.

Consumer product safety role

Consumer product safety regulation in Australia is a shared responsibility between Commonwealth, state and territory consumer protection regulators. The ACCC's product safety role involves identifying, prioritising and addressing risks to persons arising from unsafe consumer goods and product-related services.

We do this by administering the consumer product safety provisions of the ACL, which include powers for the Commonwealth Minister to issue compulsory recalls, product bans, safety warning notices, and mandatory safety and information standards.

Mandatory safety and information standards under the ACL make particular safety or information features on products compulsory for the legal supply of the product into the Australian market. They are introduced when considered reasonably necessary to prevent or reduce the risk of injury to a person, or to provide important information about a product to assist consumers in making purchasing decisions.¹

It is an offence to supply consumer products that do not comply with mandatory safety or information standards. Non-compliance can result in significant financial penalties – either the maximum of \$10 million, three times the value of the benefit gained from the contravening conduct, or 10% of annual turnover.

Mandatory safety and information standards are often based on, or reference, voluntary standards. Of the standards the ACCC administers, 25 of 40 mandatory safety standards, and one of three information standards are based on a voluntary standard developed or approved by Standards Australia. The ACCC is a member of a number of Standards Australia's technical committees where Australian Standards are referenced under the ACL.

The Government recognises Standards Australia as the peak domestic technical association charged with the development of voluntary standards in the interests of the Australian community. Government policy sets out how Australian Standards can be considered for regulatory purposes.²

Access to referenced Australian Standards

It is a fundamental principle of our democratic system that all people should have access to the laws that apply to them, particularly where the consequences of non-compliance include public safety ramifications and serious sanctions for those who breach the law, including significant financial penalties and criminal charges.

The ACCC strongly advocates for free and unfiltered access to all Australian Standards referenced in legislation, including those referenced in mandatory safety and information standards administered under the ACL.

The continued charging for access to Australian Standards that are referenced in Australian laws is a barrier to compliance, particularly for small businesses and sole operators. The ACCC believes that referenced standards should be freely available and published on the internet by Standards Australia, and the text of a referenced standard should be replicated in the relevant legislative instruments. Compliance with mandatory safety requirements should not be subject to a system where the primary concern is a commercial return.

Without access to Australian Standards, businesses and consumers will continue to operate with an inadequate understanding of legal requirements relating to many goods and services. Businesses will continue to provide goods and services that do not meet specifications, are non-complaint and possibly unsafe.

This is compounded as consumers are unlikely to readily identify many aspects of non-compliance in the goods and services they are being supplied. Some aspects of non-compliance can then lead to safety concerns, injuries and possibly deaths.

¹ Sections 104, 105 and 135 of the Australian Consumer Law.

² The Australian Government Guide to Regulation (2014).

It is important to recognise that mandatory safety and information standards prescribed under the ACL are a public good for the benefit of all members of the community. To date, a lack of public access to referenced standards has led to public detriment and high costs for parties seeking to access a standard to inform their compliance and understanding of the law.

The issue of accessibility to standards extends beyond safety regulation to a vast array of other uses of standards, where it is essential there is free access to those who are encouraged or required to comply. One example for which the ACCC has responsibility is the Consumer Data Right (CDR) where Australian Standards may be referenced in rules made by the ACCC under the CCA.

Another example outside the ACCC's regulatory remit is the building industry where businesses are required to comply with the National Construction Code (NCC). The NCC references and makes mandatory for compliance over 100 voluntary Australian Standards, which must be purchased in order for building and construction businesses to understand their legal obligations. The negative impacts of the lack of access is demonstrated by the recent major safety incidents in the building industry relating to combustible aluminium cladding and non-conforming building products.

The ACCC's views are reinforced by Commonwealth legislative drafting requirements that require referenced standards to be readily and freely available to the public (i.e. at no cost).³ Our views are also supported by the recommendations of recent public inquiries and reviews that strongly advocated for public access to standards as a fundamental aspect of people's democratic engagement with the law.⁴

Information about consumer interest standards

The ACCC supports Standards Australia's objectives of improving access to consumer interest standards. Plain English guides about standards that impact consumers' lives, such as prams and strollers, household cots and bicycle helmets, can provide useful information about the purchase of safe and compliant consumer products.

If plain English guides are developed about standards called up in legislation, including mandatory safety or information standards, they should also be freely available to the general public at no cost. Any guidance developed should also be consistent with the obligations of that instrument. This is particularly important considering some small business suppliers may rely on guidance to aid their compliance with the law.

Development of innovative standards products

The ACCC notes that Standards Australia is canvassing the development of digital platforms and protocols for the sharing of sales and customer data. The ACCC has found an increasing number of businesses across the economy are collecting and monetising consumer data, and notes that there are implications for competition, consumers, and society.

We consider that any protocols developed by Standards Australia for the purpose of sharing data with third parties must include a requirement that consumers are fully informed, fully understand, and effectively control, the scope of data collected and how it is used. This will

³ Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*. See also, section 15J(2)(c) of the *Legislation Act 2003* (Cth).

⁴ Western Australia Parliamentary Joint Standing Committee on Delegated Legislation *Report on the inquiry into access to Australian Standards adopted in delegated legislation*, Australian Consumer Law Review *Interim Report*, and Competition Policy Review *Final Report*.

increase trust in the digital economy and spur competition between businesses on the basis of privacy.

The ACCC will place this submission on its public register.

If you would like to discuss any aspect of this submission, please contact Tim Grimwade, Executive General Manager, Consumer, Small Business and Product Safety Division on

██████████ or at ██████████

Yours sincerely

A handwritten signature in black ink, appearing to read 'R Sims', with a stylized flourish at the end.

Rod Sims
Chair
Australian Competition and Consumer Commission