

EXECUTIVE OFFICE



23 Marcus Clarke Street
Canberra ACT 2601
GPO Box 3131
Canberra ACT 2601
tel: (02) 6243 1111
www.accc.gov.au

Contact officer: Neville Matthew
Contact phone: [REDACTED]

30 September 2019

Austroads Ltd.
Level 9, 287 Elizabeth St
SYDNEY NSW 2000

By email: MMD_Consultation@tmr.qld.gov.au

Austroads Motorised Mobility Devices Discussion Paper

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to comment on the Austroads discussion paper for *Establishing a Nationally Consistent Framework and Adopting Technical Specification 3695.3.2018* (the discussion paper).

The ACCC recognises that Motorised Mobility Devices (MMDs) provide a range of benefits for users by providing a way to maintain quality of life, improve overall health and wellbeing, and improve feelings of social inclusion. However, the ACCC is aware that the use of MMDs regularly results in serious injuries and deaths to users and other pedestrians on roads and footpaths.

While the ACCC generally supports measures to help consumers make informed purchasing decisions, we do not support any of the proposed options for the adoption of the Technical Specification for MMDs. Affixing a 'registration-like' product label on MMDs will not address the root cause of the safety issue and will not result in the desired objective of improved safety outcomes for MMD users, road users, pedestrians and the general community.

Rather, it is our view that Austroads should revisit the recommendations made by the Senate Inquiry on the introduction of a nationally consistent regulatory framework for MMDs.¹ Austroads should consider low cost registration and licencing arrangements, and should introduce third-party insurance. Consideration should also be given to education and training of MMD users, and safer road crossings and footpaths in areas of high MMD use.

Evidence demonstrates that the safety risks posed by MMDs relate to their use and operation on roads and footpaths, and not their design and construction or the information provided with these devices at the point of sale. The safe operation and use of MMDs on roads and footpaths, or enforcing compliance with the Technical Specification can only be successfully addressed by state and territory road transport regulators and local governments. It is not a role that can be undertaken by the ACCC.

The role of the ACCC and the ACL

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

¹ Senate Standing Committee on Rural and Regional Affairs and Transport (September 2018) *Inquiry Report into the need for regulation of mobility scooters, also known as motorised wheelchairs.*

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, and to minimise the risk posed by unsafe consumer products.

The consumer product safety provisions contained in the ACL are limited in their application and apply only to consumer goods and product related services. In most situations the personal, domestic or household use of an MMD would fall within the meaning of a 'consumer goods', and the consumer guarantees and recall provisions of the ACL would apply. However, the ACCC has no jurisdiction over user behaviour or the maintenance of public infrastructure such as roads and footpaths.

The need to regulate motorised mobility devices

MMDs present safety concerns when they are operated in an unsafe manner by the user. This can be due to an MMD user's physical inability to safely control the device, the user having no or insufficient training on the safe operation of the device on roads and footpaths, and inadequate awareness of other vehicles and pedestrians.

Australians have become injured or killed as a result of accidents involving MMDs. ACCC research has shown that the majority of injuries and deaths of MMD users are associated with collisions with cars, trucks or trains, rather than any specific design features of the devices themselves. The research also highlights that a large proportion of deaths occur when users are crossing a road, attempting to alight from the device or approaching intersections.

The safety concerns arising from the use of MMDs extends to other pedestrians, cyclists and road users. Incidents also arise where other users of roads and footpaths are struck and injured by an MMD as a result of user error.

The need to develop a nationally consistent framework for MMDs

These safety concerns illustrate the need for nationally consistent regulation of MMD use and user behaviour on roads and footpaths. There are currently significant gaps in existing regulatory framework relating to MMD use.

MMDs are specifically excluded from regulation under the *Motor Vehicle Standards Act 1989* meaning that the Department of Infrastructure, Transport, Cities and Regional Development is unable to make design rules or standards for MMDs entering the Australian market.

Under the Australian Road Rules an MMD is not considered a vehicle, instead a person operating the MMD is considered to be a pedestrian and subject to the same requirements as pedestrians on roads and footpaths. These rules are variously adopted by states and territories, meaning the use of MMDs is subject to varying levels of control.

The safe design of medical devices and therapeutic goods would normally be regulated by the Therapeutic Goods Administration (TGA). However, the TGA routinely classifies MMDs as 'low-risk' personal aids that are therefore excluded from their regulatory framework.

To address these regulatory gaps the Senate Inquiry recommended that Austroads establish a nationally consistent regulatory framework for MMDs, and consider simple and low-cost licensing and registration arrangements and third-party insurance.

The adoption of the Technical Specification for MMDs is proposed by Austroads in the discussion paper as a potential regulatory framework for MMDs.

Voluntary adoption of the Technical Specification for MMDs

The ACCC does not support Options 2 and 3 of the discussion paper. Voluntary adoption of the Technical Specification for MMDs by industry is effectively a continuation of the status quo. Technical specifications made by Standards Australia are voluntary. This means they are not mandatory for industry compliance and it remains legal to supply devices that do not meet the parameters of the Technical Specification.

The discussion paper contains an error as the ACL does not contain provisions that enable regulators to enforce compliance with voluntary technical specifications. This means the ACL is not available as a method for managing cases of non-compliance with the Technical Specification for MMDs.

In the absence of legislative capacity for regulators to enforce compliance, the burden would fall on individual consumers to independently seek a remedy or compensation through courts or tribunals from an MMD supplier or manufacturer if their device did not meet the Technical Specification. The remedies available to individual consumers under the ACL are limited to the right to a repair, replacement or refund and in some cases compensation for loss or damage suffered because a good did not meet a consumer guarantee.

It is the ACCC's view that the typical user of an MMD is unlikely to possess the relevant technical skills or equipment to identify whether a device complies with the Technical Specification. This would be further exacerbated by the need for consumers to pay a subscription fee to access the details of the Technical Specification, which is distributed by commercial suppliers on behalf of Standards Australia.

Regulatory prescription of the Technical Specification for MMDs

The ACCC also does not support Option 4 of the discussion paper. The proposed prescriptive approach effectively proposes the adoption of a mandatory standard based on the Technical Specification for MMDs. However, no legislative mechanism for making a mandatory standard is identified in the discussion paper.

While the ACL does provide a legislative scheme for mandatory safety and information standards, the power to introduce such standards is limited to circumstances where the Commonwealth Minister considers it reasonably necessary to prevent or reduce the risk of injury to a person arising from the design, construction, or composition of a consumer good.

As previously stated, research on injuries and deaths has shown that it is user behaviour and not the design of the MMD that causes the safety risk. Instead, the Technical Specification for MMDs is intended to make it clearer for purchasers of a device about the suitability of the device for its intended use, rather than to address a specific safety risk associated with the design and construction of the devices themselves.

Without sufficient evidence that the mandatory application of the Technical Specification would improve safety outcomes for Australians, the introduction of a mandatory safety or information standard for MMDs under the ACL is unlikely to progress beyond a regulatory impact assessment and ministerial decision, or achieve any added benefit for MMD users, road users or the general community.

Registration, licensing and third party insurance

The ACCC supports the recommendations of the Senate Inquiry around simple and low cost registration and licensing arrangements for MMDs. It is our view that Austroads should revisit the evidence on registration and licensing presented in the report.

Registration and licensing arrangements would address the safe use of the devices on roads and footpaths, where an MMD could not be registered for use on public infrastructure and an

MMD user could not be licenced unless they have completed mandatory training and had an assessment of their ability to safely operate the device.

Registration is already in place in Queensland and Western Australia. In Queensland, registration is provided free of charge and includes compulsory third-party insurance, which protects the user against compensation claims for personal injury following a crash.

The ACCC considers that Austroads should support state and territory road transport regulators in implementing third-party insurance arrangements for MMD users. Third-party insurance would provide a financial safety net for pedestrians and other users of roads and footpaths who may become injured as a result of an accident involving an MMD where the user is at fault.

The ACCC also considers that road transport regulators and local governments have a role to play in ensuring the education and training of MMD users, and in providing safer road infrastructure. This includes ensuring that roads and footpaths in high use areas are MMD friendly, especially in the vicinity of aged care facilities and hospitals where the use of these devices is common.

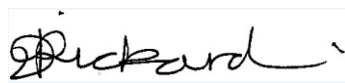
It is the ACCC's view that affixing a 'registration-like' product label on devices based on the Technical Specification for MMDs will not address the root cause of the safety issue and will not result in the desired objective of improved safety outcomes for MMD users, road users, pedestrians and the general community.

Relying on consumers to enforce the Technical Specification for MMDs using their limited rights available under the ACL is not an effective stand-in for registration, licencing, third-party insurance, education, training or improved road infrastructure. It will not address systemic or widespread safety issues affecting the safe use of MMDs or provide redress for persons harmed by MMD users who cause accidents on roads and footpaths.

Next steps

If you would like to discuss the ACCC's submission, please contact Neville Matthew, General Manager, Consumer Product Safety Branch on [REDACTED] or at [REDACTED].

Yours sincerely



Delia Rickard
Deputy Chair