ACCORD

Advocate for the Consumer, Cosmetic, Hygiene and Specialty Products Industry

Mr Robert Fitzgerald
Commissioner
Study into Standards Setting and Accreditation
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Mr Fitzgerald

ACCORD is pleased to provide the following comments in relation to the Productivity Commission's (PC) Issues Paper on Standards and Accreditation.

ACCORD Australasia (formerly the Australian Consumer & Specialty Products Association) is the peak national industry association representing the manufacturers and marketers of formulated consumer, cosmetic, hygiene and specialty products, their raw material suppliers, and service providers. ACCORD's members market fast-moving consumer and commercial goods primarily in Australia and New Zealand.

Our industry's products play a vital role in:

- keeping our households, workplaces, schools and institutions clean, hygienic and comfortable;
- personal hygiene, grooming and beauty treatments to help us look and feel our best;
- specialised uses that assist production and manufacturing to keep the wheels of commerce and industry turning; and
- maintaining the hygienic and sanitary conditions essential for our food and hospitality industries and our hospitals, medical institutions and public places.

These benefits are essential to safe, healthy living and maintaining the quality lifestyle we all too often take for granted.

Our industry has more than 50 manufacturing operations throughout Australia and member companies include large global consumer product manufacturers as well as small dynamic Australian-owned businesses.

A list of ACCORD member companies is provided at *Attachment 1.*

As an active member of a number of Standards Australia Committees, ACCORD on behalf of its member companies, has a specific and direct interest in the review of Australia's Standards and Accreditation processes. We welcome the opportunity to provide this submission for the PC's consideration in the development of its Draft Report.

ACCORD's approach to regulatory efficiency

ACCORD supports the Australian Government's approach to regulatory best practice and recommends that the Council of Australian Governments (COAG) Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies (COAG Principles) should be rigorously applied in the consideration of any regulatory response to a perceived market failure. The COAG Principles state that the aim of any national standards setting process should be *to achieve **minimum necessary standards**, taking into account economic, environmental, health and safety concerns* (COAG June 2004, p1).

ACCORD supports the following as good regulatory practice principles. Regulatory solutions should:

- be the minimum required to achieve the stated objectives;
- adopt a risk management approach to forming and administering regulation;
- minimize the impact on competition;
- be compatible with international standards and practices;
- cause no restriction to international trade;
- be developed in consultation with the groups most affected and be subject to regular review;
- be flexible, not prescriptive and be compatible with the business operating environment;
- standardize the exercise of bureaucratic discretion; and
- have a clear delineation of regulatory responsibilities and effective and transparent accountability mechanisms.

ACCORD provides the following comments in relation to issues raised in the PC's Issues Paper.

Past reviews

The Small Business Deregulation Task Force (Task Force) in its Report to the Australian Government, *Time for Business* (November 1996) recognised the burden of Australian Standards used inappropriately as regulatory standards and recommended that where regulatory standards are used, they should meet three basic principles:

- ultimate responsibility of a regulatory standard must rest with the regulatory agency, not the standards writer;
- regulatory standards should represent the minimum effective solution to the problem being addressed; and
- regulatory standards should be written for the purpose.

The Task Force also recommended:

> *That all future reviews under the Competition Principles Agreement and as a result of the five year sunset clause in the Legislative Instruments Bill, specifically addresses regulatory standards* (Recommendation 58).

As far as ACCORD is aware, this recommendation has never been implemented due to a number of reasons including the delay and amendments in the final passage to the Legislative Instruments Bill. ACCORD would suggest that this recommendation of the Task Force's is still relevant and should be revisited.

The Task Force also recommended to the Australian Government:

> *That in negotiating a new MOU with Standards Australia, the Commonwealth Government seek the development of good drafting principles for both voluntary standards and regulatory standards by 1 July 1997, and that the accreditation process being developed by Standards Australia include a requirement that standards writing agencies meet drafting guidelines*. (Recommendation 60).

As far as ACCORD is aware, the recommendation to apply good drafting principles to voluntary standards was never adopted. The Issues Paper asks if criteria should be developed to determine when a voluntary standard is under consideration. While the Issues Paper correctly identifies that voluntary standards are a matter for industry, ACCORD would nevertheless argue that industry may not always be aware of good regulatory principles and the need to strive for minimum effective outcomes. Significant benefits can be derived from impact analysis, hence ACCORD would support more guidance to industry on how this should be done. ACCORD recommends that the COAG Principles be used by industry as the standard for impact analysis for all voluntary standards.

The flow chart in Figure 2 *The Standards development process of Standards Australia* indicates cost benefit analysis is undertaken on the need for the standard after the request for a standard and public comment has been sought. ACCORD believes that the cost benefit analysis should be undertaken before public comment is sought as the information gathered during the analysis would inform those seeking to comment on the need for the standard. Given that voluntary standards may be accepted in courts of law as having evidentiary status, it is important that the same rigour is applied to voluntary as well as mandatory standards.

ACCORD would also suggest cost benefit analysis be undertaken for revisions as they may impose significant costs for no additional benefit.

Proliferation in the use of regulatory standards

ACCORD is concerned with the proliferation of standards as regulatory tools in Australia. Currently there are estimated to be around 6800 standards of which approximately 2400 have become mandatory under government legislation. This number appears excessive. These mandatory standards may or may not apply in each or all of the jurisdictions. This is confusing and does not facilitate national consistency.

In response to the Task Force's concerns about the inadequate review and scrutiny of quasi-regulation in Australia, the Australian Government established an Inter-departmental committee to inquire into quasi-regulation. The Inter-departmental committee considered a range of issues including the use of Australian Standards as regulatory standards. Its Report, *Grey Letter Law* (December 1997) made a number of recommendations regarding the use of voluntary standards as quasi-regulation.

ACCORD understands that the recommendations contained in *Grey Letter Law* were endorsed at that time, by all jurisdictions as the way forward. In addition, the COAG Principles make recommendations regarding the referencing of standards. However, the proliferation of standards as regulatory tools continues and is still a major concern to industry.

ACCORD recommends that there is merit in the PC revisiting the recommendations contained in *Grey Letter Law* as a way of minimising the adverse and unintended consequences arising from the use of Australian Standards as quasi-regulatory tools. ACCORD recommends that all voluntary standards are subject to formal processes for regulatory impact analysis.

As part of the regulatory review processes currently being undertaken by a number of jurisdictions, ACCORD members have raised their concerns regarding the referencing of Australian Standards as an additional regulatory burden. For example, under the *National Standard for Storage and Handling of Workplace Dangerous Goods (NOHSC1015:2001)* all jurisdictions have picked up *AS 1940:1993 Storage and Handling of flammable and combustible liquids* for the storage and handling of dangerous goods and combustible liquids.

ACCORD members are concerned that AS 1940:1993 was picked up and referenced without adequate consultation and industry input resulting in unnecessary regulatory burden. Formal industry consultation would have improved the standard and would have reflected the business operating environment of the affected parties leading to better compliance and improved public health and safety outcomes. Industry is also concerned about the ongoing cost of, and access to, the standard and others referenced documents contained in the National Standard.

Grey-Letter Law identified problems with the referencing of standards as a regulatory practice and stated that:

> *The Committee recommends that departments and regulatory agencies, when using standards, should:*
>
> - *Wherever possible, reference in regulation only those parts of a voluntary standard that are essential to satisfy regulatory objectives;*
> - *Ensure that all future reviews of Commonwealth legislation and regulation include an explicit assessment of their suitability and impact of all standards referenced therein, and justify their retention if they remain as referenced standards;*
> - *Ensure that, where appropriate, Australian Standards are used as 'deemed to comply' provisions rather than as mandatory requirements; and*
> - *Investigate with Standards Australia, mechanisms to provide business with low cost access to Australian Standards referenced in legislation.*

If the approach recommended by the Inter-departmental committee on quasi-regulation had been adopted in relation to AS1940, then industry's concerns about the standard failing to meet good regulatory practice could have been avoided.

The burden of unique Australian requirements

ACCORD's members are primarily regulated by a number of key Australian Government regulatory agencies and a common complaint is the high number of regulatory requirements including the referencing of Australian Standards which are unique to Australia. Many products, particularly in the cosmetic, personal care and devices area are imported from Europe, the USA, the UK, Japan and Canada and have already been assessed for public health and safety outcomes. Australian regulatory agencies still require additional controls, many of which do not contribute to safety or improved consumer knowledge but add costs and barriers to the importation of innovative products into the Australian marketplace. Two such standards are:

- AS/NZS 2869:1998 Tampons Menstrual Tampon; and
- AS/NZS 2604:1998 Sunscreen products – Evaluation and classification.

While there are good historical reasons why these originally developed as Australian Standards in that they were the first such standards anywhere in the world, comparable standards have since been developed by regulatory agencies in the European Union (EU), Canada and the USA.

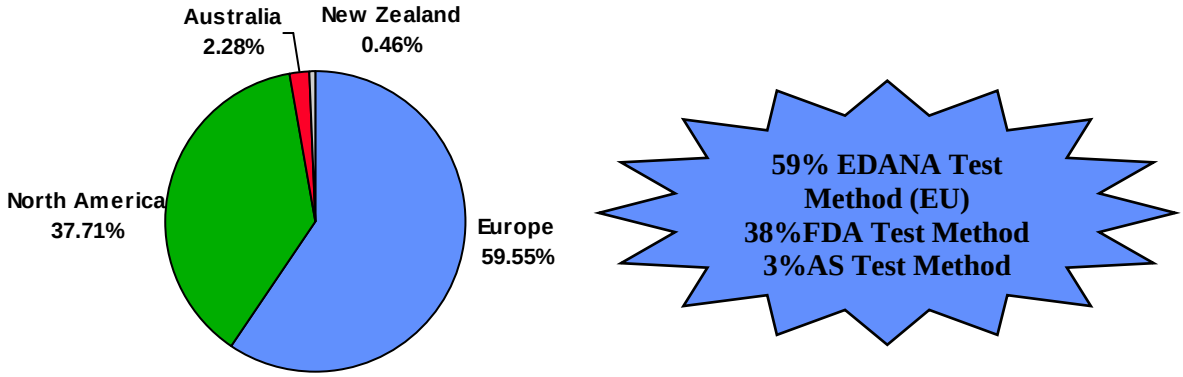
Case Study 1

Australian industry is seeking to have the Therapeutic Goods Administration (TGA) accept international harmonisation with tampon testing methodologies and has expressed its concern at the lack of progress in this area.

Industry has undertaken a comparison of absorbency classifications between the comparable test methodologies used in the EU and USA and AS/NZS 2869:1998 and we do not believe that there is any justification for the continuation of unique Australian requirement of AS/NZS 2869:1998 on public health and safety grounds.

The tampon industry is global characterised by companies marketing branded products across international boundaries. There are only a few local Australian manufacturers with the majority of tampons imported from the EU or USA. Due to the unique AS/NZS 2869 requirement for absorbency, overseas tampon manufacturers need to produce unique tampon products for the Australian market resulting in a trade barrier, delays in the introduction of new technology and a higher product cost for consumers. Australian consumers represent less than 3% of the global market for tampons yet the TGA requires unique Australian requirements. Not even New Zealand places these restrictions on the tampon industry.

Female Population – Regulated Tampon absorbency



97% FDA/EDANA Test Method

Source US Census Bureau, Population Division International Programs Centre www.census.gov 11/04/06

Initially, ACCORD members through the Standards Australia Committee for tampons, sought to review the absorbency test methodology with a view to changing the AS/NZS 2869:1998 to incorporate features of the EDANA test methodology which is used in the EU. However, industry agrees that after 2 years of trying, this would be a long process and could still result in unique Australian requirements and reduce the competitiveness of importers and local manufacturers alike. Industry then agreed to approach the regulator to seek its agreement to harmonise with international practices and recognise comparable testing methodologies, recognised and accepted throughout the EU and the USA.

ACCORD members are at a loss to understand the need to maintain this unique Australian requirement particularly in light of the fact that Australian consumers represent less than 3% of the global market for tampons and there has been no demonstrated market failure of these other standards.

In relation to sunscreens, AS/NZS 2604:1998 does not recognise the methods and test results accepted and used in the EU or by the Food and Drug Administration (FDA) of the USA for Sun Protection Factor (SPF), Broad Spectrum and Water-Resistance testing. ACCORD is working at the international level to get industry agreement for the development of an international standard to harmonise testing methodologies for improved efficacy. This will result in an improved product for the consumer with enhanced and standardized consumer information as well as public health and safety outcomes.

ACCORD recommended to the Banks Review that where imported products already met the regulatory requirements of Australia's comparable trading partners then no further specific requirements should be applied. Australia is a net importer of finished consumer goods, it does not make sense to apply additional unique requirements to this class of low risk, fast moving consumer product.

Concerns with the operations of Standards Australia technical committees

As mentioned previously, ACCORD and its members sit on a number of Standards Australia Committees. The Issues Paper identifies the efficiency and effectiveness of the current standards setting process as an area of interest. ACCORD believes that the current practice of adopting and maintaining regulatory standards by Australian regulator agencies is neither efficient nor effective.

The tampon example clearly indicates that there are comparable international standards which could be adopted and would not present a public health and safety risk to the Australian consumer but could reduce costs to industry through removing a technical barrier to trade with flow on effects to the consumer.

From our experiences, ACCORD would argue that there needs to be an improvement in the entire governance and processes of the technical committee structure and operation. The standards setting process should not support individual or cartel business interests and promote anti-competitive behavior, conflicts of interest where there are commercial interests are to be avoided and standards should not be developed as technical barriers to trade. While these are already agreed to as basic principles by Standards Australia, the practice nevertheless continues.

Australian Government MOU with NATA

ACCORD is interested to know why the Australian Government's MOU with NATA excludes therapeutic goods from it accreditation process. There may have been some historical reason for this during the early years of the implementation of the Therapeutic Good Administration Act and the establishment of the regulatory agency, but given the global marketplace for therapeutic goods there seems little apparent reason for the TGA to maintain this monopoly. In light of the concerns raised by industry during the Banks Review into regulatory reform and the recommendation arising from the review regarding certification bodies (Recommendation 4.19), the PC is encouraged to shed some light on this continuing exclusive practice.

Conclusion

In conclusion, ACCORD recommends the following:

1. The PC should revisit the work of earlier reviews undertaken by the Small Business De-regulation Task Force and the Interdepartmental committee on quasi-regulation in relation to their work and recommendation on Standards Australia with a view to recommending the adoption of the relevant recommendations as listed in Attachment 2.

2. The PC should recommend that the same level of analytical rigour in terms of impact assessment and cost benefit analysis should apply to voluntary as well as to mandatory standards.

3. Impact assessment for standards should be undertaken prior to the public comment phase and should be included for revisions as well as new standards.

Once again, I thank you for allowing ACCORD to provide comments on this important issue. Should you have any queries in relation to ACCORD's views on this matter, please do not hesitate to contact me on 02 9281 2322.

Yours sincerely

Authorised for electronic transmission

Dusanka Sabic
Regulatory Reform Strategist

23 May 2006

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Members

ATTACHMENT 1

Consumer, Cosmetic and Personal Care:

Amway of Australia Pty Ltd
AVON Products Pty Limited
Baylor Limited
Beiersdorf Australia Ltd
Chanel Australia
Clorox Australia Pty Ltd
Colgate-Palmolive Pty Ltd
Combe Incorporated (Australia)
Coty Australia Pty Limited
Creative Brands Pty Ltd
Dermologica Pty Ltd
Estée Lauder Australia
Frostbland Pty Ltd
GlaxoSmithKline Consumer Healthcare
Helios Health & Beauty Pty Ltd
Innoxa Pty Ltd
Johnson & Johnson Pacific
Kao (Australia) Marketing Pty Ltd
Kimberly Clark Australia
La Biosthetique Australia
La Prairie Group
L'Oreal Australia Pty Ltd
LVMH Perfumes and Cosmetics
Procter & Gamble Australia Pty Ltd
PZ Cussons Pty Ltd
Reckitt Benckiser
Revlon Australia
Scental Pacific Pty Ltd
Steric Pty Ltd
Tigi Australia Pty Ltd
The Heat Group Pty Ltd
Trimex Pty Ltd
Unilever Australasia

Hygiene and Specialty Products

Advance Chemicals Pty Ltd
Albright & Wilson (Aust) Ltd
Applied Australia Pty Ltd
Auto Klene Solutions
Callington Haven Pty Ltd
Campbell Brothers Limited
Castle Chemicals Pty Ltd
Castrol Australia Pty Ltd
Chemetall (Australasia) Pty Ltd
Ciba Specialty Chemicals
Clariant (Australia) Pty Ltd
Cleveland Chemical Co Pty Ltd
Deb Australia Pty Ltd
Dominant (Australia) Pty Ltd
Ecolab Pty Limited
G S B Chemical Co Pty Ltd
Henkel Australia Pty Limited
Huntsman Corporation Australia Pty Ltd
Jalco Group Pty Limited
Jasol
Lab 6 Pty Ltd
Milestone Chemicals Pty Ltd
Novozymes Australia Pty Ltd
Northern Chemicals Pty Ltd
Nowra Chemical Manufacturers Pty Ltd
Peerless JAL
Recochem Inc
Rohm and Haas Australia Pty Ltd
Selkirk Laboratories Pty Ltd
E Sime & Company Australia Pty Ltd
Solvay Interox Pty Ltd
Sonitron Australasia Pty Ltd
Sopura Australia Pty Ltd
Tasman Chemicals Pty Ltd
Thor Specialties Pty Limited
True Blue Chemicals Pty Ltd
Whiteley Corporation Pty Ltd

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Associate Members

Specialist Laboratories and Testing

ams Laboratories

Dermatest Pty Ltd

Silliker Microtech Laboratories Pty Ltd

Equipment and Packaging Suppliers

DSL Packaging

Hydro Nova Controls

Visypak Industrial Packaging

Business Management and Marketing

E-Three & Associates Pty Ltd

Legal and Business Management

Middletons Lawyers

Graphic Design and Creative

Tonic Creative

Regulatory and Technical Consultants

Cintox Pty Ltd

Competitive Advantage

Engel Hellyer & Partners Pty Ltd

Robert Forbes & Associates

Sue Akeroyd & Associates

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Small Business Deregulation Task Force Report, *Time for Business* – recommendations regarding Standards Australia

Recommendation 58

That all future reviews under the Competition Principles Agreement and as a result of the five year sunset clause in the Legislative Instruments Bill, specifically addresses regulatory standards (Recommendation 58).

Recommendation 59

That governments at all levels agree to not use voluntary standards for regulatory purposes from 1 July 1997 unless it can be demonstrated that the standard represents a minimum effective solution to the problem being addressed.

Recommendation 60

That in negotiating a new MOU with Standards Australia, the Commonwealth Government seek the development of good drafting principles for both voluntary standards and regulatory standards by 1 July 1997, and that the accreditation process being developed by Standards Australia include a requirement that standards writing agencies meet drafting guidelines.

Report of the Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey Letter Law*, December 1997

Recommendation 1

The Committee recommends that departments and regulatory agencies, when using standards, should:

- Wherever possible, reference in regulation only those parts of a voluntary standard that are essential to satisfy regulatory objectives;
- Ensure that all future reviews of Commonwealth legislation and regulation include an explicit assessment of their suitability and impact of all standards referenced therein, and justify their retention if they remain as referenced standards;
- Ensure that, where appropriate, Australian Standards are used as 'deemed to comply' provisions rather than as mandatory requirements; and
- Investigate with Standards Australia, mechanisms to provide business with low *cost access to Australian Standards referenced in legislation.*

Recommendation 2

The committee recommends that action taken to counter the perception held by some elements of small business that Standards Australia is a government body and that there is an expectation

that all standards must be complied with. The appropriate form of action should be based on advice of the quasi--regulation Working Group of Commonwealth, State and Territory officials.

Recommendation 3

The Committee recommends that Commonwealth Government regulators establish mechanisms to help ensure that existing and new standards developed by private organisations are consistent with mandatory government regulations. One way of doing this would be for regulatory bodies to establish closer working relationships with Standards Australia through, for example, negotiating Memoranda of Understanding which establish the relative roles of each party in relation to the development of standards.