

Sunscreen (Product Safety Standard) Bill

Member's Bill

As reported from the Health Committee

Commentary

Recommendation

The Health Committee has examined the Sunscreen (Product Safety Standard) Bill and recommends that it be passed. We recommend all amendments unanimously.

About the bill as introduced

The Sunscreen (Product Safety Standard) Bill is a Member's bill in the name of Todd Muller MP. The bill aims to improve the accuracy of claims about the sun protection factor (SPF) properties of sunscreen products. The bill, as introduced, would require the Minister of Commerce and Consumer Affairs to recommend that mandatory regulations be set to prescribe a safety standard for sunscreen products. The regulations would be set under section 29 of the Fair Trading Act 1986.

New Zealand and Australia have a shared Sunscreen Standard (AS/NZS 2604:2012) that specifies testing methods for sunscreens, and labelling requirements. In Australia, the standard is mandatory, whereas in New Zealand compliance with the standard is voluntary.

The bill would require the standard to be NZS 2604:2012 or any New Zealand Standard that was substituted for that standard. This would enable the product safety standard to be kept up to date if the AS/NZS Standard was updated.

The Minister would need to recommend the regulation as soon as practicable after the legislation commenced. However, this could be no later than 6 months after its commencement.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency, as introduced, with principles of legislative quality. We have no issues regarding the legislation's design to bring to the attention of the House.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Updated Australian and New Zealand Standard

Clause 5(2) of the bill provides that the product safety standard must be the New Zealand Standard for sunscreen (NZS 2604:2012) or any New Zealand Standard substituted for that standard. We note that AS/NZS 2604:2012 was recently updated and has been replaced by the revised AS/NZS 2604:2021. We recommend that the bill be amended to replace references to “NZS 2604:2012” with “AS/NZS 2604:2021”. Our proposed amendment would also reflect that the standard is a joint Australia and New Zealand standard.

Definition of “sunscreen product”

Clause 3 of the bill provides a definition of “sunscreen product”. It is defined as “any preparation (for example, creams, oils, gels, or sprays) intended to be placed in contact with human skin with a view exclusively or mainly to protect it from UV radiation by absorbing, scattering, or reflecting radiation (for example, claiming a Sun Protection Factor (SPF)).”

The definition as introduced focuses on the intended purpose of the sunscreen. To avoid confusion, several submitters suggested that the focus should instead be on whether a product makes a claim about sun protection, irrespective of its intended purpose.

We note that in Australia sunscreens must comply with requirements specified in the AS/NZS Standard. We recommend that clause 3 be amended to align with this approach. Our proposed new definition would mean that the legislation applied to sunscreens that were represented as being primarily to protect from ultraviolet (UV) radiation. It would also apply to skin care products labelled with an SPF greater than 15 and insect repellents labelled with an SPF of 4 or more.

Mandating a product safety standard under the Fair Trading Act

About existing product safety standards

Section 29(1) of the Fair Trading Act provides that the Minister can recommend the making of a product safety standard in regulations. The standards are for the purpose of preventing or reducing the risk of injury to any person and relate to all or any of the following:

- the performance, composition, contents, manufacture, processing, design, construction, finish or packaging of the goods
- the testing of the goods during or after manufacture or processing
- the form and content of markings, warnings, or instructions to accompany the goods.

At present, product safety standards exist for pedal bicycles, baby walkers, children's nightwear and toys, household cots, and cigarette lighters.

The Commerce Commission enforces product safety standards. Section 40 of the Fair Trading Act specifies that contravening the standards is an offence, with penalties of up to \$200,000 for an individual or \$600,000 for a body corporate.

We received advice that the empowering provisions of the Fair Trading Act do not appear to allow a product safety standard to be made for the purpose of mandating the AS/NZS Standard for sunscreen. This advice is based on an interpretation that section 29(1) is designed to prevent or minimise the risk of injury by addressing potential harm that is inherent in a product. We note that a product safety standard should seek to prevent or minimise the risk of injury to a person that could result from something intrinsic to the product.

One example of a product safety standard is AS/NZS 1249:2014, a joint Australian and New Zealand standard for children's nightwear and limited daywear. It aims to address hazards or potential harm to children resulting from features that are intrinsic to nightwear, including the highly flammable nature of the fabric. The standard also aims to minimise the risk of the hazard being realised and children suffering burns. It does so by specifying requirements that must be met.

Conversely, the AS/NZS Standard for sunscreen does not seek to prevent or minimise the risk of injury resulting from the intrinsic properties of the sunscreen. Instead, the standard sets out how products may be labelled in terms of their protective factors so that the degree to which a sunscreen product offers protections from the adverse effects of UV radiation is disclosed to consumers.

To address these matters and provide legal clarity, we consider that compliance with the AS/NZS 2604:2021 Standard should be mandated in the primary legislation. Accordingly, we recommend replacing clause 5 of the bill. Our proposed new clause would specify that AS/NZS 2604:2021 would be deemed to be a product safety standard for sunscreen products. It would need to be treated and enforced as if it was made under section 29 of the Fair Trading Act.

Enabling future revisions to the Australia and New Zealand Standard

We recommend inserting new clause 5(3) to allow future revisions to AS/NZS 2604:2021 to be incorporated into the product safety standard. Our proposed amendment would enable regulations to be made for a replacement standard under section 29 of the Fair Trading Act. This would apply if AS/NZS 2604:2021 was added to, varied, or replaced. We consider that this approach would avoid having to amend the primary legislation, while also maintaining Ministerial oversight of any revisions.

We sought feedback about this amendment from the Regulations Review Committee, which had no concerns about our proposed approach. However, it noted a general concern about New Zealand Standards where they are incorporated by reference into legislation. The Regulations Review Committee pointed out that a person must pur-

chase a copy of the New Zealand Standards to access them. It considers this to be an important issue of accessibility because a person must pay to read a document that forms part of the law.

We were advised that the cost of AS/NZS 2604:2021 is \$107.10. We believe that only people who would have to comply with the standard, such as sunscreen manufacturers, would actually need to access it. We are therefore comfortable with its inclusion in the legislation. By clarifying in the bill what sunscreen products the standard will apply to, sunscreen suppliers will know upfront whether their products need to comply and therefore whether they will need to access the standard.

Commencement of the legislation

Clause 2 of the bill provides that the legislation would commence on the date that it received Royal assent. Several submitters suggested that transition periods would be needed before the standard, and any future revisions, came into force. They proposed time frames of 18 months and three years, to allow time for existing stock in trade to sell, and allow for the typical shelf-life of a sunscreen product.

Our proposed amendments to clause 5 would provide for the product safety standard to be made in the primary legislation rather than through a regulation-making process. We accept that it could therefore be impractical for manufacturers and suppliers to comply with the requirements immediately after the legislation was enacted.

We recommend that the legislation should come into force six months after it is enacted. We recommend amending clause 2 to this effect.

Commencement of stock-in-trade provisions

We discussed whether the legislation should include a provision to allow existing stock in trade to be sold. We received advice that the industry would need time to adjust their products. We were told that the AS/NZS Standard contains some very specific labelling requirements, for example about directions for use. As a result, a reasonable amount of work could be required for some suppliers to ensure that their labels comply with the standard.

We considered possible time frames for stock-in-trade provisions, ranging from 6 to 12 months after the legislation commenced (12 to 18 months after Royal assent). We had some concern that a 12-month time frame could be too lenient given that suppliers should not be selling products that make inaccurate or misleading claims.

We received advice that reducing or removing a stock-in-trade provision could adversely affect consumers and suppliers, which would be disproportionate to the harm being prevented. We note that the sunscreens that could continue to be sold are already subject to regulation—under the Cosmetic Products Group Standard, which regulates ingredients, and the Fair Trading Act, which prohibits false and misleading representations about products. The availability of sunscreen products could be affected if suppliers were unable to meet the transition period for the stock-in-trade provisions. This situation could be exacerbated if the legislation came into force during a period of higher demand.

Further, we understand that most sunscreen suppliers in New Zealand claim to comply with the AS/NZS Standard. On balance, we consider that existing stock in trade should be allowed to be supplied for up to 18 months after the legislation was enacted (12 months after the legislation commenced). To enable this, we recommend inserting clause 3A, which would insert Schedule 1.

Despite this recommendation, we still expect manufacturers to comply with the standard as quickly as possible to ensure that New Zealanders are protected.

We understand that the Ministry of Business, Innovation and Employment and the Commerce Commission would usually communicate with the sector when new legislation is introduced. We encourage them to consider a communications approach that would support manufacturers and suppliers to comply with the standard sooner.

Repeal of the legislation

Clause 5(3) of the bill as introduced provides that the Minister would need to recommend the making of regulations for a product safety standard no later than 6 months after the legislation commenced. The intention is that once this is done, the legislation would be repealed. As introduced, clause 6 specifies that the Act would be repealed 6 months after it commenced.

Given that our proposed amendments would deem the AS/NZS Standard as a product safety standard, we recommend deleting clause 6. This would ensure that the legislation would remain until a comprehensive regulatory regime for sunscreen was introduced.

We understand that the Ministry of Health is developing the Therapeutic Products Bill, which would repeal and replace the Medicines Act 1981. The bill aims to establish a comprehensive, proportionate, and risk-based scheme for therapeutic products that ensures their safety, efficacy, and quality. We were advised that the definition of “therapeutic purpose” in the draft bill covers products that prevent a disease, ailment, defect, or injury. We note that sunscreens would meet this definition because their main purpose is to prevent sunburn and consequential skin cancers.

We received advice that the Therapeutic Products Bill is expected to be introduced to Parliament in this term. We consider that the Therapeutic Products Bill, if enacted, could repeal and replace this legislation.

We note that the Sunscreen (Product Safety Standard) Bill does not look to exhaustively address all issues with the current regulatory settings for sunscreen. We acknowledge that there are gaps that could be addressed by a comprehensive regulatory solution. We understand the intent of the Sunscreen (Product Safety Standard) Bill is twofold:

- to improve consumer information about sunscreen products, by mandating compliance with disclosure requirements
- to increase consumer confidence in the accuracy of claims made about the skin protection properties of sunscreens, by mandating compliance with a single testing standard.

Appendix

Committee process

The Sunscreen (Product Safety Standard) Bill was referred to the committee on 7 April 2021. The closing date for submissions was 26 May 2021. We received and considered 36 submissions from interested groups and individuals. We heard oral evidence from seven submitters at hearings in Wellington and by videoconference.

We received advice on the bill from the Ministry of Business, Innovation and Employment and the Ministry of Health. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Dr Liz Craig (Chairperson)

Chris Bishop

Dr Elizabeth Kerekere

Dr Anae Neru Leavasa

Dr Tracey McLellan

Debbie Ngarewa-Packer

Sarah Pallett

Dr Gaurav Sharma

Penny Simmonds

Tangi Utikere

Brooke van Velden

Simon Watts

Todd Muller also took part in the consideration of this item of business.

Sunscreen (Product Safety Standard) Bill

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Todd Muller

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Sunscreen (Product Safety Standard) Act **2021**.

2 Commencement

This Act comes into force ~~on the day~~ 6 months after the date on which it receives the Royal assent. 5

3 Interpretation

In this Act,—

Act means the Fair Trading Act 1986

AS/NZS 2604:2021 means Australian/New Zealand Standard AS/NZS 2604:2021 Sunscreen products—Evaluation and classification 10

labelled SPF means a sun protection factor indicated on a sunscreen product container

~~sunscreen product~~ means any preparation (for example, creams, oils, gels, or sprays) intended to be placed in contact with human skin with a view exclusively or mainly to protect it from UV radiation by absorbing, scattering, or reflecting radiation (for example, claiming a Sun Protection Factor (SPF)).

sunscreen product means a product that both—

(a) contains, or is represented as containing, any component able to absorb, reflect, or scatter ultraviolet rays and that is intended to be on the surface of human skin with the purpose of protecting against reddening of the skin caused by ultraviolet radiation and other ultraviolet-induced damage; and

(b) is 1 or more of the following:

(i) a product that is represented as being primarily to protect the skin from ultraviolet radiation;

(ii) an insect repellent with a labelled SPF of 4 or more;

(iii) a skin care (within the meaning of AS/NZS 2604:2021) with a labelled SPF greater than 15 (other than a product intended for application to the lips, or a product that is represented primarily as a tinted base or foundation).

3A Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

4 Act binds the Crown

This Act binds the Crown.

5 New product safety standard: sunscreen

(1) ~~The Minister of Commerce and Consumer Affairs must recommend the making of regulations under section 29 of the Fair Trading Act 1986 prescribing a product safety standard for sunscreen products.~~

(2) ~~The product safety standard must be the New Zealand Standard for sunscreen (NZS 2604:2012) or any New Zealand Standard substituted for that standard.~~

(3) ~~The Minister must make the recommendation as soon as practicable after the commencement of this Act, but no later than 6 months after its commencement.~~

(4) ~~The requirements of this section continue to apply even if the deadline in **subsection (3)** has passed or this section has been repealed by **section 6**.~~

(5) ~~To avoid doubt,—~~

(a) ~~the Minister may satisfy this section by recommending regulations that amend other regulations; and~~

- (b) ~~this section does not limit section 29 of the Fair Trading Act 1986, so that the regulations recommended by the Minister to satisfy this section—~~
- (i) ~~may prescribe a product safety information standard that includes other products; and~~ 5
 - (ii) ~~may be amended or repealed later.~~

5 Product safety standard for sunscreen products

- (1) AS/NZS 2604:2021 is a product safety standard for sunscreen products for the purpose of section 29 of the Act.
- (2) The product safety standard must be treated, and may be enforced, as if the standard had been prescribed under section 29 of the Act. 10
- (3) Regulations may also be made in respect of sunscreen products under section 29 of the Act if there is any addition to, or variation or replacement of, AS/NZS 2604:2021.

6 Repeal of this Act 15

~~This Act is repealed 6 months after its commencement.~~

Schedule 1
Transitional, savings, and related provisions

s 3A

Part 1
Provision relating to this Act as enacted

5

1 **Existing products manufactured or imported before Royal assent**

In the 12 months after the commencement of this Act, AS/NZS 2604:2021 is not a product safety standard for the purpose of section 29 of the Act for any sunscreen product that was manufactured in, or imported into, New Zealand before the date on which this Act receives the Royal assent.

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Legislative history

11 March 2021
7 April 2021

Introduction (Bill 11–1)
First reading and referral to Health Committee