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23 July 2015

Senate Standing Committees on Rural and Regional Affairs and Transport
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sirs,

RE: Motorcycle Helmets, Road Rules & Consumer Law

We write in respect of road rules.

The attached correspondence to the National Transport Commission and the Standing Committee on Transport and Infrastructure set out the details of problems with construction and enforcement of Road Rule 270 for motorcycle helmets.

Disengagement of the public from Road Rules arises from their failure to be a guide to safe driving. Road Rules are largely a catalogue of offences. In many cases, the objective or intent of the Road Rule is unclear, requiring uncertain and often contradictory interpretation. In some cases, Road Rules are simply ignored by road users and enforcement agencies. Yet some rules are pursued with robotic assiduity.

For example, it is an offence under Road Rule 245 for a bicycle rider failing to remain sitting during an uphill climb, rather than standing on the pedals to maximise power. This may surprise our Prime Minister.

Road Rule 271 has a similar requirement for motorcycle riders. Yet every rider training organisation, as well as Police, encourages riders to stand on the footpegs when negotiating rough, sandy or corrugated roads. Not doing so could result in serious injury or death. Unlike bicycle riders, motorcycle riders are issued infringement notices for this “offence”. Attempts to have the wording changed from “remain seated” to “remain astride” have vanished into a black hole.

Road Rule 217 for fog lamps is not applied in all jurisdictions. Some states have written their own version, such as NSW RR [218-1](#). Yet these appear to not be enforced and as a result, glare is common on winding and undulating roads. The message delivered to road users is that allowing glare is acceptable as long as the vehicle is below the speed limit.

Road Rules 148 and 149 provide dangerous alternate interpretations of a lane reduction situation on a country road. Road Rule 148 allows assertion of right of way of the right hand lane, while RR 149 requires a polite merge. Confusion over meaning of the “guide line” sees vehicles stopping to give way at the high speed end of a motorway acceleration on-ramp. Slow caravans become parked at the unlit lane merge at the end of a rural overtaking section or come into lane-merge conflict with faster vehicles asserting right of way.

Road Rule 270 is another example. No two versions of this rule are in agreement as to what is an “approved” helmet for use. The only consistency is that none of the definitions of an approved helmet for use is consistent with a helmet allowable for sale under Australian Consumer Law.

It is impossible for a helmet to remain in compliance with requirements of road rules once it is put into use (see attached submission).

That is, every motorcycle helmet in use in Australia breaks either or both Commonwealth law or a State law. None are completely legal. Yet it is only consumers who are being penalised for breaches of law for a non-compliant helmet.

Road Rule 270 has been modified multiple times by jurisdictions since 2007. The only result is that the requirements for each State are drifting further apart without any of the fundamental issues being addressed. Efforts to resolve this situation by the Australian Motorcycle Council (AMC) have continued since 2010 without any progress.

A current review of the mandatory helmet standard by the ACCC is likely to exacerbate the situation. The ACCC's preferred Option is to allow Road Authorities to determine what is an allowable helmet. It appears to be allowing the various States to modify their road rules to include product safety standards in addition to AS/NZS 1698 in anticipation of this move. Queensland has added helmets compliant to ECE 22.05 to its definition of an approved helmet for use. New South Wales is moving towards accepting ECE 22.05. Helmets in accord with ECE 22-05 are not legal for sale in Australia under the ACL as it stands. The two States have different requirements. In Queensland the European compliance and certification regime is considered sufficient. However, we have reason to believe that in NSW, helmets will have to be re-certified by a JAS-ANZ accredited Conformity Assessment Body (CAB). This requirement is not supported by evidence that overseas CABs are deficient in any way. In fact, the only unsafe helmets recalled by the ACCC in recent years were certified to be compliant by JAS/ANZ accredited CABs.

This situation impacts consumers. An ECE 22.05 compliant helmet that is approved for use in Queensland may not be used in New South Wales or any other State. If Road Authorities are all allowed to make their own decisions regarding an approved helmet we may well end with a situation where a consumer has to purchase a separate helmet for each State and Territory. This is ludicrous, confusing, expensive for consumers and is at variance with the Government's efforts to create a National Seamless Economy.

The only impact of the proposed New South Wales requirement is that it continues a closed market for a select few conformity assessment bodies and their client importers. It does not improve safety to consumers. European conformance requirements are significantly more stringent than those of Australia.

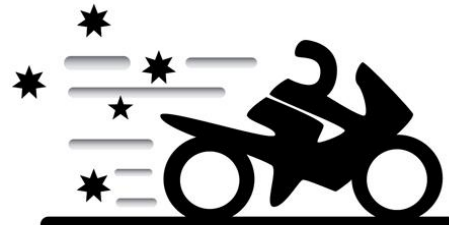
Generally, it appears that Road Rules are not concerned with the safety of road users, but instead create a list of offences under which road users can be penalised. Nor do individual Rules take into consideration their impact on other laws and regulations, including other Road Rules.

We implore you to examine the role of Road Rules in road safety generally and in particular, the processes of modification of jurisdictional definitions for purposes of Road Rule 270.

Road Rules 266 and 256 have similar issues to Rule 270.

Yours faithfully,

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Helmets Committee Chairman
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23 July 2015

National Transport Commission
Level 15, 628 Bourke Street
Melbourne, 3000 Victoria

Dear Sirs,

RE: Road Rule 270

We write in respect of National Road Rule 270 and its lack of uniformity across all jurisdictions as a result of the prime definition being subject to “...*another law of this jurisdiction*”. Further, that the present disparate jurisdictional definitions are in conflict with the Australian Consumer law 2010 for sale of helmets in all jurisdictions.

The present situation is a farce. Road Rule 270, as implemented by States and Territories, is incapable of compliance. The only persons who have been penalised for inconsistencies in helmet road rules have been consumers. This group has been provided no consultative input to the development of RR 270.

Offences for breaches of Road Rule 270 attract significant fines and demerit points. Due to poor construction of Road Rule 270, a rider wearing a safe helmet is in breach of Road Rule 270 and may be issued an Infringement Notice to the effect that they were not wearing a helmet at all.

Jurisdictional definitions of “*an approved motor bike helmet*” have never been subject to any form of COAG “Better Regulation” processes, nor had those principles applied to their amendment.

The result appears as regulatory protection for certain commercial parties and convenience for isolated administrators in the jurisdictions. Motorcycle helmets have previously been the subject of two Parliamentary Inquiries in respect of reliability of conformity assessment.

In any case, the plethora of definitions has resulted in inconsistency and impossibility of compliance by road users with Road Rule 270.

All jurisdictional definitions are in conflict with Australian Consumer Law.

All jurisdictional definitions continue to create conflict with the 2008 COAG Agreement on a National Seamless Economy, rendering it meaningless for road users and bringing the entire body of Road Rules into disregard.

We therefore seek:-

- uniformity of the definition for “*an approved motor bike helmet*” across all jurisdictions by including the definition within Road Rule 270.
- consistency of the definition within Road Rule 270 with the *Australian Consumer Law 2011* governing market supply of motor bike helmets.
- immediate implementation of uniform requirements for motor bike helmets in use across all jurisdictions.

This submission will now discuss some of the issues with the current situation. It will then provide background information on worldwide helmet standards and research. It will finish with some suggestions on how the current farcical situation can be addressed.

The Current Situation

Jurisdictional definitions of an “approved” motor bike helmet in all cases require “compliance with” a voluntary standard, not the standard mandated by the *Australian Consumer Law 2011* that determines whether a helmet is legal for sale. This creates an immediate conflict that will be discussed shortly.

A brief read of voluntary standard AS 1698-1988 or any of the four versions of the voluntary standard AS/NZS 1698:2006 shows two immediate problems of compliance in use. These are associated with Clause 8(g) and Clause 9 of these standards.

Firstly, Clause 8(g) requires the helmet be marked with “*The certification mark (where required by Statutory Authorities)*”. There is no definition for “the certification mark”, unless one erroneously assumes this means the certification mark of the company that issued the voluntary standard.

High level legal advice obtained by the Australian Motorcycle Council informs us that the “mark”, while undefined, cannot mean nothing and that the only way to put meaning to Clause 8(g) is to read the entire Clause, where the words in brackets provide clear guidance.

Thus, where the statutory authority of each jurisdiction requires “a mark”, then this is the “mark” required by Clause 8(g). In other words, compliance with the voluntary standard can be achieved only if the helmet bears the mark required by each jurisdiction. A veritable plethora of “marks” are required by various jurisdictions, including “marks” that simply no longer exist, or are meaningless in terms of signifying compliance.

Secondly, Clause 9 requires that each helmet “*shall be accompanied by a brochure or label*” that includes the necessary “*Instructions for Use and Care*”. In the marketplace, the Clause 9 brochure/label may be found loose in the packaging box or attached to the chin-strap by a rubber band or other tie. Users will commonly read instruction brochures then file them away and do not generally carry them around in order to “accompany” the helmet in use. Failure to have the Instructions for Use and Care “accompany” the helmet renders the helmet non-compliant with AS 1698-1988 or any of the multiple versions of AS/NZS 1698:2006.

A similar problem arises in respect of helmet visors. The motorcycle helmet visor standard AS 1609-1981 requires for compliance, at Clause 7.2 that “*durable labels shall be attached to eye protectors or their wrapping conforming with Clause 7.3*”. In the marketplace, visors are supplied with a protective film covering the entire surface of the visor to prevent scratching in transit. The Clause 7.3 information is generally printed on this covering film, along with the obvious instruction to remove the film before use. Once the film is removed, the visor becomes non-compliant with AS 1609-1981.

AS1609-1981 does NOT require a compliance mark to be affixed to a visor. In the marketplace, some visors are marked with a compliance mark, leading to confusion of some authorities as to the exact requirements. Police in some States have been issuing infringement notices to riders for using visors that do not bear a compliance mark.

It is impossible for a helmet that is being used by a rider to remain “in compliance with” the standard and therefore the requirements of Road Rule 270, as written, cannot be met.

As mentioned above, there is also a problem with the Standard referenced in Road Rule 270.

Under Australian Consumer Law 2011 (ACL) a helmet must comply with the mandatory standard, Commonwealth legislative instrument, *Consumer Protection Notice No. 9 of 1990* (CPN 9), before it can be made available for sale. CPN 9 refers to AS 1698-1988, with modifications.

Since publication in 2006, of a completely revised joint Australian and New Zealand voluntary standard for motorcycle helmets, all jurisdictions have independently modified their definitions for “*an approved motor bike helmet*” for purposes of Road Rule 270. The inclusion of voluntary standard AS/NZS1698:2006 in jurisdictional definitions was, in every case, in conflict with jurisdictional consumer law requirements for market supply of motorcycle helmets. In any case, referencing a voluntary standard in favour of the declared C’t standard required for market supply creates tension between laws for sale and use.

It is impossible to meet both Commonwealth and State laws.

At best either retailers, wholesalers and importers are breaking a Commonwealth law or consumers are breaking State laws. Yet it is only consumers who are being penalised even though, as demonstrated above, State laws cannot be met. This is despite helmets being tested and certified to a standard other than that required by ACL.

It is the view of the AMC that demonstrable compliance with a required helmet standard is essential for point of sale and that this is the area of responsibility of the ACCC and jurisdictional Departments of Fair Trading or Consumer Affairs. This is not the proper role of road authorities and leads to confusion and conflict at law.

The majority of jurisdictions have also failed to address the subject of compliance markings in their definitions since the 2003 sale of the commercial certification division of Standards Australia into the ASX listed company SAI Global Ltd. As part of this sale, Trademarks of Standards Australia were also sold into the private hands of SAI Global Ltd.

Failure to alter jurisdictional definitions of an “*approved motor bike helmet*” through reference to Trademarks or stickers once owned by Standards Australia has provided powerful market advantage to one Conformity Assessment Body in the newly competitive commercial market for certification services since 2003. New entrants to the market for certification services have struggled for recognition due to jurisdictional definitions. Following the 5 February 2010 changes to the NSW definition of “an approved motor bike helmet”, three (3) Conformity Assessment Bodies have been ejected from the marketplace, including the British Standards Institute.

In every case, changes to jurisdictional definitions have failed to follow any COAG principles for “Better Regulation”. No public consultation has taken place at all, nor has any evidence for a need for change been presented.

As a consequence, changes to jurisdictional definitions are now subject to accusations of improper process, lack of transparency, misleading and/or speculative advice, or lack of a rigorous process free of commercial influence. This reflects badly on all jurisdictions as well as upon the process of making Road Rules generally. Road Rules have been altered to accommodate the commercial practice of ignoring the C’t mandatory standard.

Further to the above, the AMC has doubts as to Standards compliance of a number of helmets in the marketplace and raised these doubts with the Minister for Small Business in March this year. The ACCC is currently investigating the subject matter of our allegation.

The single most important quality of a helmet made in compliance with an adequate standard is that it correctly fit the head of the end user. Helmet sizing varies between the various standards and between

brands and models of helmet. Much like buying shoes, it is necessary to try them on to find a suitable fit.

In the present environment, it is very difficult to have a conversation with riders about helmet safety and the importance of helmet fit. Discussions are only about whether a particular helmet is “legal”. The AMC adage of “never buy a helmet unless you have had it on YOUR head” is impossible when buyers are forced to purchase over the internet, as they are in Queensland, where ECE 22-05 helmets are permitted in use, but not able to be sold in local shops. We favour a strong presence of shops selling helmets and providing a fitting service.

Helmet Standards

The Australian Standard for motorcycle helmets AS 1698 was first accepted for publication on 27 September 1974 as a copy of the American National Standards Institute (ANSI) Z.90-1971 standard “Protective Helmets for Vehicle Users”. This was a general purpose vehicle user helmet suitable for racing car drivers and endorsed for use by motorcycle riders. ANSI Z.90 was originally developed as a car racing driver helmet.

The USA national standard, the Department of Transportation (DOT) Federal Motor Vehicle Safety Standard (FMVSS) Number 218, first published 4 January 1974, was also a copy of ANSI Z.90-1971.

Similarly, the Japanese national standard JIS T8133, first published 23 May 1974, was also a copy of ASNSI Z.90-1971

While each version of ANSI Z.90 has evolved slightly differently after national adoption, all three remain substantially identical.

European Regulation 22 “*Protective Helmets and their Visors for Drivers and Passengers of Motor Cycles and Mopeds*” was developed from public health studies of crashed helmeted motorcycle riders and is specific to the needs of motorcycle riders, as opposed to the general purpose helmet of the ANSI Z.90 based variants.

Considerable improvements have been made since its inception in 1954. Notable amongst the improvements is the 1996 publication of ECE 22-04 which removed the requirement for a penetration test or “shell integrity by penetration test”, in an effort to reduce overall helmet mass to below 1.5 kg and thus reduce the incidence of neck injury that is significant with helmets above this weight. The penetration test is NOT a test against penetration injury which has historically been and remains very rare. It was designed to test the integrity of a helmet shell which, in early years of helmet manufacture, tended to be variable. Included in ECE 22-05 is an improved oblique impact test developed by the British Standards Institute and other methods for determining shell integrity.

A considerable body of research preceded these changes and an even larger body of research has followed, to assess public health outcomes. Results have been good.

On the other hand, the Australian helmet Standard appears to have lost its way and has most likely reached its use-by date. Australia lacks the resources to maintain its own helmet standard.

For example, the May 2009 Amendment 2 of AS/NZS 1698:2006 was primarily to permit marketing of “flip-face” helmets by clarifying requirements for internal projection of the chin-bar pivots. Amdt 2 also introduced the Oblique Impact test of Appendix Q of British Standard BS 6658:1985, contrary to the recommendations made in 1988 by Dowdell in the RTA/Crashlab Research Note 5/88 “*A Study of Helmet Damage and Rider Head/Neck Injuries for Crash Involved Motorcyclists*”. Whilst the improved oblique impact test was available and is now incorporated in ECE 22-05 and JIS T8133, it was not incorporated in AS/NZS 1698:2006.

Of significance, the problem now becomes one of “conditional compliance” as to whether a flip-face helmet is in compliance with AS/NZS1698:2006 when the chin-bar is lifted, as is commonly done by riders when stopped in traffic, particularly in hot weather. A similar issue now arises in respect of raising the clear visor of helmets, particularly those with internal dark sunshades that cannot comply with AS 1609-1981. This goes to the question of “what comprises compliance with road rules?” and will be further discussed under the topic heading of “in-service regulation”.

The Snell private standard published by the Snell Memorial Foundation has achieved public recognition through widespread advertising. Due to excessive “stiffness” and increased weight, the AMC does not endorse this private standard.

The most up to date and research based standard for use on roads is ECE 22-05, an International Standard endorsed by the U.N. and accepted in over 50 countries including New Zealand.

It should be noted that Australia is already represented on the United Nations Working Party 29 responsible for developing ECE 22-05 and vehicle regulations from which Australia’s Australian Design Rules (ADR’s) are copied. Australia may exert influence over the direction of ECE 22, but has no influence over the national standards of Japan or the USA.

In summary, the national helmet standards of Europe, USA, Japan and Australia all provide high level injury protection for motorcyclists. For purposes of road rules, all are acceptable to motorcycle riders.

The principal risk to be managed by road rules is that a rider wears a helmet.

In depth studies indicate little difference in helmet type or standards¹ beyond a minimum requirement that is exceeded by the helmet standards of the major industrialised countries or Europe, Japan, USA and Australia. Other industrialised countries often adopt these, for example, Canada and New Zealand.

Comparisons between these Standards is virtually impossible unless such testing compares helmets made in accordance with the absolute minimum requirements of each national standard. It is public health outcomes for crashed, helmeted riders, that remains as the prime significant measure.

Issues of compliance with the standard claimed on any helmet supplied to the market are ultimately the responsibility of the ACCC and we would pay close attention to their advice on this subject. We favour a transparent process for demonstration of compliance. The AMC favours the European “compliance folder” system where compliance test results must be made available, prior to any batch of helmets being made available for sale.

Having National Road Rule 270 reference the same standards required for market supply under Australian Consumer Law would allow the system to work as designed, ensure national uniformity and simplify construction and maintenance of road rules in every jurisdiction.

A Way Forward

The above has demonstrated that:

- Requirements of Australian Consumer Law are being ignored by commercial businesses, AUSTRROADS, NTC and Road Authorities.
- There is conflict between ACL and RR 270

¹ Liu BC, Ivers R, Norton R, Boufous S, Blows S, Lo SK. Helmets for preventing injury in motorcycle riders. *Cochrane Database of Systematic Reviews* 2008, Issue 1. Art. No.: CD004333. DOI: 10.1002/14651858.CD004333.pub3.

- RR 270 cannot be met
- There is inconsistency between versions of RR 270 being used in each State and Territory

This situation must be addressed.

Firstly, no formal process exists for public consultation or input into Road Rules, other than the COAG process managed by the NTC after amendments have been decided by the Australian Road Rules Maintenance Group of AUSTROADS. The public consultation process is limited to saying “yes” or “no” to proposed changes. The result is often poor and from a very narrow view.

Consumer groups, such as the Australian Motorcycle Council, must be involved during the development of road rules, and not as an afterthought.

Development of definitions for purposes of RR 270 has generally ignored COAG principles for better regulation and, in particular, the need to conduct regulatory impact statements. It is this neglect that has resulted in so many versions of RR 270 referring to non-existent marks and standards, ignoring the mandated standard when defining an approved helmet, and making requirements that cannot be met.

NTC could, and should, take a role in ensuring that States have followed the principles of better regulation prior to a road rule being promulgated.

The NTC could also guide AUSTROADS and the various jurisdictions to ensure consistency of RR 270 throughout Australia and with the ACL. Including the definition for “an approved motor bike helmet” within RR 270 and not leaving it to an uncontrolled “another law of this jurisdiction” is an appropriate step and will assist the Government in achieving its National Seamless Economy.

The AMC is of the firm view that each Road Rule should commence with a clear *statement of intent*. This should guide the interpretation of the rule by consumers, jurisdictions, law enforcement agencies and courts as well guiding further amendments to road rules.

In-Service Regulation

The ACL and CPN 9 have been written to ensure that only safe product reaches the market. The authority of the C'th mandatory Standard ends at the point of sale, as its requirements cannot be met when a helmet is in use.

However, there is a need to ensure that helmets remain safe whilst in use. This is the role of In-Service Regulations. We discuss some of the items that may be appropriate as In-Service Regulations below.

Accessories sold for use on motorcycle helmets must correctly assign responsibility to the vendor, not simply penalise the road user, who must be provided clear and unequivocal guidelines by in-service regulations.

Accessories include a large array of items and devices, from decorative headwear such as “mohawks” or suction cap toys, to dark visors, communication and video equipment and items yet to become popular, such as helmet-mounted brake light repeaters, heated anti-fog visors, head-up displays and the like. An In-Service Regulation could define how such accessories should be attached, and whether a maximum “break-off” limit is required. It important that the ACCC is engaged in these decisions to ensure vendors are aware of their obligations when advertising or supplying goods to the marketplace.

General guidance in this area may be drawn from the improved tests for external projections incorporated in ECE 22-05 and JIS T8133. Such guidance could be in the form of dimensions and break-away forces. The external projections test added to AS/NZS 1698:2006 in the 2009 Amendment

is one that was not recommended² in 1988. As a result, helmets sold locally are often unique and more expensive than their corresponding counterparts in other markets, such as USA, Europe or Japan due to the small size of the local market.

It is well known that cutting away parts or drilling of a helmet shell can compromise the protective qualities of a helmet. It is sensible to include this, in clearly definable terms, as a condition that results in revocation of the “approved” status of that particular helmet.

Similarly, there are some who modify their helmet by dissolving part of the impact absorption liner to make it “snug down” on their head like a beanie. Any in-service regulation directed to this area must be very clear in distinguishing between normal wear and tear and tangible modification of the helmet. Exceptionally clear criteria are required.

Dark visors in use during daylight hours provide no difference in vision obstruction than car drivers wearing sunglasses. We recommend an in-service rule to allow dark visors between sunrise and sunset, but not at night.

We may entertain an in-service regulation in respect of helmet fit, however, this again would require exceptionally clear criteria and must only address egregious cases.

While the current road rule requires a helmet to be properly fastened on the riders’ head, our view is that this should be separated from issues of helmet compliance. This is clearly an issue of individual manner of use, not an issue with the equipment itself.

The matter of inconsistencies and irregularities within RR 270 has been dragging on since the 5 February 2010 introduction in NSW of a retrospective definition for “*an approved motor bike helmet*” that saw considerable market disruption. Since that time, riders have been subject to intense enforcement in all jurisdictions. Helmet wearing rates have remained high since the 1970’s, however problems in respect of supplied helmet quality remain a feature of our unique local market.

Continuing to make end users responsible for poor quality helmets through badly written Road Rules is unacceptable.

The Australian Motorcycle Council is keen to work with all parties, including the NTC in a transparent process to achieve workable road rules in respect of helmet wearing by motorcyclists using roads in all jurisdictions.

If we may be of further assistance, please contact us.

Yours faithfully

Guy Stanford
Chair, Helmets Committee
Australian Motorcycle Council

² Dowdell, B, Long, G, Ward J, Griffiths, M, A Study of Helmet Damage and Rider Head/Neck Injuries for Crash Involved Motorcyclists, Road Safety Bureau Crashlab, Research Note 5/88