

Submission to Standards Australia in response to the Discussion Paper, Distribution and Licensing Policy Framework

29 July 2019

About Us

The Australian Law Librarians' Association is a national association with over 430 members in all Australian states and territories. ALLA represents librarians and information professionals working in courts, universities, government departments, law firms and professional associations. The Association supports the interests of law libraries, collections and legal information services to both legal and public communities.

The Association aims to promote a network for Australian law librarians, providing forums for continuing education, including legal literacy, and advocating on behalf of the interests of law libraries and our patrons. We also aim to promote access to legal information within the wider community.

Introduction

Australian Standards have become a significant source of legislative extrinsic materials, with approximately 2400 standards being incorporated by reference into Australian legislation, making them mandatory for compliance.¹

This is a special class of Regulated Standards, as acknowledged in the current Discussion Paper, at 6.1.²

Australia is a leader in providing free access to primary legal materials, and extrinsic materials, via government websites and the Australasian Legal Information Institute (AustLII).

Ideally, Regulated Standards should be similarly freely accessible. While the Discussion Paper doesn't address this directly, Standards Australia has made a formal undertaking to facilitate public access to its Standards especially where they are regulated by legislation or relate to public health and safety.³

¹ Standards Australia estimated that approximately 2400 of its standards have been referenced in Australian legislation and legislative instruments, Daniel Stewart, "Private Standards as Delegated Legislation, in Anthony J Connolly and Daniel Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce*, (The Federation Press, 2015), 78.

² Australian Standards, *Distribution and Licensing Policy Framework*, (Discussion Paper, 29 July 2019) <https://www.standards.org.au/getmedia/aabf7d12-2a11-4700-822b-9a587e97585b/SA-Distribution-discussion-paper.pdf.aspx>, 8

³ The Commonwealth Government, as represented by The Department of Industry, Innovation and Science (Industry) and Standards Australia, Memorandum of Understanding (13 November 2018, [8.32.4]), available at <https://www.industry.gov.au/sites/default/files/2018-12/standards-australia-memorandum-of-understanding-13-november-2018.pdf>, accessed 29 July 2019

Public access to legal sources in Australia

Australia is a leader in providing free access to primary legal materials, and extrinsic materials. Legislation, including second reading speeches and explanatory memoranda, can be accessed via government websites. The Courts make case law available through their websites, but also on the via the Australasian Legal Information Institute (AustLII).

Other relevant materials, such as law reform reports, are similarly available on government sites or AustLII.

The case of *Wright v TIL Services Pty Ltd*⁴ stands for the validity of incorporating extrinsic materials by reference, as long as it “clearly identified, and contains no ambiguity in its own terms”.⁵ However, there is the additional stipulation that the document be “readily accessible”.⁶

Until recently, Standards were “readily accessible” in that some Standards were available in print at some public libraries, including the National and State Libraries. Online access via public libraries, however, has been contingent on negotiating commercial subscriptions. Negotiations fell through in late 2016, and this was noted by the Senate Standing Committee on Regulations and Ordinances.⁷

Access to such important documents, especially regulated Standards and those relevant to consumer welfare should be reliable and not be subject to pricing and licensing negotiations.

Standards Australia recently made a formal undertaking with the Commonwealth Government to

facilitate forms of public access to Australian Standards, particularly where referenced in regulation, or where they relate to public interest outcomes, such as health and fire safety.⁸

Under the same Memorandum of Understanding, there is potential for a Commonwealth government grant to provide financial assistance.⁹ The 2016 Western Australian Parliamentary *Inquiry into Access to Australian Standards Adopted in Delegated Legislation* also made a recommendation that all access to Standards incorporated into legislation by reference should be facilitated by the responsible departments and agencies (Finding 2, Recommendation 3)¹⁰.

Online access is critical – either on websites or via an app. Consideration should be given to view-only PDF versions of Regulated Standards (possibly with printing disabled) available on the Standards Australia, with links to the referring legislation.

⁴ *Wright v TIL Services Pty Ltd* (1956) SR (NSW) 413

⁵ *Ibid*, 422

⁶ *Ibid*.

⁷ Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor: Monitor 8 of 2016* (9 November 2016), available at

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor/mon2016/index> (viewed 29 July 2019), p 73-74

⁸ Above n 3, p 11 [8.32.4]

⁹ *Ibid*, p 11 [9.1]

¹⁰ Western Australian Joint Parliamentary Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation*, (Report No 84, June 2016), available at [http://parliament.wa.gov.au/parliament/commit.nsf/\(InqByName\)/Inquiry+into+access+to+Australian+Standards+adopted+in+delegated+legislation#Report](http://parliament.wa.gov.au/parliament/commit.nsf/(InqByName)/Inquiry+into+access+to+Australian+Standards+adopted+in+delegated+legislation#Report) (viewed 29 July 2019), p 67

Subscription access to Australian Standards

ALLA welcome the initiative to explore other access models beyond the current purchase of individual Standards or subscriptions to suites of Standards.

Many of our members manage access to Australian Standards as part of law library collections, and there is considerable frustration with the restrictive and onerous licensing conditions governing standards under the stewardship of the current and only vendor, SAI Global.

Where Standards are used for commercial purposes, there is a willingness to pay for access, but the existing licensing model is excessively restrictive.

Particular issues identified are

- Complexity of managing subscription models, and the confusion for online subscribers
- No easy method of sharing digital copies of Standards with third parties, including clients and consultants
- Separate process and licensing fees for purchasing access to Standards for use in judicial proceedings, contrary to the *Copyright Act 1968* (Cth), s 43 which allows for free use of materials
- The current licensing restrictions make using the standards within the legal profession very difficult to administer
- The licensing restrictions are more far more restrictive than s 43 of the *Copyright Act 1968* (Cth) regarding the provision of legal advice
- No streamlined way of accessing Standards directly from online versions of legislation which reference the Standard

ALLA acknowledges that Australian Standards relies on revenue from the sale of Standards to continue its work.

Flexibility in pricing and a more nuanced understanding of how Australian Standards are used by the legal sector and industry, as well as the wider community, will hopefully produce mutually beneficial access models.

Responses to questions in the Discussion Paper

A. Do you agree with Standards Australia's broad objectives?

- Importance of the work of Standards Australia is not in dispute
- Essential to promote importance of Standards, and their compliance by making them more readily accessible
- Current access options are unnecessarily restrictive and licensing terms are obstructive

B. Are there other broad objectives that should be considered by SA's Board?

- Access should be streamlined. Where a Standard is referred to in legislations, links to the relevant Standard should be made available on the legislative source site

C. Do you support a non-exclusive model for the distribution of standards content in Australia?

- Yes, the current model is unnecessarily restrictive and licensing terms are obstructive and onerous.
- Separate fees and licences apply for Standards required for judicial proceedings, contrary to the *Copyright Act 1968* (Cth), s 43
- Access should be streamlined. Where a Standard is referred to in legislations, links to the relevant Standard should be made available on the legislative source site

D. What criteria do you think should be applied to the selection of distribution partners?

- Ability to deliver Standards in a variety of access models – online, API, apps
- Ability to link from legislation sites
- Ability (through licence) to excerpt Standards clauses within contracts / appliance instructions
- Options to provide referenced clauses of Standards
- Ability to incorporate amendments within the main Standard

L. How can Regulated Standards be made more accessible to the end user while maintaining the financial sustainability of the standards ecosystem?

- Develop a critical understanding of the different ways in which Standards are provide flexible pricing and access model to suit end users

N. How can useful information be better provided to the public regarding Consumer Interest Standards?

- Making Standards readily and easily accessible will encourage good practice and compliance, rather than making it complex and arduous
- Excerpt Standards clauses at "Point of Sale", eg included within appliance instructions
- Use plain English rather than technical language to assist users in finding what they need, Eg Installing a gas oven – see AS XXXX

O. Do you have a view on what types of partners SA could work with in providing better information to the public regarding Consumer Interest Standards?

- Partner with large organisations to mitigate costs
 - Government Departments and Agencies incorporating Standards through reference in legislation – potential for free access - WorkSafe, ACCC, National Coronial Information System
 - Industry Associations and Unions – paid access which allows sharing of content, ETU, etc
 - Manufacturers of goods (or installation of goods) governed by Standards – to include Standards clauses within Information Guide
 - Choice – ability to buy relevant Standard at the same time as purchasing a Choice report