

**JOINT STANDING COMMITTEE ON
DELEGATED LEGISLATION**

**INQUIRY INTO ACCESS TO AUSTRALIAN STANDARDS
ADOPTED IN DELEGATED LEGISLATION**

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
FRIDAY, 14 AUGUST 2015**

SESSION FOUR

Members

Mr P. Abetz (Chair)
Hon Robin Chapple (Deputy Chair)
Hon Mark Lewis
Ms S.F. McGurk
Mr P. Papalia
Hon Martin Pritchard

Hearing commenced at 11.40 am**Mr GEOFF LAWN****Acting Parliamentary Counsel, Parliamentary Counsel's Office, sworn and examined:**

The CHAIR: On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I need to ask you to take either the oath or the affirmation.

[Witness took the affirmation.]

The CHAIR: You will have signed the document entitled "Information for Witnesses". Have you read and understood the document?

Mr Lawn: Yes, I have.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones and try to talk into them, ensure you do not cover them with papers or make too much noise near them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Would you like to make an opening statement before we start asking questions?

Mr Lawn: Maybe if I could just outline the role of the PCO.

The CHAIR: Actually before you do that, could you also just explain—because we asked for representation from Parliamentary Counsel and the Attorney General's department—are you representing purely Parliamentary Counsel or the department as well?

Mr Lawn: Both.

The CHAIR: Okay, thank you. Go ahead.

Mr Lawn: In terms of what the Parliamentary Counsel's Office does, we obviously draft bills for ministers for introduction to parliament, and amendments to bills as they are going through Parliament; we draft subsidiary legislation for ministers; and we draft bills for private members and for parliamentary committees. This is obviously the subject matter of today's hearing; we draft subsidiary legislation. Our other major role is the publication of subsidiary legislation. The work that we do consolidating legislation with the amendments incorporated is the feed stock for the State Law Publisher website. We provide all the material for that website and State Law Publisher makes that available. This hearing is very relevant to the work of the Parliamentary Counsel's Office, obviously, because we are drafting the material that you are looking at. The incorporation of standards by reference is a matter that we confront quite often, and this is really part of the whole subject of incorporation by reference because, obviously, we incorporate not just standards but a whole range of other documents. Our role is to make law effective, clear, coherent, and accessible, and this is part of the accessibility aspect of our role. I do have some suggestions for the committee in terms of how access to standards and other material incorporated by reference might be improved. I can outline those a bit later if you would like me to do that.

Hon ROBIN CHAPPLE: We certainly would.

Mr Lawn: Just to summarise, I think we can provide some guidance material for drafters, which would then be useful to departments on when it is appropriate to incorporate standards and other material by reference. We could develop some model provisions to go in primary legislation that deal with the situations where material can be incorporated by reference and the sorts of safeguards that can be put in place to make sure it is accessible. I would also like to raise for consideration an approach adopted in New Zealand, which is to have a provision in the Interpretation Act, which sets out various rules about material incorporated by reference and in a particular requirements to make it available, including on the internet where that it is possible. So there are three things I think we can look at to improve the situation.

The CHAIR: That is really at the heart of what we are here for. I would love to hear —

Hon ROBIN CHAPPLE: If you would like to join us on the table up here for the next inquiries, it would be great!

The CHAIR: That is really what this whole thing is about because we expect people to obey the laws; therefore, we believe that we need to make the law as readily accessible for people who need to have access to it and it would appear to us that there are so many barriers to having access to Australian Standards, particularly for people who do not live in the city, that it really, to some extent, undermines the rule of law.

Hon ROBIN CHAPPLE: Good governance.

The CHAIR: So we are very keen to hear your suggestions. Over to you.

Mr Lawn: I have provided the committee with some material and I apologise that it is so voluminous but I hope it is useful to the committee. I have included an extract from the commonwealth Copyright Act, which just sets out the provisions relating to the Crown and the use of copyrighted material. Some of the questions that you posed to us relate to that in terms of what the Crown can do and what the consequences of that are in terms of whether the Crown is covered by an arrangement or a payment, or has to negotiate individually with copyright holders to publish the material. I have provided some sample provisions from WA legislation that relate to the incorporation of material, including standards by reference: items number two through to seven. They adopt a variety of approaches; they are not consistent, and I think that is a problem. I think it would be useful to develop some model provisions relating to the incorporation of material by reference that might set out when legislation and when subsidiary legislation can be made under an act incorporating material by reference; whether the material can be incorporated as it exists from time to time, or only at a certain point because, obviously, if you reference material, as it exists from time to time, you have no control over the content of that material going forward. So, in effect, there is a sub-delegation by a Parliament to the person who is developing the material incorporated by reference.

Hon ROBIN CHAPPLE: We have experienced that.

Mr Lawn: Yes. There is the issue of access to that material. Some of the provisions I referred to require the chief executive of the agency to make copies available, say, at the head office. There are no provisions that require the material to be made available on the internet, although the New Zealand provision does require that unless it would be an infringement of copyright. The Public Health Bill provisions, which, I have to say, I drafted, are probably more restrictive than some of the other provisions because we have not allowed the material to be incorporated by reference as it exists from time to time. We have required that if the material incorporated by reference is in a foreign language, and it may well be—I have encountered the situation where standards relating to motor vehicles were in Japanese; they were incorporated by reference, but, of course, unless you understood Japanese, you could not understand them. A requirement that where

the material incorporated by reference is in a foreign language, for the department to provide an English-language translation could be a requirement. Then there is the issue of access.

Hon MARK LEWIS: In terms of copyright, both federal and state governments are members of Standards Australia. Does that mean that under these copyright laws they could be deemed to be owned by the Crown—original ownership is the Crown? As a member?

Mr Lawn: I do not think so. I think the copyright belongs to Standards Australia.

Hon MARK LEWIS: But Standards Australia is made up of members of the government.

The CHAIR: And others.

Hon MARK LEWIS: And others, yes.

The CHAIR: It is a legal entity. I am not a lawyer, but my understanding is that the company limited by guarantee is a legal entity as such, so they own the copyright and therefore that is what you have to deal with, is it not?

[11.50 am]

Mr Lawn: I think that is right. The arrangement that Standards Australia has entered into with SAIC certainly assumes that Standards Australia has the copyright and has authorised SAI to manage that on its behalf. The provisions in the Copyright Act that I have included allow the state to use copyrighted material, but there are different regimes applying depending on how the state uses that material. Simply providing copies falls under section 183A, and there is a collecting agency for that and the state pays equitable remuneration for that. It is not related to individual copies; it is just a global payment. But if the state were to publish on the internet, for example, that is exercising the publication right that the copyright holder would have and there is a different regime for that in section 183 that would require on each occasion that the state published the material, for the state to give notice to the copyright holder and to negotiate terms on which that publication could happen and in the absence of negotiations to go to the Copyright Tribunal. That would be a very onerous requirement every time you publish on the internet, and that is relevant to the question that you asked about whether we could make this material available through the State Law Publisher.

Hon ROBIN CHAPPLE: Looking at your example 7, the Public Health Bill, that is in essence what you are doing, cleverly, because you are saying there that if you create a regulation or adopt a code, you are going to make it public.

Mr Lawn: Yes, that is right.

Hon ROBIN CHAPPLE: Brilliant! Can you draft all the bills like that, please?

Mr Lawn: As you will see from that material, there are different approaches that have been adopted over time, and even more recently there are different approaches. I think it would be useful to have a model provision that we would operate with—there would have to be exceptions from time to time.

Hon ROBIN CHAPPLE: Politically it is quite interesting, because it then puts the cost back, to a degree, on the department, and all the departments will get together and go, “Hang on, this is costing us a fortune. Why were you paying SAI Global all this money?” Sorry, I do not expect a comment, do not worry.

Mr P. PAPALIA: They do not seem to be as motivated at the moment!

Mr Lawn: It is certainly possible to get a license from SAI Global to publish that, but it seems to be quite a difficult thing to do, and very expensive.

At items 9 and 10 of the material, I have included some material from New Zealand about incorporating material by reference, which I think would provide some content for guidelines that

we might develop in the office for drafters when they are confronting the issue of incorporating by reference. The Victorian Office of the Chief Parliamentary Counsel, which is paper 10 in the collection, has also issued some material, which is available on the internet, about incorporating material by reference. That is relevant to one of the questions you asked about the operation of section 32 of their Interpretation of Legislation Act 1984. We are developing a comprehensive drafting manual within the Parliamentary Counsel's Office, and this is an area that we could generate advice on and make it available to drafters and also make it available publicly, I think. So that would guide departments when they are giving us instructions, in terms of the issues that they need to think about when they are instructing us to incorporate material by reference.

Hon ROBIN CHAPPLE: This is a bit of a long bow and it is not necessarily in your area, but local government draft lots of regulations and quite often there is a reference there. How would you think about implementing something through local government—I do not know if you could—by encouraging their drafters to make sure that the material was incorporated?

Mr Lawn: One option would simply be to amend the Local Government Act to say that when local governments make local laws that they incorporate material by reference and that there is an obligation on them to make that material available publicly; physically at certain places and, if it is possible, on the internet if that does not breach copyright—a simple requirement.

Hon ROBIN CHAPPLE: I should have thought of it!

The CHAIR: In terms of parliamentary counsel, do you ever actually put Australian Standards into legislation? Or is that very rare?

Mr Lawn: We do that all the time. I was discussing this issue in the office in the last few days, and there were at least three drafters who said they had confronted this issue quite recently in relation to something that they were working on—working out whether they should incorporate material by reference. One of the examples was some standards, and the issue was: can we make it an offence to breach those standards? The standards were not really drafted in a way in which they could work as a description of criminal behaviour, so the answer to that was no, we cannot make breach an offence. And there were some other examples. It is an issue that confronts us quite regularly.

The CHAIR: Do you have full access to the Standards Australia in your office, or how does that work?

Mr Lawn: We tend to rely on our instructing agencies to provide us with the copies. The Department of the Attorney General library does have some copies of standards; some of them are quite old. They are able to inter-loan copies from time to time, but otherwise we just have to go down to State Library and access the material available or buy them. Buying them for one single job is not really very cost-effective. The only alternative really is to go down to State Library and access the material there, subject to all the restrictions that are imposed on that.

The CHAIR: If all Australian Standards were online and freely accessible to the public, that would result in a significant cost saving. I am not sure what parliamentary counsel get paid per hour —

Mr Lawn: Not much —

The CHAIR: —but to have someone go down to State Library to have to access a paper document and come back to their office very quickly involves hundreds of dollars. Do you have a guesstimate of what it costs Parliamentary Counsel's Office in a year because they are not readily available online?

Mr Lawn: No, I could not hazard a guess. As I say, in most instances we would ask the instructing agency to provide us with copies, so the cost is theirs.

Hon ROBIN CHAPPLE: That is an interesting point, because they are not allowed to.

Mr Lawn: They can give us a copy. That is not in breach of copyright. If they have bought a copy, they can. It is just like a library book.

Hon ROBIN CHAPPLE: But you cannot get a copy from the library.

Mr Lawn: No, but they could just provide us with the official standard. They would buy a copy and give it to us.

Hon ROBIN CHAPPLE: Check that out.

Hon MARK LEWIS: I think you were here when I asked questions to the guys from Commerce about the validity or otherwise of something that has not been published by the State Law Publisher. It is a question that an ex-member, Hon Murray Nixon, who was a student of these things, was quite adamant that unless it is published at law print and effectively available to the public through that process, it is not a law.

Mr Lawn: I do not think that is correct, legally. You can incorporate material by reference and that material does not have to be printed by the State Law Publisher. And the various acts that I have outlined here empower incorporation by reference.

Hon ROBIN CHAPPLE: When it comes to drafting a bill to become an act and that act, not the regulation, refers to a standard—we know from experience here that standards just disappear; they are actually written off. We have actually had examples where a standard has been referenced, we have gone looking for the standard and it does not exist anymore. How would that affect the law?

Mr Lawn: I think as long as you can still identify that particular standard. It did exist at a point in time, so that the law —

Hon ROBIN CHAPPLE: But nobody has a copy of it.

Hon MARK LEWIS: It is not available to anyone. The law has to be available.

Mr Lawn: The provision would still work because you would still have to reference whatever that document was at a particular point in time. The availability would not affect the validity of the law.

Hon ROBIN CHAPPLE: But currently, as I say, you have then got to go and hunt some paper copy floating around somewhere that might have been left over, because it will not be in the libraries any longer.

Hon MARK LEWIS: It is a question for Parliament.

[12 noon]

The CHAIR: The Premier's circular of 2014 requires responsible bodies to produce to the committee copies of standards that are adopted in subordinate legislation being scrutinised. We understand in Victoria, section 32 of their Interpretation of Legislation Act states that responsible bodies must lay before Parliament copies of the standards that are adopted into secondary legislation. Do you see any copyright issues surrounding that at all, or not?

Mr Lawn: If the official copies are being tabled, then there is no copyright issue involved in that. If people were making their own copies, then there might be an issue, although if it were the state, they would be covered by the provisions in the Copyright Act that allow the state to make copies. If those tabled copies were then to be made available to the public, say, on an internet website, there may be some copyright issues there. That gives rise to some interesting issues about the relationship between the Copyright Act and state legislation relating to parliamentary privilege, parliamentary papers, and there are a couple of statutes in WA from the 1890s that relate to parliamentary privileges and papers. Just how those fit with the Copyright Act is an interesting legal question.

Hon ROBIN CHAPPLE: There was an interesting part of an act that I came across recently. When we get material from a parliamentary library, it is covered by privilege for distribution to constituents.

Mr Lawn: There are special provisions in the Copyright Act for libraries.

Mr P. PAPALIA: The member is trying to get around everything by blaming all the poor librarians!

Hon ROBIN CHAPPLE: There is, and I am sure it must be in that document you have provided to us.

Mr P. PAPALIA: Just table all the standards! I do not think that will work.

Hon MARK LEWIS: Good luck suing Parliament!

Hon ROBIN CHAPPLE: There is a gentleman here who has a very good legal aspect about all this, and he is grinning from ear to ear.

The CHAIR: Technically, the Parliament would need to purchase a copy from SAI Global to put on the table, but to actually copy it so that all members of Parliament could take one away. I am not familiar with the Copyright Act. Would that be a breach of copyright or not?

Mr Lawn: The tabling requirements are on the individual ministers responsible for the subsidiary legislation. They table subsidiary legislation in Parliament today. They would be able to table the standards or other material incorporated by reference. It is just a copy.

Hon ROBIN CHAPPLE: Because a tabled paper is publicly available.

Mr Lawn: I think the issue then is: what can you do with the tabled copies? As I say, it is an interesting issue, the relationship between the Copyright Act and state legislation. Maybe it is something you could ask your clerk to investigate.

Hon MARK LEWIS: Because what Parliament does with that tabled copy is Parliament's business.

Mr Lawn: Indeed, and that is what —

Hon MARK LEWIS: It is a sovereign entity.

Mr Lawn: That is right. That is what the Parliamentary Papers Act 1891 says. If Parliament authorises the publication of material, the people who then use it cannot be sued. But, as I say —

Mr P. PAPALIA: Everything in Parliament is online now.

Hon MARK LEWIS: *Hansard*.

Hon ROBIN CHAPPLE: Everything that is tabled goes straight up.

Mr Lawn: I did look at the Victorian Parliament website. From what I could see, the documents that are tabled, that fall into this category, are not made available on the internet. I think they have recognised the copyright issue.

The CHAIR: But they are not making them available?

Mr Lawn: I could not find any of this kind of material on their website. It is certainly listed as being tabled, but you cannot access it through their website.

The CHAIR: Are there any other questions from committee members? Anything further you would like to share with us in terms of giving us good ideas?

Mr Lawn: We have covered the issue of providing guidance. The issue of developing some model provisions that we might have as standard provisions in legislation is the issue. This refers in particular to item 8 in the bundle of papers, which is the Legislation Act 2012 from New Zealand. In that act, they have a specific subpart—this is paper 8, the second page and following. They have a specific part about incorporating material by reference, which would include standards, and there are certain requirements. There is a requirement to consult on a proposal to incorporate by reference. People can make submissions on the whole issue of whether or not material should be incorporated by reference. That is section 51. There is a provision relating to access to the material,

which is section 52. The chief executive responsible for the material has to make the material available for inspection, let people know where copies are available, make copies available free of charge on the internet unless that would infringe copyright, and also give notice in the *Gazette*, giving information about where this material can be obtained. There is also a provision about material that amends material incorporated by reference. There is an issue there about whether that needs to be available, and the provision requires that. So you have always got access to the latest version or the amendments because that is really important. You need to know if the standards have been amended and what those amendments are, otherwise you do not know what the current state of the law is.

Hon ROBIN CHAPPLE: Just on that, if you drafted a bill, which is now an act, and it references a standard, do we ever go back and periodically check that that standard is still the standard, or exists? How do you deal with that if it has changed or disappeared, or do you just wait for somebody to find out?

Mr Lawn: We do actually get notifications that the standard is going to be revoked. I think what we do—I have done this recently—is go and check the legislation just to make sure that the revocation of the standard is not going to affect anything.

Hon MARK LEWIS: If it has changed, then you have to come back through delegated legislation and amend the regulation?

Hon ROBIN CHAPPLE: Amend the law.

Hon MARK LEWIS: If it is in the primary act, yes.

Mr Lawn: If it is in the primary act, it depends on whether the material is incorporated from time to time, which means it does not really matter if it is amended. But if it is just at a point in time, then we would have to amend it to incorporate the amendments.

Hon MARTIN PRITCHARD: Do you have any idea if New Zealand is similar to ourselves, whether they have an independent body setting the standards?

Mr Lawn: Yes, they have Standards New Zealand, and there are joint standards, Australia–New Zealand standards.

Hon MARTIN PRITCHARD: Would you have any knowledge how that is funded? Obviously, at the moment Standards Australia is funded through their licensing agreement. Is that similar with New Zealand?

Mr Lawn: I am not absolutely sure. There is a Standards Act in New Zealand. I think it is just set up as a statutory body. I am not sure where its funding source comes from.

Mr P. PAPALIA: It would be more interesting if they had a third party that is below Standards New Zealand that is paying all the money!

Hon ROBIN CHAPPLE: It might be SAI Global again!

Hon MARTIN PRITCHARD: Would it be the New Zealand Parliament funding Standards New Zealand?

Mr Lawn: I do not know. They may get some public funding and they may get their other funding from the sale of standards; I just do not know, I am afraid.

The CHAIR: We could ask our research staff to look into that.

Anything further you would like to raise with us, otherwise we will draw it to a close? It has been very helpful. Thank you very much. The transcript will be sent to you with the usual covering letter, and if you can return it in due course, it would be good. Thank you very much.

Hearing concluded at 12.09 pm
