



THIRTY-NINTH PARLIAMENT

REPORT 84

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

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

Presented by Mr Peter Abetz MLA (Chair)

Hon Robin Chapple MLC (Deputy Chair)

June 2016

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

28 June 2001

Terms of Reference:

The following is an extract from Schedule 1 to the Legislative Council Standing Orders:

“10. Joint Standing Committee on Delegated Legislation

- 10.1 A *Joint Standing Committee on Delegated Legislation* is established.
- 10.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chair must be a Member of the Committee who supports the Government.
- 10.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 10.4 (a) A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.
(b) Where a notice of motion to disallow an instrument has been given in either House pursuant to recommendation of the Committee, the Committee shall present a report to both Houses in relation to that instrument prior to the House's consideration of that notice of motion. If the Committee is unable to report a majority position in regards to the instrument, the Committee shall report the contrary arguments.
- 10.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 10.6 In its consideration of an instrument, the Committee is to inquire whether the instrument –
(a) is within power;
(b) has no unintended effect on any person's existing rights or interests;
(c) provides an effective mechanism for the review of administrative decisions; and
(d) contains only matter that is appropriate for subsidiary legislation.
- 10.7 It is also a function of the Committee to inquire into and report on –
(a) any proposed or existing template, *pro forma* or model local law;
(b) any systemic issue identified in 2 or more instruments of subsidiary legislation; and
(c) the statutory and administrative procedures for the making of subsidiary legislation generally, but not so as to inquire into any specific proposed instrument of subsidiary legislation that has yet to be published.
- 10.8 In this order –
“instrument” means –
(a) subsidiary legislation in the form in which, and with the content it has, when it is published;
(b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;
“subsidiary legislation” has the meaning given to it by section 5 of the *Interpretation Act 1984*.”

Members as at the time of this inquiry:

Mr Peter Abetz MLA (Chairman)	Hon Robin Chapple MLC (Deputy Chair)
Hon John Castrilli MLA	Hon Peter Katsambanis MLC
Hon Mark Lewis MLC	Ms Simone McGurk MLA
Mr Paul Papalia MLA	Hon Martin Pritchard MLC (from 5 May 2015)
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Government Response

This Report is subject to Standing Order 191(1):

Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.

The two-month period commences on the date of tabling.

Glossary

ABCB	Australian Building Codes Board
ACTU	Australian Council of Trade Unions
AS	Australian Standard
BSI	British Standards Institution
BSOL	Building Standards and Occupational Licences
CAUL	Council of Australian University Librarians
COAG	Council of Australian Governments
GRAIL	Government Research and Information Library
HIA	Housing Industry Association
IEC	International Electrotechnical Commission
IP	Internet Protocol
ISO	International Organisation for Standardisation
JSCDL	Joint Standing Committee on Delegated Legislation
MOU	Memorandum of Understanding
NCC	National Construction Code
NSLA	National and State Libraries Australasia
NZS	New Zealand Standard
OBPR	Commonwealth Government's Office of Best Practice Regulation
OCPC	Office of Chief Parliamentary Council (Vic)
PLA	Publishing Licence Agreement
QAS	Quality Assurance Services Pty Ltd
QCPP	Quality Care Pharmacy Program
RGU	Regulatory Gatekeeping Unit
RIA	Regulatory Impact Assessment
SAQAS	Standards Australia Quality Assurance Services

SCC	Standards Council of Canada
SDA	Shop, Distributive and Allied Employees' Association of Western Australia
SDO	Standards Development Organisations
TPM	Technological protection measures
WAER	WA Electrical Requirements
WALGA	Western Australia Local Government Association
WHS	Work Health and Safety

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EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS

EXECUTIVE SUMMARY

- 1 In what is regarded as the most definitive history written of Standards Australia, Winton Higgins wrote:

Standardisation has accompanied the development of all civilisations. Since the industrial revolution, however, it has become a more salient element in the modernisation process. Standardisation makes possible precise measurements to underpin industry, trade and regulation, the manufacturing of complex products composed of interchangeable parts and the efficient construction and safety of buildings and other large structures. Consumers depend on standardisation to make informed choices and to maximise the safety of products they and their families use, bring home, drive and travel in. In our globalised world, standards now underpin our very ability to communicate and do business. Without the essential standardised mechanisms, we could not send emails, transfer funds electronically, use the internet or use our credit cards.¹

- 2 The importance of such standards, domestically and internationally, is not in doubt. The extent to which the public is aware of this is unclear at best. In many cases this is not a cause for concern. People will go about their lives purchasing a product or enjoying the fresh air of the environment confident that manufacturers or public entities have followed applicable standards to keep them safe and comfortable.
- 3 With increasing frequency, however, standards are becoming law through being incorporated in delegated legislation. This Committee believes that it is much more important that the public is aware of what such a standard (law) says, not only because everyone is entitled to know the law as it applies to them but also so that compliance may be better achieved. Generally, laws made by parliaments and the executive through statutes and statutory instruments, or local laws made by local governments, are freely available to everyone through libraries and websites, but this is not the case with material such as the standards which are adopted in those instruments or local laws.
- 4 This Committee is tasked with the scrutiny of delegated legislation on behalf of the Parliament of Western Australia, but where such incorporation by reference of a standard has taken place, such scrutiny comes at a price. Of more importance though

¹ *Engine of Change: Standards Australia since 1922*, Winton Higgins, Brandl & Schlesinger, Australia, 2005, p 9.

is the fact that restricting free access for members of the public to the laws that apply to them is contrary to the rule of law principles that apply to all democracies such as ours.

- 5 In his book *The Rule of Law*², Lord Bingham of Cornhill identified eight core ingredients of the rule of law. The first of these was that:

The law must be accessible and so far as possible intelligible, clear and predictable.

He enunciated three reasons for this:

First, and most obviously, if you and I are liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must do or must not do on pain of criminal penalty. This is not because bank robbers habitually consult their solicitors before robbing a branch of the NatWest, but because many crimes are a great deal less obvious than robbery, and most of us are keen to keep on the right side of the law if we can.

The second reason is rather similar, but not tied to the criminal law. If we are to claim the rights which the civil (that is, non-criminal) law gives us, or to perform the obligations which it poses on us, it is important to know what our rights and obligations are. Otherwise, we cannot claim the rights or perform the obligations.

The third reason is rather less obvious, but extremely compelling. It is that the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. No one would choose to do business, perhaps involving large sums of money, in a country where the parties' rights and obligations were vague or undecided.

- 6 As standards become quasi-legislation upon adoption, a failure to comply with their terms may carry serious consequences, as will be outlined in this report – consequences such as a lack of public safety, criminal sanctions and dismissal from employment. It is clear though that there are significant problems in accessing those laws without cost. All jurisdictions that operate under the Westminster-style of parliamentary democracy would agree that free access to the whole of the law is not only desirable but essential. In the case of accessing adopted standards, however, none of those jurisdictions have found a way of providing such access. If the achievement of that were easy, and without significant cost, it would have been done by now.

²

The Rule of Law, Tom Bingham, Allen Lane, London, 2010, pp 37-47.

- 7 This report will make some recommendations for minor legislative and administrative changes to facilitate easier access to adopted standards for the public and for Parliament. However, an overall and lasting solution to the problem will, we believe, require a national response. We are aware from correspondence received that other jurisdictions share our concerns, and the final and main recommendation of this report is that the Government of Western Australia takes the first step to facilitate such a response.

FINDINGS AND RECOMMENDATIONS

- 8 Findings and recommendations are grouped as they appear in the text at the page number indicated:

Page 14

Finding 1: The cost of creating the content and the intellectual property in Australian Standards is borne by Standards Australia, but this is entirely dependent on the voluntary efforts of others. The Committee finds that the current system for the production and subsequent publication of Standards created by the contractual arrangements entered into between Standards Australia and SAI Global Ltd. in 2003 provides a financial advantage to the latter.

Page 40

Recommendation 1: The Committee recommends that the Department of Commerce, representing the Government of Western Australia as a member of Standards Australia, works with other members as soon as possible to bring about a general meeting of Standards Australia under Article 20 of its constitution, for the purposes of settling the options open to Standards Australia (if any) when the option clause in the Publishing Licensing Agreement is considered in 2018.

- 9 The free availability or otherwise of Australian Standards is, in part, dictated by an agreement entered into between Standards Australia and SAI Global Ltd. when the latter was the subject of a public flotation in 2003. That agreement was for a term of 15 years, but is seemingly subject to an option clause allowing for a five year extension. The terms of this agreement were denied the Committee. Nor, would it appear, have they been shared with the membership of Standards Australia. Given the final recommendation of this Committee, that option clause may have some significance.

Page 40

Recommendation 2: The Committee recommends that the Minister for Commerce, as a member of the Industry and Skills Council of the Council of Australian Governments, seeks to have placed on the agenda of that Council a discussion with Commonwealth, State and Territory colleagues regarding the options open to Standards Australia (if any) when the option clause in the Publishing Licensing Agreement is considered in 2018.

- 10 This report will recommend a national response to the problem of the lack of free availability of Australian Standards that have been referenced in legislation. Debate on such a national response, should the recommendation be accepted, ought to begin immediately, so that action may be possible in 2018, depending on the terms of the option clause mentioned above.

Page 67

Finding 2: The Committee finds that, whilst departments and agencies are free to incorporate Standards into their delegated legislation as a matter of law, few of them provide adequate facilities for those affected by that legislation to access them free of charge. Administrative and financial provision could easily be made to remedy this situation.

Page 67

Recommendation 3: The Committee recommends that the Government directs all departments and agencies within Western Australia to replicate the practice of the Department of Environment Regulation, in that where an Australian Standard or other external material is adopted into delegated legislation made by that department or agency, a copy of that Standard or other material, or of the relevant part of it, be supplied upon request free of charge, and that the department or agency bear the cost of doing so.

Page 89

Finding 3: The Committee finds that it would not be unduly onerous to expect government departments or agencies to keep available for public inspection a copy of any Standard that it chooses to reference in delegated legislation. That should be provided in addition to the service recommended at Recommendation 3 above, which would clearly be more convenient for those people or businesses resident in regional areas.

Page 90

Recommendation 4: The Committee recommends that section 43 of the *Interpretation Act 1984*, or such other provision considered more suitable by Parliamentary Counsel, be amended so that departments or agencies that adopt an Australian Standard or other external material in delegated legislation be required to keep a copy of that Australian Standard or other material available at the entity's principal office or other convenient place, available to the public, free of charge, during office hours.

Page 90

Finding 4: The Committee finds that the same duty to keep a copy of an Australian Standard available for public inspection should apply to local governments that choose to adopt them in local laws.

Page 90

Recommendation 5: The Committee recommends that section 5.94 of the *Local Government Act 1995*, or such other provision considered more suitable by Parliamentary Counsel, be amended to make it clear that any local government that adopts an Australian Standard or any other external material in a local law must keep a copy of the same at its main offices, available for inspection free of charge during the Council's office hours.

Page 101

Recommendation 6: The Committee recommends that when Premier's Circular 2014/01 is reviewed in February 2017, the opportunity is taken to amend the Committee's requirements to include a hard copy of any Australian Standard or other external material called up (adopted) into delegated legislation, rather than an electronic copy.

- 11 This Committee sought and achieved an amendment to the Premier's Circular in 2014 so that, when material in support of delegated legislation is provided to the Committee, that material includes an electronic copy of any Standard referenced. In light of some licence terms that apply to such electronic copies, this has not proved to be efficient or effective.

Page 102

Recommendation 7: The Committee recommends that the amendment to the Premier's Circular recommended at Recommendation 6 be replicated for the purposes of the scrutiny of local laws by amending the *Local Laws Explanatory Memoranda Directions 2010* to include a requirement to supply the Committee with a hard copy of any Standard or other external material called up (adopted) in a local law.

Page 119

Finding 5: The Committee finds that the legislative practice of allowing reference to Standards '*as existing from time to time*' or '*as made from time to time*' inhibits not only the proper scrutiny of delegated legislation by this Committee but also simple legislative research.

Page 119

Recommendation 8: The Committee recommends that consideration be given to amending section 43 of the *Interpretation Act 1984*, or such other provision considered more suitable by Parliamentary Counsel, so that, unless the contrary intention is made clear on the face of an empowering statute, delegated legislation may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing '*as existing from time to time*' or any similar statutory formulation.

- 12 It is common practice to reference a Standard ‘*as existing from time to time*’ or ‘*as made from time to time*’. As a result, re-issues or re-writes of such Standards simply become law without any parliamentary scrutiny whatsoever. Moreover, it becomes increasingly difficult for the public to know what version of the Standard, or indeed the law, is in force at any given time.

Page 124

Finding 6: The Committee finds that inadequate explanation is currently provided by departments and agencies as to why the adoption of a particular Standard is either necessary or preferable, given the outlined difficulties in accessing those Standards.

Page 125

Finding 7: The Committee finds that, given the length and complexity of some Standards that are adopted in delegated legislation, a simple explanation or description of the material so adopted should be provided in the accompanying explanatory memoranda.

Page 125

Recommendation 9: The Committee recommends that Premier’s Circular 2014/01, when reviewed in January 2017, be expanded to include a requirement that, if any documents are incorporated in delegated legislation by reference, then the accompanying explanatory memorandum supplied to the Committee must contain an explanation as to the necessity or desirability of the incorporation and a description of the documents so incorporated.

- 13 Given the length and complexity of some incorporated Standards, it is not uncommon for this Committee to experience difficulties in properly scrutinising those documents. The Commonwealth law provides for explanatory memoranda that must accompany delegated legislation to contain a description or explanation of the material so incorporated. A similar provision in Western Australia would greatly assist this Committee in its scrutiny role.

Page 125

Finding 8: The Committee finds that it would not be unduly expensive or onerous to expect that a hard copy of Standards should be tabled in the Houses of Parliament alongside the instruments into which they are adopted. It is open to any Member of Parliament to move a motion to disallow an instrument, not only Members of this Committee, and accordingly every Member should be entitled to free and easy access to such adopted material.

Page 125

Recommendation 10: The Committee recommends that section 42 of the *Interpretation Act 1984*, and/or such other provision considered more suitable by Parliamentary Counsel, be amended so that departments, agencies or local governments that adopt an Australian Standard or other external material in delegated legislation be required to table a copy of that Standard or other material in each House of the Parliament.

- 14 Unlike most other documents tabled, however, these would not be placed on the Parliament of Western Australia website, due to copyright restrictions.

Page 132

Recommendation 11: The Committee recommends that Premier's Circular 2014/01, when reviewed in January 2017, be expanded to include, where a Standard is called-up in delegated legislation, an estimate of the number of people or businesses that will be required to access that Standard, and at what projected cost.

- 15 The Committee takes the view that the Government's Regulatory Impact Assessment Guidelines, administered by the Regulatory Gatekeeping Unit of the Department of Finance, should provide for an analysis of the anticipated costs of purchasing or otherwise accessing Standards that are adopted in delegated legislation to those businesses or individuals that may reasonably be expected to be affected by them.

Page 143

Finding 9: The Committee finds that, taking into account the monies spent annually by public bodies in Western Australia on copies of Australian Standards or access to the SAI Global Ltd. website, and extrapolating those figures across the country, there is a clear economic case to be made for governments centrally and jointly providing for the direct funding needs of Standards Australia at the conclusion of its arrangements with SAI Global Ltd. When the current costs to business and other organisations are added to this, the case for such direct provision is strengthened inordinately. Therefore, it is contemplated, universal public availability could be achieved, with accompanying greater compliance, at a reduced cost overall.

Page 143

Recommendation 12: The Committee recommends that the Minister for Commerce works with his colleagues on the Industry and Skills Council of the Council of Australian Governments with a view to agreeing to a fully publicly-funded model for online access to the full suite of information in which copyright is currently held by Standards Australia, upon the cessation of the Publishing Licensing Agreement between Standards Australia and SAI Global Ltd., with an implementation target of either 2018 or 2023 depending on the terms of that agreement.

- 16 Late into this Inquiry, it came to the Committee's attention that free access to Standards is no longer available at the State Library of Western Australia. In fact, it

appears that such access is no longer available at any of the State or Territory Libraries in Australia, or indeed at the National Library in Canberra. Given that, our conviction that a nationally coordinated response should be undertaken is even stronger.

CHAPTER 1

REFERENCE AND PROCEDURE

REFERENCE

1.1 On 10 September 2014, the Joint Standing Committee on Delegated Legislation (the Committee) resolved to conduct an own motion inquiry (Inquiry) into access to Australian Standards (Standards) adopted in delegated legislation.

1.2 The Inquiry arises out of the Committee's scrutiny of instruments referred to it under its terms of reference. Delegated legislation often adopts or incorporates Standards.

1.3 The Committee's term of reference 10.7(b) states:

It is also a function of the Committee to inquire into and report on any systemic issue identified in 2 or more instruments of subsidiary legislation.

1.4 It was resolved that the Inquiry would have the following terms of reference:

The Committee will inquire into access to Australian Standards adopted in delegated legislation in Western Australia including:

- 1. the level of free public access to adopted Australian Standards in metropolitan and regional Western Australia;*
- 2. whether amendments to legislation are required to improve public access to adopted Australian Standards;*
- 3. other measures to improve public access to adopted Australian Standards;*
- 4. measures to improve access to adopted Australian Standards provided to the Joint Standing Committee on Delegated Legislation; and*
- 5. any other related matters that arise during the course of the inquiry.*

BACKGROUND - COMMITTEE CONCERNS

1.5 Before resolving to undertake this Inquiry, the Committee raised its concerns regarding public access to Standards with the Government through its Annual Reports to Parliament. In the 2011 report, for example, the Committee alerted Parliament to the problems created by the incorporation of Standards into delegated legislation in

carrying out its proper function of scrutinising such legislation. It also drew attention to the difficulties facing the public in accessing laws that may apply to them. It concluded:

*The Committee recommends that the Government requires departments, agencies and local governments to advise on their internet site where standards called up in subsidiary legislation can be accessed at no cost.*³

- 1.6 In an undated response, the Premier of Western Australia, Hon Colin Barnett MLA, wrote to the President of the Legislative Council, concluding:

*The Government notes the Committee's recommendation and will consider the merits of its implementation.*⁴

- 1.7 In its 2012 Annual Report, the Committee reiterated its concerns, stating:

*The Committee remains concerned about the accessibility of standards published by Standards Australia adopted in delegated legislation. As noted in the Committee's Annual Report 2011, it is an important principle that people have a right to know the law that they are obliged to comply with.*⁵

- 1.8 It went on:

On the basis of the disappointing Government response, the Committee re-affirms its recommendation and requests a determinative response to the following:

*Recommendation 1: The Committee recommends that the Government requires departments, agencies and local governments to advise on their internet site where standards called up in subsidiary legislation can be accessed at no cost.*⁶

- 1.9 In response to that report and recommendation, the Premier wrote:

I advise that providing access to standards called up in subsidiary legislation is an issue that needs to be considered on a case-by-case basis, and supported where appropriate. An example of where this

³ Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, Report 49, *Annual Report 2011*, May 2012, p 7.

⁴ Hon Colin Barnett MLA, Premier of Western Australia, Letter, undated.

⁵ Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, Report 61, *Annual Report 2012*, November 2012, p 28.

⁶ Ibid. p 28.

access is provided is the Building Code. The Building Commission website currently provides a number of hyperlinks to the Australian Building Codes Board (ABCB), which publishes the Building Code of Australia, as called up by the Building Regulations 2012. The ABCB website provides a hyperlink to a list of various outlets in Western Australia (a number of local government offices and libraries) at which a hardcopy version of the Building Code can be viewed by the general public at no cost.⁷

- 1.10 As will be seen later in this report, that Building Code is now available online, free of charge, on the website of the Australian Building Codes Board (ABCB). However, in fact, that Code is not a Standard, but a Code developed and published by the ABCB utilising public funding. This will be dealt with later in this report.
- 1.11 The Committee's concerns remain, and can be split into two main categories:
- **Access to the law for all.** People have a right to know the law that they are obliged to comply with, and Standards take on legislative status once adopted. Access to the law promotes justice and the rule of law. Citizens and businesses should be able to access the law and any barriers to access, including cost and not being aware about the availability of free access, undermines the rule of law
 - **Access to the law by Parliament** to enable it to properly fulfil its function of scrutinising the Executive to which it has delegated the function of making the law.

INQUIRY PROCEDURE

- 1.12 Following the tabling of Report No. 74 on 11 September 2014 (*Tabled Paper 1845*), announcing the commencement of the Inquiry, direct requests for submissions were sent to the Governments of the Commonwealth and of each Australian State and Territory, the various government departments of Western Australia, along with other public institutions, trade unions and other industry representative bodies with a perceived interest. Some 30 submissions were received.
- 1.13 Evidence was taken by the Committee on 14 and 21 August, 14 October and 18 November 2015.

⁷

Hon Colin Barnett MLA, Premier of Western Australia, Letter, 10 June 2014.

- 1.14 Details of the submissions received and a list of the witnesses who appeared before the Committee are at **Appendix 1**. Those responses and transcripts of the evidence are available on our webpage.⁸

STRUCTURE OF REPORT

- 1.15 Chapter 2 of this report will explain why access to the law is so important, including access to quasi-legislation, such as Standards adopted in delegated legislation. Chapter 3 gives an overview and history of the two main bodies involved in the production and publication of Australian Standards, being Standards Australia and SAI Global Ltd., and Chapter 4 gives a mention to the most detailed inquiry to date into Standards and their development and use, carried out by the Productivity Commission in 2006. Chapter 5 looks at copyright and licensing issues preventing wider free dissemination. The extent or lack of free access to Standards for the public, businesses, governments and representative bodies, and the consequences and cost of that lack of access, is explored in Chapters 6 and 7, and problems faced by parliaments and by parliamentary committees such as this one follow in Chapter 8. A comparison of the legal structures and ways that the problem of free access is dealt with in similar jurisdictions to Western Australia is dealt with in Chapters 9 and 10 before Chapter 11 sets out possible solutions. The conclusions of this Committee can be found at Chapter 12.
- 1.16 We extend our gratitude to all submitters and to those who gave evidence. Your contributions and explanations were of great assistance to us.

⁸ [http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(EvidenceOnly\)/](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(EvidenceOnly)/). Viewed 14 March 2016.

CHAPTER 2

INTRODUCTION

THE RULE OF LAW

The maxim that ignorance of the law does not excuse any subject represents the working hypothesis on which the rule of law rests in British democracy. That maxim applies in legal theory just as much to written as to unwritten law, i.e., to statute law as much to common law or equity. But the very justification for that basic maxim is that the whole of our law, written or unwritten, is accessible to the public – in the sense, of course, that, at any rate, its legal advisers have access to it, at any moment, as of right.

Scott LJ, *Blackpool Corporation v Locker* [1947] 1KB 349, at p. 361.

- 2.1 Many have offered a definition of the concept of the rule of law, which applies as a doctrine in Australia today as it applied in Britain in 1947. In brief, it means that nations should be governed by laws made by parliaments rather than arbitrary decisions of governments or government officials, and that all are equal before the law, a concept well understood since Magna Carta 800 years ago. It is to Professor A.V. Dicey of Oxford University that the first use of the phrase ‘rule of law’ is generally credited (first used in his book *An Introduction to the Study of Law of the Constitution*, first published in 1885).
- 2.2 A common thread running through any definition of the concept however is that the law must be clear, understandable and accessible. Whilst most laws, in the form of primary and delegated legislation, are easily accessible in written hard-copy form or (more recently) on numerous free to use websites, it has become increasingly common for such legislation to incorporate external material by reference without setting out the contents of that material.

Incorporation by reference

- 2.3 Incorporation by reference may have the effect of making the external material legally binding. This practice brings a number of practical benefits, such as:
- the content of the external material would have to be replicated in full, sometimes leaving the legislation cumbersome, if this practice were not adopted
 - the practice serves to provide a measure of uniformity of provision nationally, or indeed internationally

- where the instrument adopts a standard as published ‘from time to time’ rather than as it stands on a given date, it allows for ease of amendment to incorporate future developments without the need to follow the full statutory process for making regulations.
- 2.4 On the other hand, it is possible to hold a suspicion that public authorities, including governments, have become reliant on the material produced by external agencies in order to fulfil their own regulatory responsibilities.
- 2.5 Whichever way the practice is regarded, the result is that the reader is forced to look outside the usual sources of written laws in order to gain a complete understanding of it. Affected parties are required to obtain the incorporated material if they are expected to know and fully comply with the law. Not only does this increase compliance costs, it may also have an adverse impact on actual levels of compliance.

Availability of standards

- 2.6 Some standards are produced by government bodies, which may or may not be given force through regulations, and these will generally be available free of charge. The Australian Communications and Media Authority, for instance, has developed a wealth of standards, and assists with Australia’s input to international telecommunication standards, under the *Australian Communications and Media Authority Act 2005*. They may be perused on its website.⁹ Another example is the National Quality Standard, produced by the Australian Children’s Education and Care Quality Authority. Others may be developed by private standards developing organisations such as Standards Australia, on behalf of, and funded by, the Commonwealth Government. Generally, the resulting output is made freely available, for example the guidance connected with the Department of Health’s eHealth initiative (see paragraph 7.2). Standards Australia is by far the biggest producer of such material, though the Committee was told in evidence that such independently funded standard development (including Government commissioned standards) amounts to only 2 per cent of that organisation’s project work.¹⁰ The rest, those that are not independently funded, are generally only available through purchase.
- 2.7 Those Standards, produced by Standards Australia and obtainable only from SAI Global Ltd. (SAI Global), are the focus of this report (and are identified through the adoption of the capitalised ‘Standard’).
- 2.8 Most of the output of Standards Australia is charged for, so that costs of production and intellectual property rights may be recovered and, as the Inquiry has found, those Standards are generally not easily accessible by anyone without purchase. The general

⁹ <http://www.acma.gov.au>. Viewed 10 March 2016.

¹⁰ Adam Stingemore, General Manager, Stakeholder Engagement and Public Affairs, Standards Australia, *Transcript of Evidence*, 14 August 2015, pp 1-2.

public, businesses, peak trade bodies, unions, government departments and local councils should, in an ideal world, be able to gain access to any material which forms a part of the law without charge, so that they may fully understand the laws applicable to them and the obligations they are under. Furthermore, this Committee should be entitled to scrutinise delegated legislation in accordance with the terms of reference provided to it by Parliament without incurring financial outlay.

- 2.9 This situation has caused significant concern to this Committee and, it would seem, to many of the people and organisations and governments that either made submissions to us, or gave direct evidence during a number of public hearings between August and November 2015.

Standards and their use in legislation

- 2.10 A memorandum of understanding made between the Commonwealth Government and Standards Australia in 2003 defined an Australian Standard as:

a standard issued by or under the authority of Standards Australia. 'Australian Standard' is a registered trade mark of Standards Australia. Australian Standards are consensus based, voluntary documents with which compliance is not mandatory unless incorporated into law or called up in contractual arrangements.

- 2.11 Industry clearly views Standards as a means of distributing technical information and establishing compatibilities. Governments are primarily interested in Standards as a means of managing risk and guaranteeing minimum levels of public health and safety and environmental qualities.
- 2.12 Section 50 of the *Fair Trading Act 1987* is an example of the way in which primary and delegated legislation can interact with Standards, adopted directly or with amendments, to create a whole. That section states:

Safety standards

(1) The regulations may prescribe a product safety standard for a specified kind of goods.

(2) A product safety standard for goods shall consist of such requirements —

(a) as to performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods;

(b) as to the testing of the goods during, or after the completion of, manufacture or processing;

(c) as to the form and content of markings, warnings or instructions to accompany the goods or be placed on a vending machine for the goods or a display stand or sign adjacent to the goods;

(d) as to equipment, component parts or other accessories to be supplied with the goods; or

(e) otherwise relating to goods of that class or description,

as are reasonably necessary to prevent or reduce risk of injury to a person.

(3) Regulations made under subsection (1) may —

(a) adopt either wholly or in part and either specifically or by reference any Australian Standard or any of the standards, rules, codes or specifications —

(i) of Standards Australia; or

(ii) of a specified prescribed body,

with or without specified additions or variations; and

(b) prescribe any specified class or description of goods, notwithstanding that the goods are for use only as component parts of other goods (whether or not those other goods are goods of a prescribed class or description).

*(4) In this section **specified** means specified in the regulations.*

2.13 The text of this provision and the delegated legislation made under it (the *Fair Trading (Product Safety Standard) Regulations 2001*) may be found on the State Law Publisher's website (www.slp.wa.gov.au) as an illustration of the type of architecture of legislative provisions that can be created. The regulations, in 34 Parts, cover all manner of consumer goods from elastic luggage straps, through cycle helmets and bunk beds, ending with children's toys. The laws covering the safety standards relating to each of those categories of goods are then contained by reference in Standards, varied as necessary, and listed in 24 schedules to the regulations.

2.14 It is provisions such as these regulations that operate to give the Standards legislative effect. The modifications to the Standards that are set out in the schedules to those regulations suggest that they have been the subject of independent consideration by the relevant government authority though, and (at least in theory) it is the job of this Committee in scrutinising such instruments to consider whether the resulting law was

what was contemplated by Parliament when it made the delegation. It is worth reiterating though that whilst the Act and the regulations made under it may be found in hard copy in libraries, or online at various sites, free of charge, the referenced Standards may not. Obviously, the variations to the Standards made by the schedules to the regulations make no sense without the Standards themselves.

Committee scrutiny

- 2.15 The Committee may recommend disallowance of a provision such as that above if the terms of the Standard are beyond the regulation-making power delegated, as contained in the relevant Act, or if it otherwise offends against its terms of reference. The reality is however that, despite calls for Standards to be subjected to the same level of parliamentary scrutiny as the regulations that adopt them (see, for example, the submission of the Housing Industry Association¹¹), Committees such as ours have neither the technical expertise to do so nor the time. This problem has been raised in the past, as mentioned in Chapter 1, with the 2011 Annual Report of this Committee stating:

*The Committee is concerned about its capacity to scrutinise the law when, through delegated instruments, a further delegation occurs in the calling up of standards. The Committee questions whether it is Parliament's intention to provide this level of scrutiny. Committee concerns are compounded when a standard calls up a number of further standards and documents.*¹²

- 2.16 By way of recent example to illustrate the problem, in August 2015 the Department of Commerce made the *Electricity (Network Safety) Regulations 2015*, which adopted, and therefore required compliance with, Australian Standard AS 5577, which deals with network safety management systems. That Standard alone runs to more than 1,000 pages. The regulations also adopted by reference AS/NZS 2067:2015, AS/ANZ 3000:2007 and AS/NZS 7000:2010. In addition to all of those, regulation 19 requires compliance with 'obligatory provisions' and 'evidentiary provisions', which mean provisions in a standard or code specified in Schedules 1 and 2 to the regulations. Those schedules then list 87 further Australian or Australian/New Zealand Standards. All of these are only legitimately obtainable through purchase from SAI Global.

Impact of Standards

- 2.17 Of more concern to the Committee from the public's point of view is the fact that a breach of an adopted Standard of which a person or company may be unaware, or may be unable to easily reference, may lead to the commission of an offence, or may lead to a person's dismissal, as was pointed out to the Committee in evidence. This will be

¹¹ Submission 10 from Housing Industry Association, 29 January 2015, p 2.

¹² At page 6, paragraph 3.5.

explored later in this report, but by way of a simple example of such an offence provision, under regulations 42 and 43 of the *Water Services Regulations 2013*, an owner or occupier of land may be required by the Water Corporation to install a backflow prevention device. The selection and installation of such a device is governed by Standards called-up into the regulations, as is the testing, certification and maintenance of the device. A failure to comply with the provisions of these Standards may result in the owner or occupier incurring a fine of \$5,000 and a daily penalty of \$500.¹³

- 2.18 Standards undoubtedly play a valuable role in all of our lives, whether we are aware of it or not, as the quote from Winton Higgins on page 1 of the Executive Summary illustrates. The Chief Executive Officer of SAI Global told us in evidence:

*There are numerous economic benefits that come out of standardisation, things like trade facilitation, elimination of duplication, competence, interoperability ... supply chain efficiency, improved safety, highest quality environmental protection, risk management and business process improvement.*¹⁴

- 2.19 Standards Australia, in its submission to the inquiry, described the benefits to Australian life of a robust and independent standard-setting system as:

- *facilitating market exchange*
- *facilitating international trade, transport, communication and innovation*
- *improving the process of research*
- *providing businesses and consumers with greater certainty about the safety and quality of products*
- *addressing public concerns on issues such as health, safety and the environment, and*
- *harmonising supply chains nationally and internationally by contributing to trade in compliance with Australia's World Trade Organisation obligations.*¹⁵

¹³ By virtue of section 222(6) of the *Water Services Act 2012*, under which these regulations are made, the adoption of external material in the regulations is of no effect unless it '*can at all reasonable times be inspected or purchased by the public*'. The simple fact that the Standard regarding materials, design and performance requirements (AS/NZS 2845.1:2010) is available from SAI Global for between \$256.71 and \$438.97, depending on format, would satisfy this requirement.

¹⁴ Peter Mullins, Chief Executive Officer, SAI Global Ltd., *Transcript of Evidence*, 14 October 2015, p 2.

¹⁵ Submission 19 from Standards Australia, January 2015, p 3.

- 2.20 It is noted that of particular importance to the relationship between Standards Australia and the Government is the use of consensus in formulating Standards. We heard evidence from representatives of Master Electricians Australia (MEA)¹⁶, the State Library, Public Libraries Western Australia and the National State Libraries Association¹⁷, for example, about the level of participation of experts in their development, which assists in balancing different interests. Not only that, but this gathering together of experts and the aggregation of their joint knowledge in one document allows for easier and wider dissemination.
- 2.21 Government itself has been able to play various roles in the development and enforcement of Standards, as Daniel Stewart said in his essay *Private Standards as Delegated Legislation*.¹⁸ It can mandate compliance with them; commission or encourage development of them through funding; design the framework in which standards are to be developed in an attempt to bridge the gap between public and private interests; establish ‘deemed-to-comply’ regulatory arrangements; use standards as guidelines or advisory documents or use them as an adjunct for the main regulatory purpose, such as providing ways to test compliance or measurement.

Committee concerns

- 2.22 It should be stressed from the outset of this report that the existence, desirability or quality of Australian Standards, or indeed standards produced by other standards writing organisations, domestically or internationally, are not the focus of this inquiry. As recently as March 2015, the Commonwealth Government recognised the work of Standards Australia in enhancing the nation’s economic efficiency and international competitiveness, and its contribution to community demand for a safe and sustainable environment.¹⁹ This Committee would agree, and views the role and input of Standards Australia in positive terms, recognising the important function that it fulfils.
- 2.23 We also recognise the fact that some, if not most delegated legislation that incorporates by reference relevant Standards will be of no concern or interest to the general public. At one extreme, we accept that provisions such as the electricity supply provisions mentioned at paragraph 2.16 will only be of interest to a handful of electricity suppliers, who might be expected to be in a position to purchase the relevant Standards, or at least have an online subscription through which to access them. Likewise, for example, regulations that adopt Standards relating to mining and

¹⁶ Alan McCallum, Acting State Manager, Master Electricians Australia, *Transcript of Evidence*, 21 August 2015, p 9, and answer to question on notice asked at hearing held on 21 August 2015, p 1.

¹⁷ Debra Summers, President, Public Libraries Western Australia Inc., Alison Sutherland, Acting Chief Executive Officer and State Librarian, State Library of Western Australia, Libby Cass, Manager eResources Consortium, National Library of Australia, *Transcript of Evidence*, 21 August 2015, pp 8-9.

¹⁸ See Daniel Stewart, ‘*Private Standards as Delegated Legislation*’, *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce*, The Federation Press, Leichhardt, p 81.

¹⁹ *Australia’s Standards and Conformance Infrastructure: An Essential Foundation*. Australian Government Department of Industry and Science, Canberra, March 2015.

explosives, which would only be applicable to licenced professionals in the field, and thus:

*are therefore unlikely to be used by the general public, but rather by professional or commercial entities that absorb the cost of access to the Standards.*²⁰

- 2.24 As an aside though, it does seem plain to the Committee that absorption of the costs of accessing Standards inevitably has an effect on the overall outgoings of those commercial enterprises, costs which will generally be passed on to the customer in the long run.
- 2.25 At the other extreme, many other Standards will have a more direct effect on ordinary consumers, small businesses and sole traders, covering as they do diverse subjects such as the manufacture of children's nightwear and personal flotation devices, tree management, swimming pool fencing, car seats and restraints, house insulation, etc. The list goes on.
- 2.26 It must be recognised that, for example, purchasers of children's nightwear would not generally be expected to examine the material specifications and testing Standard applicable to that product (AS/NZS 1249:2014). They would rely on the assumption that the manufacturer had complied. In respect of tradespeople, as Peter Gow of the Building Commission told the Inquiry:

*In some situations the regulations will speak about the need to obtain protective eyewear which is in compliance with an Australian Standard. So the need to actually obtain the Standard is negligible, if at all, because the person who is buying the eye protection can rely on the supplier to have the appropriate labelling.*²¹

- 2.27 That is not to say that Standards should not be available to the public or available for parliamentary scrutiny. This Inquiry arose, as mentioned previously, not out of a concern at the quality or complexity of Standards incorporated, or because of any doubts as to the benefit derived from such incorporation. It arose out of a concern long held by the Committee that Standards are generally not accessible free of charge to the public, or to the Parliament, in the same way that primary and delegated legislation is publicly available.
- 2.28 The following extract from a submission made to us by the Urban Development Institute of Australia serves well to illustrate the balancing act that is faced:

²⁰ Submission 7 from Department of Mines and Petroleum, 23 January 2015, p 1.

²¹ Peter Gow, Executive Director, Building Commission, Department of Commerce, *Transcript of Evidence*, 14 August 2015, pp 2-3.

*UDIA understands the advantages and efficiencies in referring to Australian Standards within legislation, in that it allows legislative requirements to reflect best practice and current community standards, without the need for legislative amendment to effect such changes. While we recognise such efficiencies, the current barriers to obtaining Australian Standards, including financial burden, may impede the public's ability to fully understand and interpret legislation.*²²

- 2.29 That Standards adopted in legislation are only available at a cost should in particular be viewed in light of the fact that, as mentioned by the Productivity Commission in 2006, and as will be seen below, those Standards are created by experts and practitioners in their given fields, be they public servants or private employees or individuals, who donate their time and knowledge to Standards Australia free of charge. The Productivity Commission described the process thus:

*It is common practice for Australian Government agencies to reference Australian Standards in regulation without payment to Standards Australia (but at cost to those wishing to access the standard), and for a significant number of State, Territory and Australian Government representatives to contribute to the development of Australian Standards at no cost to Standards Australia.*²³

- 2.30 It would appear therefore that there is no cost involved in those parts of the chain. But there is a cost, ultimately, for anyone wishing to use the end product, due to the involvement of the third party publisher and distributor. Alison Sutherland, Acting Chief Executive Officer and State Librarian of the State Library of Western Australia, concurred, saying in evidence to the Committee:

*In summary, State Library is very concerned about the high levels of restrictions SAI Global places on the access and availability of Australian Standards, despite the fact that those standards are created by committees with significant and long-term input of experts who are often paid employees of private companies, government and universities across Australia.*²⁴

²² Submission 17 from Urban Development Institute of Australia, 30 January 2015, p 1.

²³ *Standard Setting and Laboratory Accreditation, Productivity Commission Research Report*, Commonwealth of Australia, Canberra, 2006, at pXVIII.

²⁴ Alison Sutherland, Acting Chief Executive Officer and State Librarian, State Library of Western Australia, *Transcript of Evidence*, 21 August 2015, p 3.

Finding 1: The cost of creating the content and the intellectual property in Australian Standards is borne by Standards Australia, but this is entirely dependent on the voluntary efforts of others. The Committee finds that the current system for the production and subsequent publication of Standards created by the contractual arrangements entered into between Standards Australia and SAI Global Ltd. in 2003 provides a financial advantage to the latter.

- 2.31 In the view of this Committee, it is important that no similar arrangements are made upon the expiry of the relationship.
- 2.32 In a welcome nod to transparency, the National Construction Code (NCC) has recently become freely available online on the website of the ABCB, as mentioned above. This is not a product of Standards Australia. It was produced by the ABCB with monies provided by Commonwealth and State and Territory Governments. Having said that, this version of the Code still incorporates over 200 Standards (according to the website of SAI Global), none of which are similarly freely available. An online subscription to the Code and the Standards referenced in it is \$2,510 per year as of May 2016.
- 2.33 Until very recently, those 200 Standards, along with all of the other Standards that are published by Standards Australia and that may be accessed via the SIA Global database, could be viewed at the State Library of Western Australia in Perth. However, on 10 May 2016, the Committee was made aware that contractual negotiations between the Library (indeed, all the State Libraries and the National Library of Australia) and SAI Global had broken down.²⁵ This is clearly an unhelpful development.

STANDARDS AS QUASI LEGISLATION

- 2.34 Once they are adopted or ‘called-up’, Standards become a type of ‘quasi-legislation’.²⁶ Other types of more informal regulatory documents that can create legal obligations when so adopted include codes, rules and guidance. Standards Australia itself estimates that some 2,400 of its Standards are mandatory because they have been called up in Federal and State legislation, with compliance legally required.²⁷

²⁵ Julie Ham, State Library of Western Australia, Electronic Mail, 10 May 2016.

²⁶ Sometimes described as ‘quasi-regulation’. The Commonwealth Interdepartmental Committee on Quasi-regulation, in its report *‘Grey Letter Law’* (December 1997), asserted at page 36 that the incorporation by reference in legislation of a standard did not render it ‘quasi-regulation’, but was better characterised as explicit government regulation. The previous year, however, the *Report of the Small Business Deregulation Task Force, ‘Time for Business’* (November 1996) had adopted a definition of ‘quasi-regulation’ which included adopted voluntary standards. (see paragraph 3.32)

²⁷ Standards Australia, *Development Phases*, Available at: <http://www.standards.org.au/StandardsDevelopment/Developing_Standards/Pages/Development-phases.aspx>. Viewed 10 March 2016.

- 2.35 However, unlike primary legislation, delegated legislation and some standards created by the Executive, which the Government makes readily accessible on the internet²⁸, access to Standards is limited because they are subject to copyright and licence terms, as referred to by the Acting State Librarian above.
- 2.36 It is the view of this Committee that, by the very nature of their legislative status, these documents ought to be available free of charge, as many of the bodies who submitted evidence to the Inquiry told us. The Housing Industry Association, for example, said:
- HIA believes that any Australian Standard referenced directly in delegated legislation or as a secondary reference, such as the NCC [National Construction Code], should be made freely available to the public in an online format. The use of standards in this manner has the effect of making them 'quasi-regulation' and therefore it is our view that they should be freely available in the same manner as the delegated legislation.*²⁹
- 2.37 It is also possible for Standards to take on a legal status through incorporation by reference in a contract. Furthermore, even 'voluntary' Standards (Standards that have not been incorporated anywhere in legislation or contract) can be given an evidential status by the courts, either as an aid to establishing negligence, for example, or conversely as an aid in the defence to such an action.³⁰ A Standard '*is accepted as representing a consensus of professional opinion and practical experience about sensible, safe precautions*'.³¹
- 2.38 This Inquiry will however deal only with Standards that have been incorporated into legislation.

Legality of quasi-legislation – a brief history

- 2.39 According to Pearce and Argument³², the term 'quasi-legislation' can first be attributed to RE Megarry (later Sir Robert Megarry J, Vice Chancellor) in an article

²⁸ All Acts, delegated legislation and Government Gazettes can be viewed at the Western Australian Government State Law Publisher site www.slp.wa.gov.au. The Department of Local Government and Communities website also contains a Local Laws Register, a more efficient way to access local laws.

²⁹ Submission 10 from Housing Industry Association Ltd., 29 January 2015, p 1.

³⁰ In this context, Standards 'are a guide to, but they cannot dictate, the standard of reasonable care required in the circumstances of individual cases'. *Jones v Bartlett* [2000] HCA 56, per McHugh J at paragraph 110.

³¹ Per Pullin JA in *MR and RC Smith Pty Ltd. t/a Ultra Tune (Osborne Park) v Wyatt (No.2)* [2012] WASCA 110 at paragraph 70. See also for example *Anne Christina Benton v Tea Tree Plaza Nominees* (1995) 64 SASR 494; *Fitzpatrick v Robert Norman Job and Wendy Barbara Job t/a Jobs Engineering & Ors* [2007] WASCA 63.

³² Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 4th Edition, LexisNexis Butterworths, Australia, 2012, p 15.

that appeared in 1944 entitled *Administrative Quasi-legislation*.³³ In it, he discussed the growing use of wartime practice notes, announcements and agreements that had taken on almost statutory force. The matter was taken up in a more modern setting by Professor Gabrielle Ganz in a book entitled *Quasi-legislation: Recent Developments in Secondary Legislation*.³⁴ She mentions a plethora of forms in which such quasi-legislation may appear, including:

*Codes of practice, guidance, guidance notes, guidelines, circulars, White Papers, development control policy notes, development briefs, practice statements, tax concessions, Health Service Notes, Family Practitioner Notices, codes of conduct, codes of ethics and convention...*³⁵

- 2.40 Historically, in Australia, doubts were cast on the validity of delegated legislation that merely referenced external material without setting out its terms in full. Things have moved on though. In the words of Pearce and Argument:

*It can be seen that there has been a movement in the thinking of the judges. The earlier decisions required the legislation to be complete. Later cases, probably because of a tacit recognition of the problems associated with a full spelling-out of the obligations in a form that merely repeated another document, permit legislation by reference.*³⁶

- 2.41 In the case of *McDevitt v McArthur* (1919) 15 Tas LR 6, a by-law made under powers contained in the *Marine Boards Act 1899* (Tas) was declared to be void on the grounds of non-publication and/or uncertainty because it merely referenced imperial regulations without setting out their terms in full. Nicholls CJ said:

*I am prepared to lay down that, when by-laws are to be published in the Gazette, then what is there published must be sufficiently complete to leave a reader, who can and will understand ordinary English, free from uncertainty as to any enacting part off the by-law.*³⁷

- 2.42 That line of argument was followed in a number of subsequent cases, amongst them the High Court matter of *Arnold v Hunt* (1943) 67 CLR 429, concerning the fixing of minimum prices for goods under national security legislation in force during World

³³ 60 *Law Quarterly Review*, 125.

³⁴ *Quasi legislation: Recent Developments in Secondary Legislation*, Professor Gabrielle Ganz, Sweet and Maxwell, London, 1987.

³⁵ Ibid. pp 1-2.

³⁶ *Delegated Legislation in Australia*, 4th Edition, Dennis Pearce and Stephen Argument, LexisNexis Butterworths, Australia, 2012, pp 381-2.

³⁷ *McDevitt v McArthur* (1919) 15 Tas LR 6, p 8.

War II. The Prices Commissioner had fixed the price of liquor by reference to a price list prepared by the United Licenced Victuallers Association. Hunt J said:

*I consider that the price must be fixed and declared in the body of the order itself or in a schedule to the order and cannot be fixed by some extraneous document which is not part and parcel of the order.*³⁸

- 2.43 In *Wright v TIL Services Pty Ltd* (1956) SR (NSW) 413, however, regulations which required electrical devices to comply with the relevant rules of the Standards Association of Australia (as Standards Australia was then known) were held to be valid. Walsh J said:

*The general proposition that in no circumstances can a regulation incorporate by reference something not set forth in it is, in my opinion, unsound.*³⁹

- 2.44 The reasoning of Walsh J has since been followed in a number of cases⁴⁰, including *Dorfler v Pine Rivers Shire Council* [1994]⁴¹, where it was held that a reference to a design manual in specifying obligations relating to the sealing of roads was found to be legitimate.

Legality of quasi-legislation today

- 2.45 It is now clear that the incorporation of other material into delegated legislation in Western Australia is perfectly legitimate, and it has been specifically provided for in statute. In respect of regulations made by the Governor at the request of Government, section 43 of the *Interpretation Act 1984* provides, in so far as is relevant:

(8) *Subsidiary legislation may be made —*

(b) *so as to require a matter affected by the legislation to be —*

(i) *in accordance with a specified standard or specified requirement;*

- 2.46 Other primary legislation in the State allows for the making of regulations which may adopt, either specifically or by reference, standards, rules, codes or specifications without reference to section 43. These include, by way of example, the *Caravan Parks and Camping Grounds Act 1995*, the *Control of Vehicles (Off-road Areas) Act 1978* and the *Dog Act 1976*.

³⁸ *Arnold v Hunt* (1943) 67 CLR 429, p 432.

³⁹ *Wright v TIL Services Pty Ltd* (1956) SR (NSW) 413, pp 421-2.

⁴⁰ e.g. *Medcraft v City of Box Hill* [1959] VR 768; *Sobania v Nitsche* (1969) 16 FLR 329; *Dainsford Ltd v Smith* (1985) 115 CLR 342.

⁴¹ *Dorfler v Pine Rivers Shire Council* [1994] 1 Qd R 507.

2.47 In relation to local laws, section 3.8 of the *Local Government Act 1995* provides:

(1) A local law made under this Act may adopt the text of —

- (a) any model local law, or amendment to it, published under section 3.9; or*
- (b) a local law of any other local government; or*
- (c) any code, rules, specifications, or standard issued by Standards Australia or by such other body as is specified in the local law.*

(2) The text may be adopted —

- (a) wholly or in part; or*
- (b) as modified by the local law; or*
- (c) as it exists at a particular date or, except if the text of a model local law is being adopted, as amended from time to time.*

(1) The adoption may be direct, by reference made in the local law, or indirect, by reference made in any text that is itself directly or indirectly adopted.

2.48 Other Western Australian legislation which specifically provides for the adoption of external texts in local laws, including Australian Standards, includes the *Cat Act 2011* (section 82) and the *Health Act 1911* (section 344A). With regard to the latter, it is common for health local laws to cite:

- AS/NZS ISO 717.1:2004 – acoustics and sound insulation (in respect of adjoining toilets)
- AS 1530.2:1993 and AS/NZS 1530.3:1999 – methods for fire tests
- AS 1668.2-2912 – ventilation and air-conditioning
- AS 2001.5.4-2005 – domestic washing and drying techniques for textiles, and
- AS/NZS 3666.22:2011 – air handling and water systems – microbial control.

- 2.49 In contrast to some enabling legislation, which requires publication of a standard that has been created by or on behalf of the Executive⁴², external material incorporated under either of the Western Australian provisions relating to regulations or local laws cited above, including a Standard, does not have to be published in the *Government Gazette*.

Delegation or abdication?

- 2.50 This ability to simply cite external documentation in legislation raises questions about the role of Parliament.
- 2.51 The act of delegation generally retains a measure of continued oversight, in terms of reports back to the delegator on the use of the delegated power, or indeed a final veto on their use. In terms of the delegation of legislation under statute in the Westminster model of Parliaments, the review power is generally entrusted to committees such as ours, so as to ensure that the delegated power is not exercised capriciously or outside of the legislative boundaries set. If such committees are unable to properly fulfil that role, then Parliament might be said to have abdicated the power rather than delegating it, in that it has authorised a marked deviation from accepted rule of law principles.
- 2.52 This apparent abdication is particularly evident where statutory provisions allow for the adoption of Standards ‘*as made from time to time*’, for example in section 3.8(2)(c) of the *Local Government Act 1995*, set out above. This is extremely convenient for the makers of the instrument, in that the regulations or local law need not be re-produced each time the Standard is updated or rewritten. Unfortunately, it also means that only the version of the Standard as it exists at the time the legislation is made is subjected to any sort of parliamentary scrutiny – when it is later amended or reproduced, it is effectively the private standard making body that is making law. It amounts to a sub-delegation of the delegation to make the instrument, albeit a lawful one. In some circumstances, an abdication perhaps.
- 2.53 It is, however, a common formulation. Other comparable jurisdictions also allow for the incorporation of external material as made or published from time to time. Nor, for the record, is this type of formulation restricted to the adoption of Standards. For example, the *Mental Health Act 2013* provides, at section 6(4):

A decision whether or not a person has a mental illness must be made in accordance with internationally accepted standards prescribed by the regulations for this subsection.

- 2.54 The relevant regulation then states:

⁴² For example, the *Competition and Consumer (Corded Internal Window Coverings) Safety Standard 2014* (3925:13) drafted by the Australian Competition and Consumer Commission under the *Australian Consumer Law*. Section 21 of the *Fair Trading Act 2010* requires certain instruments, including this standard, to be published.

Standards for diagnosing mental illness (Act s. 6(4))

For section 6(4) of the Act, a decision whether or not a person has a mental illness must be made in accordance with the diagnostic standards set out in either or both of these publications —

- (a) the International Statistical Classification of Diseases and Related Health Problems published from time to time by the World Health Organisation;*
- (b) the Diagnostic and Statistical Manual of Mental Disorders published from time to time by the American Psychiatric Association.*

- 2.55 The use of this formulation has been restricted in Commonwealth legislation; Section 14(2) of the *Legislation Act 2003* (Cth) states:

Unless the contrary intention appears, the legislative instrument or notifiable instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

- 2.56 This general limitation on the adoption of such material ‘*in force or existing from time to time*’ gives the statutory authors and drafters pause for thought as to whether that formulation is strictly necessary, and allows the Australian Parliament, through its Regulations and Ordinances Committee, to control the content of delegated legislation (and thus the content of the law).

- 2.57 On the matter of abdication of power, the famous and often quoted case of *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan*⁴³ considered the proposition that the scope of delegated authority should not be unqualified. Evatt J stated⁴⁴:

the Parliament of the Commonwealth is not competent to “abdicate” its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; and not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or bylaws ..., for it does so in almost every statute; but because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters stated in the Constitution. A law by which Parliament gave all

⁴³ *Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73.

⁴⁴ At p 121.

its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned.

- 2.58 Other judges in the case considered the scope of parliamentary delegation to be a political matter – the courts’ only role was to consider whether the instrument in question fell within the scope of the delegation (much like this Committee’s term of reference 10.6(a)). Overall, the High Court found that it was impossible to insist upon a strict separation of powers between government and legislature. This dicta has been followed in other cases since, on the basis that so long as parliaments have the power to amend or rescind the delegation given, then it retains ultimate power and this does not therefore amount to an abdication of power.⁴⁵

Scope of scrutiny role

- 2.59 In light of the statutory provisions mentioned above which specifically allow for the adoption into legislative instruments of external materials, the role of committees such as this is necessarily limited to the matters outlined in our terms of reference. But in order to exercise even that limited role, Parliament and this Committee must be afforded free and easy access to the documents that are given quasi-legislative status. This will be explored more fully in Chapter 8.
- 2.60 It is of course a matter for the Parliament of Western Australia to decide the level of scrutiny which this Committee should exercise over delegated legislation, and what the balance should be between freely allowing the calling-up of outside documents and exercising Parliamentary oversight. However, should this Committee believe that the balance may not be working as contemplated, it is to be expected that we should report this to Parliament. This we now do.

⁴⁵

See for example *Capital Duplicators v Australian Capital Territory* (1992) 177 CLR 248.

CHAPTER 3

STANDARDS AUSTRALIA AND SAI GLOBAL

OVERVIEW

- 3.1 In an interview with the Australian Financial Review published on 20 March 2014, the Chief Executive of Standards Australia, Dr Bronwyn Evans, said that there were ‘6,500- plus’ Australian Standards in operation, about one quarter of which ‘*become mandated either through law or contracts*’.⁴⁶ As noted in paragraph 2.34, Standards Australia’s website puts the figure at an estimated 2,400.
- 3.2 A certain figure is difficult to achieve. A rather rudimentary (though extremely helpful) search exercise carried out by the Commonwealth Department of Industry and Science in February 2015 put the number of items of primary and delegated legislation that cite Standards nationwide at 1,832 (207 in Western Australia, being 95 Acts of Parliament and sets of regulations).⁴⁷ This number did not include local laws – the Department of Local Government and Communities gave a figure for Western Australia in 2014 at around one quarter of local laws submitted to the Department under section 3.12 of the *Local Government Act 1995* that adopted Standards out of a total of approximately 100.⁴⁸
- 3.3 Copyright for Standards is owned by Standards Australia. Since 2003, SAI Global has distributed those Australian Standards under the terms of a Publication and Licensing Agreement (frequently referred to in evidence and below as the PLA). The *Copyright Act 1968* (Cth) has the effect of making Standards publicly available only if an exception in the Act or statutory licence applies, or if SAI Global permits (for payment or otherwise).

STANDARDS AUSTRALIA

- 3.4 Put simply, the main role of Standards Australia is to produce Australian Standards. To be more precise, Standards are produced by committees of volunteers put together and supported by Standards Australia staff. In the words of Standards Australia:

These Committee Members are consumer representatives, industry professionals, government representatives and academics who come together across Australia to debate how a product or system should

⁴⁶ <http://www.standards.org.au/AnalyticsReports/140320%20AFR%20Op%20Ed.pdf>. Viewed 4 September 2015.

⁴⁷ Hon Ian Macfarlane MP, Ministry for Industry and Science, Letter, 4 February 2015.

⁴⁸ Submission 6 from Department of Local Government and Communities, 23 January 2015, p 2.

*perform and how it should be made. Their contributions are essential - they are the life blood of Standards Australia.*⁴⁹

- 3.5 Acknowledging the work contributed by those committee members, and its estimated worth to the community at large, the website goes on:

*Our Technical Committee members are the lifeblood of standardisation. They willingly give their time and expertise to advance the principles and practices of standardisation. Their contribution to Australia's well-being cannot be overestimated. Although they give their time freely, it is estimated that their contribution is worth more than \$30 million per year to the national interest.*⁵⁰

- 3.6 Standards Australia's Annual Review 2015 gives a figure of some 6,000 volunteers who serve on its network of 835 Technical Committees and Subcommittees. None of these experts are paid by Standards Australia. Generally, or perhaps usually, they will be paid by their employers for the time donated to serving on committees, and they will have their necessary expenses covered. This will not always be the case. We heard from Libby Cass of the National Library of Australia, for example, who told us:

*The committee members receive no funding from Standards Australia to attend meetings. Often, they realise the importance of it, and they will be flying to things on their own dollar or their organisation will support their attendance.*⁵¹

- 3.7 Ms Cass continued:

*The advice that I have is that over the years, NSLA [National and State Libraries Australasia] members' ability to contribute to this work has diminished because of the financial constraints that their institutions are under, but we recognise the importance of this work, and this is where some members are attending these things at their own cost.*⁵²

- 3.8 The financial aspects of the role of these expert volunteers was clarified for the Committee by Adam Stingemore of Standards Australia. He told us:

⁴⁹ http://www.standards.org.au/StandardsDevelopment/Developing_Standards/Pages/Standards-Developers.aspx. Viewed 16 November 2015.

⁵⁰ <http://www.standards.org.au/OurOrganisation/AboutUs/Pages/default.aspx>. Viewed 16 November 2015.

⁵¹ Libby Cass, Manager NSLA eResources Consortium, National Library of Australia, *Transcript of Evidence*, 21 August 2015, p 8.

⁵² *Ibid.* p 9.

*By us, by Standards Australia, there is no fee paid to technical committee contributors. In terms of those who contribute to our process, obviously those from government and some industry contributors do it as part of their work; they do it as part of their ongoing employment relationships. Importantly, when you are talking about industry contributions, they are not there to represent a company; they are there to represent a nominating organisation or a group—through a trade association—and we provide funding to the Consumers' Federation of Australia on an annual basis to allow the CFA then to fund contributions from the consumer community sector to our process.*⁵³

- 3.9 Mr Stingemore confirmed that membership of a Standards Australia committee of experts does not even endow a participant with any sort of exclusive free access to copies of Standards generally or to the SAI Global website. Alan McCallum, Acting State Secretary of MEA, told the Inquiry in a written response to questions on notice:

Master Electricians Australia have a couple of individuals that are on Standards committees so they have free access to a number of related Standards due to the relationship they have with other standards reference to their specific committees.

*They are not allowed to share these with any other organisation, our own included. Only for committee use.*⁵⁴

- 3.10 Materially, volunteers are rewarded with a hard copy of the Standard in which they assisted in the development, as well as a certificate of appreciation.
- 3.11 Standards Australia is not a government or public entity. It is a company limited by guarantee, with guarantor members rather than shareholders. At the time of writing, it has around 75 such members drawn from a range of government, industry and consumer organisations, one of which is EnergySafety, a division of the Western Australian Department of Commerce. A list of members as at May 2016 can be found at **Appendix 2**.
- 3.12 Just as Standards Australia is not part of government, nor is it a regulator responsible for enforcing compliance with its published Standards. It is a not-for-profit organisation, in that by its constitution it is prohibited from making any payments to

⁵³ Adam Stingemore, General Manager, Stakeholder Engagement and Public Affairs, Standards Australia, *Transcript of Evidence*, 14 August 2015, p 6.

⁵⁴ Answer to question on notice asked at hearing held on 21 August 2015, p 1.

its members, and must only apply its income and property solely towards the promotion of its objects⁵⁵, the principal one of which is:

*To prepare and maintain standards as a principal activity both at the national and international levels and to promote the general adoption of standards (including international standards) as well as preparing other related publications, handbooks, codes and guides including but not limited to those relating to structures, commodities, materials, practices, operations, services, safety, environmental, economic and business efficiency, consumer matters, and from time to time revise, alter and amend the same.*⁵⁶

- 3.13 It has a non-legally binding memorandum of understanding with the Commonwealth Government (see below), and receives some Commonwealth funding towards its obligations in representing Australia on various international standards-making bodies. Otherwise, its funding is derived partly from its own activities, in the form of royalties paid by its outsourced publishing partner, SAI Global, and partly from investment income.

History of Standards Australia

- 3.14 Whilst the history of Standards Australia may not appear to be pertinent to the subject matter of this inquiry, it does reveal the reasons why the issues that concern the Committee came about.
- 3.15 The organisation that is now known as Standards Australia began life with the announcement in the *Australian Commonwealth Government Gazette* on 12 October 1922 of the creation of the Australian Commonwealth Engineers Standards Association, formed by a gathering of organisations concerned with science and engineering, railways, chemicals and mining and metallurgy. It changed its name to the Standards Association of Australia in 1929, following a merger with the Australian Commonwealth Association of Simplified Practice, and received a Royal Charter to develop standards in the national interest in 1950. Shortly before that, in 1947, it had become one of the founding members of the International Organisation for Standardisation, recognised globally for the ISO prefix to many modern standards.
- 3.16 In 1988, the word ‘association’ was discarded, and Standards Australia, as it was now known, entered into a memorandum of understanding with the Federal Government recognising it as the peak non-Government body for standards development (see later at paragraph 3.22). In terms of corporate structure, by 1999, it had revoked its Royal Charter and incorporated as an Australian public company limited by guarantee.

⁵⁵ Clause 3 of the Constitution of Standards Australia Limited – ABN 85 087 326 690.

⁵⁶ Ibid. Clause 7(a).

- 3.17 In the meantime, in 1990, it had established a wholly owned ‘for profit’ business, known as Standards Australia Quality Assurance Services (SAQAS), which provided certification services for Standards compliance, whilst the development of those Standards remained within the not-for-profit Standards Australia. This, however, was not without controversy, with a belief in some quarters that, in spreading its commercial wings, Standards Australia might have lost the sense of its original reason for being. It was also accused of trespassing on the field of testing activities occupied by, notably, the National Association of Testing Authorities, as well as creating unnecessary overlap and duplication. In the words of Winton Higgins:

In this period (1990-93) the organisation found itself, its subsidiary SAQAS, and their newfound entrepreneurial spirit the objects of controversy for a range of actors within the national technical infrastructure, the business press, industry and the federal bureaucracy.⁵⁷

- 3.18 The establishment of this new and growing activity seems to have been the catalyst for perhaps the most significant period of government scrutiny in Standards Australia’s history.

The Kean Review

- 3.19 In 1995, the Commonwealth Government published ‘*Linking Australia Globally*’. This was the title given to the report of the Committee of Inquiry into Australia’s Standards and Conformance Infrastructure, otherwise known as the ‘Kean Review’, in reference to the inquiry’s Chairman, Bruce Kean.⁵⁸
- 3.20 The terms of reference for that inquiry, which may be found at Appendix C to its final report, were extremely wide-ranging. Its commission came about as a result of a decision to review Australia’s infrastructure organisations to ensure that they were responsive to world developments, able to take a lead in shaping those developments and able to forge arrangements to reduce barriers to international trade. It was also in part because of some perceived shortcomings in the responsiveness of Standards Australia to industry’s needs in regards to Standards writing, amongst other concerns.⁵⁹
- 3.21 The final report made some 18 recommendations regarding the structure and governance of Standards Australia, the way that Standards were formulated and the relationships between Standards Australia and other international standards-setting

⁵⁷ *Engine of Change: Standards Australia since 1922*, Winton Higgins, Brandl & Schlesinger, Australia, 2005, p 241.

⁵⁸ *Linking Industry Globally: Report of the Committee of Inquiry into Australia’s Standards and Conformance Infrastructure*, Australian Government Publishing Service, Canberra, March 1995.

⁵⁹ *Ibid.* pp 13-14.

and trade organisations. The matters that are relevant for the purposes of this inquiry are largely set out at pages 83-85 of that report. The review team had identified questions about the performance by Standards Australia of its core function, being that of standard writing. It was at least possible, it was thought, that this function had suffered as a result of the pursuit of non-core commercial activities, being:

- publishing, and
- the certification of corporate compliance with standards.

3.22 On the matter of publications, that committee had received submissions complaining that Standards Australia was producing material for profit rather than to meet the needs of its constituents, its client base or the community. It was alleged that Standards were being republished, and broken up into several parts, with the purpose of generating extra revenue. On the carrying out of certifications, SAQAS was perceived to be at a significant commercial advantage to other certification providers due to its close links with Standards Australia which had, as mentioned previously, received the imprimatur of government by way of the memorandum of understanding which recognised it as Australia's peak standards provider. It was found that the highly commercial nature of the business of certification of quality assurance *did not sit comfortably in an organisation whose primary function was writing standards*.⁶⁰

3.23 The report concluded:

The Committee considered that there were signs that Standards Australia was already feeling the effects of such a dynamic. It considered that such a prospect had deleterious implications for the performance by Standards Australia of its core obligation to serve as Australia's peak standards writing body and the national interest that is so served.

*The Committee concluded that a greater separation between Standards Australia and SAQAS was required. It considers that Standards Australia should divest itself of at least 51% of SAQAS so that SAQAS can be independently governed by a board which is not bound to be directed by Standards Australia. Under such an arrangement, Standards Australia can still enjoy the benefit of the asset which it has created in SAQAS through realisation of the capital value of 51% of SAQAS and from a continuing stream of income as a result of its significant minority shareholding.*⁶¹

3.24 Thus, recommendations included:

⁶⁰ Ibid. pp 84-85.

⁶¹ Ibid. p 85.

20. The Commonwealth Government request that Standards Australia and SAQAS should immediately remove cross-identification with each other, including use of common terminology in their names.

21. The Commonwealth Government request that Standards Australia take steps to divest 51% of SAQAS at an early date to maintain the national interest of ensuring that Australia's peak standards writing body retain standards writing as its core activity.⁶²

- 3.25 The Government responded to the Kean Review later in 1995.⁶³ In response to Recommendations 20 and 21, it noted that Standards Australia had by then already changed the name of SAQAS to Quality Assurance Services Pty Ltd. (QAS), and that arrangements had been made for less cross representation on the two boards. It concluded:

The Government agrees it is important that standards writing remain the focus of Standards Australia's activities and that its commercial interests not distract from that core activity. It also agrees that it would be most undesirable if the special status conferred on Standards Australia through the Memorandum of Understanding with the Government were in any way to give its subsidiary a commercial advantage in the certification market. The Government notes that Standards Australia has already taken steps to remove cross identification and to effect greater management separation. Notwithstanding the views put to Government in favour of divestiture, the Government is not persuaded at this stage that there is a clear cut case for pressing Standards Australia to divest itself of part or all of its interests in QAS.⁶⁴

- 3.26 The Government concluded, however, by stating that it would be keeping the situation under review to ensure that, in the national interest, there was adequate separation between the two bodies.

Standards Accreditation Board

- 3.27 Another outcome of the Kean Review was that, in 1996, Standards Australia created the Standards Accreditation Board (now known as the Accreditation Board for Standards Developing Organisations), following a finding from that inquiry that other standards developers should be encouraged. It recommended:

⁶² Ibid. pp xx-xxi.

⁶³ *Australia's Standards and Conformance Infrastructure: The Government's response to the Report of the Committee of Inquiry into Australia's Standards and Conformance Infrastructure*, Commonwealth of Australia, Canberra, 1995.

⁶⁴ Ibid. pp 12-13.

26. Standards Australia reorganise its structure to enable it to serve more effectively as peak body for standards writing in Australia, specifically by

- establishing a process for accreditation of other standards writers which is entirely independent of its existing procedures for standards writing*
- establishing a comparable independent process for approval of standards, both written in-house and by other standards writers*
- establishing for distribution and publication of standards fixed and public procedures and prices which allow for an appropriate return to the standards writer for the intellectual property.*

3.28 Thus, provided they have been accredited, other bodies, known as Standards Development Organisations (SDOs) can develop their own industry standards and have them recognised as Australian Standards. Standards Australia supports those SDOs (which currently comprise the Pharmacy Guild of Australia, Australian Forestry Standard Ltd., the Australian Horticultural Export Association, the Communications Alliance, the Fisheries Research and Development Corporation and the Rail Industry Safety and Standards Board), and this is reflected in Object 7(d) of its constitution, which reads:

to support the Accreditation Board for Standards Development Organisations carrying out its powers.

3.29 Clearly, such accreditation brings with it rights and responsibilities. Technical support and assistance is rendered in the development of relevant Standards, provided that the policies and rules of Standards Australia are complied with in the preparation, development and publication of those Standards, and that compliance is checked through a thorough auditing process. This also means that the final product carries the recognised quality mark that goes with being an Australian Standard. On the downside, it means that the rights to publish and sell the Standards produced by those accredited bodies belongs to SAI Global:

*SAI Global has exclusive rights to publish, distribute market and sell Australian Standards. It does not matter whether the Australian Standards are developed by Standards Australia or a Standards Development Organisation (SDO) which has been accredited by Standards Australia.*⁶⁵

⁶⁵ Tabled by Peter Mullins, Chief Executive Officer, SAI Global Ltd., during hearing held on 14 October 2015, p 3.

- 3.30 We received a written submission from The Pharmacy Guild of Australia dated 5 December 2015.⁶⁶ It said that the Guild was expecting to negotiate a new agreement with SAI Global in 2016 for the publication of a revised *AS 85000 Quality Care Pharmacy Standard – quality management systems in Australia*, which it is contractually bound to reproduce every five years, and for which it would receive a small royalty from the proceeds of any copy of the Standard purchased. The submission continued:

*Previously the Guild has had a contract with SAI Global that enabled the Guild Managed Quality Care Pharmacy Program (QCPP) to distribute the Australian Standard as a supplement to the QCPP accreditation requirements to each pharmacy seeking accreditation in Australia. This agreement resulted in the Guild paying for licences for each requirements manual provided to a pharmacy, and included payment to SAI Global for all reprinting or accreditation requirement modifications. The contract was terminated in 2014 due to the changing requirements of the QCPP and the ongoing financial impact of the contract.*⁶⁷

- 3.31 Neither the Guild nor any Guild members receive any discount on the price of the current 2011 version of the Standard which costs, depending on the format and the concurrent user numbers, between \$68.35 and \$129.86 (as at May 2016).

Time for Business: Report of the Small Business Deregulation Task Force

- 3.32 The year after the publication of the report of the Kean Review, progress towards putting its recommendations into action was reported by the Commonwealth Government's Small Business Deregulation Task Force (Task Force) in its report '*Time for Business*'.⁶⁸ It stated that recommended changes to the way Standards Australia operates that would benefit small business were being implemented, including the development of a system for appraising the need for new Standards and an independent process for approving them, and making better use of international standards instead of developing new ones. The report concluded;

*The Commonwealth Government's response to the Kean Review is a good step forward in reducing small business compliance costs. More reform is required, however, to ensure that regulatory standards do not impose an unnecessary burden on small business.*⁶⁹

⁶⁶ David Quilty, Executive Director, Pharmacy Guild of Australia, Letter, 5 December 2015.

⁶⁷ Ibid. pp 1-2.

⁶⁸ *Time for Business: Report of the Small Business Deregulation Task Force*, Commonwealth of Australia, Canberra, November 1996.

⁶⁹ Ibid. p 125.

- 3.33 More interestingly for the purposes of this Inquiry, the Task Force had looked into complaints from the small business sector into what was alleged to be the rapid growth in the use of ‘quasi-regulations’, and the seeming absence of mechanisms to ensure such regulations were in the public interest. For the purposes of this part of the review, the Task Force defined ‘quasi-regulations’ as being:

*rules or instruments for which there is a reasonable expectation of compliance but which do not have the full force of law.*⁷⁰

which included standards made by Standards Australia or other bodies such as international organisations.

- 3.34 In its final report, the Task Force opined that governments should assess the public benefit of any proposed regulatory arrangements that impose a burden on small businesses. Recommendation 57 was:

*That from 1 July 1997, proposals to introduce quasi-regulation be subject to cost benefit analysis, for instance in the form of a regulation impact statement, and there be independent review processes built into quasi-regulations to ensure they remain effective and efficient.*⁷¹

- 3.35 In 2003, Standards Australia sold off its commercial arm to SAI Global. This is dealt with at paragraphs 3.44 to 3.46.

- 3.36 As mentioned above, the Commonwealth Government first entered into a memorandum of understanding with Standards Australia in 1988. The current iteration was signed on 17 May 2013. For the purposes of this Inquiry, the important undertaking on the part of Standards Australia may be found at Article 8.8, which states:

Standards Australia accepts that standards referenced in legislation:

8.8.1 *must represent minimum effective solutions;*

8.8.2 *clearly separate essential regulatory requirements from those which are not;*

8.8.3 *where appropriate, will be structured in hierarchical form with the higher form in performance terms and the lower in prescriptive terms;*

⁷⁰ Ibid. p 123.

⁷¹ Ibid. p 124.

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- 8.8.4 *where they support a performance regulation, will clearly outline technical solutions reflecting a range of ways in current use by which legal obligations can be met;*
 - 8.8.5 *will provide a designation including standard number and year; and*
 - 8.8.6 *will, wherever possible, be standalone documents to minimise duplication and cross referencing. The referencing of secondary and tertiary standards will be limited, where practical, by including information in the primary standard.*

3.37 Notably, perhaps, the enormous volume of cross-referencing that is referred to at clause 8.8.6 continues, as can be seen from the example cited at paragraph 2.16.

3.38 In return, the Government, amongst other things, undertook as follows, at Article 9.7:

The Commonwealth will encourage government legislative and regulatory bodies to use the process of developing standards and related documents provided by Standards Australia rather than develop their own standards and documents and, where appropriate, participate in the development of Australian Standards that are in a form suitable for referencing in legislation, regulation and purchasing guidelines. The Participants note that the Commonwealth's general policy is to use Australian Standards for regulatory purposes only where it is satisfied that the standard represents a minimum effective solution to the problem being addressed. Consistent with this policy, the Commonwealth will retain the right to develop, where warranted, its own standards.

3.39 Standards Australia explained to the Committee that there are substantial costs associated with the production of Standards, notwithstanding the voluntary efforts of contributing experts. These arise out of infrastructure and support, as well as international obligations arising out of being Australia's member of the International Standards Organisation and the International Electrotechnical Commission (though part of this expense is met from annual Commonwealth Government funding). It was explained that:

Standards Australia's costs are subject to a very structured financial model which essentially works on an annual break-even budget. Revenues are derived from royalties that flow from the sales of Australian Standards, a limited amount of specific government funding, and investment revenues. It is fundamental to Standards

*Australia's business model that it is financially sustainable in the short, medium and long-term.*⁷²

- 3.40 Figures given in Standards Australia's Annual Review 2015, for the year ending 30 June 2015, showed an investment portfolio of \$255.62 million, generating some \$14.461 million in revenue. Revenue from activities appears as:

Royalties	\$4.855 million
Grants received	\$2.654 million
Externally funded projects	\$701,000
Recoveries and other income	\$137,000
Total	\$8.347 million

- 3.41 As is stated in the Annual Review's Financial Overview:

*Standards Australia's long term financial viability is dependent on returns from its investment portfolio, and to a lesser extent, royalties from the sale of standards publications.*⁷³

Indeed, of a total revenue of \$22.808 million, just over 21% comes from SAI Global.

- 3.42 The total operating expenses, including those for the Accreditation Board for SDOs, were said to be \$17.618 million.

SAI GLOBAL

- 3.43 SAI Global was, and remains, the monopoly provider of Standards in Australia.

Genesis

- 3.44 In a submission to the Productivity Commission in 2006 (see Chapter 4), Standards Australia wrote of its response to the Kean Review, of the birth of SAI Global and beyond:

At various times there has been criticism of National Standards Bodies failing to act in the national interest, for example by giving priority to the development of Australian Standards that could be used in third-party certification programs as a means of promoting business opportunities for their own certification arms. This

⁷² Submission 19 from Standards Australia, January 2015, p 3.

⁷³ *Transformation and Innovation, 2015 Annual Review*, Standards Australia.

proposition was examined in detail in the 1995 Kean Report and was found to be unsupportable in the case of Standards Australia. Nonetheless, the perception that there was a potential for a conflict of interest was something that could not be ignored. Standards Australia implemented the recommendations of the Kean Report in terms of establishing a proper separation of standards development and certification activities within the one group of companies.

In 2003, Standards Australia took this separation much further by selling its certification businesses to its subsidiary SAI Global Ltd, a company now listed on the Australian Stock Exchange. Standards Australia has since reduced its shareholding in SAI Global as part of its balanced portfolio of investments, finally selling its remaining 9 per cent to hold nil shares on 6 April 2006.

At the same time in 2003, the publishing and distribution business, Standards Australia Publishing, was also sold to SAI Global Ltd, including an exclusive licence to distribute Australian Standards® (until 2018). This was a commercial decision reflecting the fact that the distribution of national standards from all countries now required sophisticated software and was becoming dominated by major multi-national publishing companies like IHS Inc that could make the necessary investment in this technology. Links between the two organisations are now governed by contractual agreements.⁷⁴

- 3.45 Thus, some 8 years after the Kean Report had recommended separation, Standards Australia sold its commercial businesses (including marketing, publications, education, training, consulting and assurance) to its wholly-owned subsidiary, SAI Global, for over \$60 million, whilst retaining 40 per cent of SAI Global's stock.⁷⁵ SAI Global was then floated on the Australian Stock Exchange on 17 December 2003.
- 3.46 Initially, Standards Australia retained that 40 per cent interest in SAI Global, but progressively sold this shareholding down to zero by 2006, enabling it to focus exclusively on its core business of developing and managing its collection of Standards and representing Australia's interests in international standardisation.

Relationship with Standards Australia

- 3.47 The Committee was denied a copy of any of the contractual documentation involved in the flotation and transfer, including the exclusive agreement to publish and

⁷⁴ Paragraphs 13 and 14, Standards Australia Submission to *Productivity Commission Review of Standards and Accreditation*, 11 April 2006.

⁷⁵ Standards Australia *Annual Review 2003-2004*, at p22.

distribute Standards. However, the key components of that agreement, referred to in the prospectus⁷⁶ as the PLA, were:

- that Standards Australia granted to SAI Global an exclusive worldwide licence to publish, distribute, market and sell Australian Standards and other materials in Australia
- that Standards Australia also granted to SAI Global an exclusive regional licence to distribute, market and sell other licenced material, being standards and other documents produced by other organisations (e.g. overseas standards producing bodies such as the International Organisation for Standardisation (ISO) and the International Electrotechnical Commission (IEC)) to which Standards Australia had the rights to publish and sell
- that those rights were to extend for a 15 year period, with an option to renew for a further five year term, subject to shareholder approval of SAI Global and *'certain other conditions being satisfied'*
- that SAI Global would pay Standards Australia a royalty of 10 per cent of the net revenue received from the sale of the licenced material and an additional bonus royalty of up to 15 per cent (decreasing over time) in relation to the licencing of *'significant new material'*
- that Standards Australia were to regularly review and revise the collection of Australian Standards, so that no more than 30 per cent were over 10 years old, and to use its best endeavours to produce new material each year corresponding to at least 7 per cent of the existing Standards at the start of each year.

3.48 Under the terms of the agreement, SAI Global sets the price charged for Australian Standards in consultation with Standards Australia and based generally on Standards Australia's pre-existing pricing guidelines. The formula used for all but a small number of Standards is said to be based on applying a fixed cost per page to a given publication. Cost per page is determined by several factors, such as the total number of pages in the document and whether there are any special printing requirements (such as colour printing or unique covers).

3.49 Generally, average price increases for licensed material are limited under the agreement to CPI plus 2 per cent per annum, capped at CPI plus 5 per cent per annum (subject to cost increases).

3.50 It is also notable, as mentioned previously, that SAI Global retains the rights to publish and sell all of those Standards that are produced by accredited SDOs (see

⁷⁶ Prospectus for the offer of 60 million shares in SAI Global Limited, ABN:67 050 611 642, at p 40.

paragraph 3.28). The following is an extract from Standards Australia's *Annual Review 2008-09*:

Standards Australia and SAI Global have been in discussions since late 2005 over differences in the interpretation of the commercial-in-confidence Publishing Licence Agreement (PLA) of 2003.

Following failure to resolve differences over the publishing and distribution rights for Australian Standards written by accredited Standards Development Organisations (SDOs), Standards Australia entered into arbitration with SAI Global in July 2008.

Standards Australia contended that the PLA did not require it to secure exclusive publishing rights for SAI Global for Australian Standards developed by third party accredited SDOs.

In his written award published in June 2009, arbitrator Michael McHugh did not accept Standards Australia's view and confirmed that, under the PLA, Standards Australia must not permit or knowingly allow SDOs to develop Australian Standards without securing exclusive rights for SAI Global to publish, distribute, market and sell those Australian Standards.⁷⁷

3.51 SAI Global's statutory accounts for the financial year 2014-15 showed sales revenue of some \$547.6 million, with net profit after tax, overheads, etc., of around \$39.5 million. The revenue split showed that some \$79.3 million came from 'Standards and Technical Information'.

3.52 In evidence before the Committee, the Chief Executive Officer of SAI Global said:

We focus on four different product suites, being risk, assurance, learning and knowledge. It is the standards component of that that is part of the knowledge suite of products that we offer. Worldwide this generates around about \$80 million, which is about 15 per cent of our revenue. We have a relationship with about 200 different bodies—international standards bodies, national standards bodies and industry bodies. Our relationship with Standards Australia is by far the largest of these and accounts for about half of our knowledge revenue, so about \$40 million around the world, most of which is predominantly generated from Australia.⁷⁸

3.53 He later added:

⁷⁷ Standards Australia *Annual Review 2008-09*, p 7.

⁷⁸ Peter Mullins, Chief Executive Officer, SAI Global Ltd., *Transcript of Evidence*, 14 October 2015, p 2.

*only eight per cent of our revenue comes out of Standards Australia.*⁷⁹

The Publishing Licensing Agreement

3.54 As mentioned, the Committee was denied a copy of the PLA between Standards Australia and SAI Global, and was thus not able to properly evaluate the effect of the option to renew at the end of the initial 15 year term or what the *certain other conditions being satisfied*, as referred to in the prospectus, means.

3.55 In response to a request for a copy of the PLA, and for information on the option to renew the agreement for five years from 2018, SAI Global told the Inquiry in written responses tabled before the hearing held on 14 October 2015:

Not only does the PLA contain strict confidentiality provisions, but commercial sensitivities are heightened at this time as we approach the renewal of the term of the PLA in 2018. Put simply, we cannot be put in a position where we lose control over who has access to this very important document.

Re option to renew: In summary, it is **SAI Global's option** to renew, subject to the PLA being amended to reflect market terms (and other conditions) and subject to the approval of SAI Global's shareholders if that is a requirement of the Australian Stock Exchange at the time.⁸⁰

3.56 Mr Stingemore told the Committee in evidence:

*The PLA is in place until December 2018 and there is an option, which is exercisable in certain circumstances, the details of which are contained in the prospectus on the listing of SAI Global.*⁸¹

3.57 In fact, that prospectus contains no clear detail on the true nature of the option clause. The terms of the PLA as described in the prospectus are set out at paragraph 3.47, but to simply reiterate the description of the material terms here, at section 10.5 of the prospectus, it is stated that the PLA grants to SAI Global three rights:

- a worldwide licence to publish, distribute, market and sell 'Australian Standards and Standards Normative Documents and Products'

⁷⁹ Ibid. p 10.

⁸⁰ Tabled by Peter Mullins, Chief Executive Officer, SAI Global Ltd., during hearing held on 14 October 2015, p 1.

⁸¹ Adam Stingemore, General Manager, Stakeholder Engagement and Public Affairs, Standards Australia, *Transcript of Evidence*, 14 August 2015, p 3.

- an exclusive regional licence to distribute, market and sell certain ‘other licenced material’
- an exclusive licence to publish and distribute ‘The Global Standard’.

3.58 These three rights, it is said, and as was mentioned previously, extend for a 15 year period with an option to renew for a further five year term subject to shareholder approval of SAI Global being obtained and certain other conditions being satisfied. However, it would seem to us to be unconscionable that an agreement such as this could be settled, where it could be simply renewed for an extra term at the call of one of the parties without the other party, Standards Australia, having any say in the matter through its members.

3.59 Peter Mullins of SAI Global told the Committee:

The arrangement that we have with Standards Australia goes for 20 years starting from 2003, so it goes out to 2023. At the end of 2018, after 15 years, there is effectively a renegotiation of market terms. The contract does not define what “market terms” means. Obviously, we have got an interpretation on it and undoubtedly Standards Australia will have an interpretation and I am sure the industry will have an interpretation, and I am sure that lawyers will make a lot of money at that stage. That will happen in three years’ time and it will change.⁸²

3.60 Later in the hearing, Mr Mullins was questioned again about the future, and as to whether another entity might be awarded the contract in 2018, at the expiry of the initial 15 year term. Mr Mullins said:

No, no, we will get it. On our reading of the contract, we believe we have exclusivity until 2023. After that, it is open market.⁸³

3.61 It is notable that, in another part of the prospectus (also within section 10.5), there is described a ‘Business Purchase Agreement’, part of the overall suite of transfer documentation. Under that agreement, it is said, there is a non-compete clause, whereby Standards Australia is prohibited from carrying on a business or operation similar to or competitive with the business of SAI Global in relation to, amongst other things, publishing, marketing, distribution and sales of ‘standards deliverables’. The period of operation of that non-compete clause is 15 years.

3.62 This Committee does not seek to determine the meaning of any particular clause in a contract between these two private entities, even were we afforded access to it. It

⁸² Peter Mullins, Chief Executive Officer, SAI Global Ltd., *Transcript of Evidence*, 14 October 2015, p 9.

⁸³ *Ibid.* p 13.

should be mentioned though that it is of interest that the parties to the PLA are so incredibly secretive about its contents. Neither agreed to provide a copy to the Committee so that the full details of the option clause could be determined. Indeed, even the nominee of the State's representative on Standards Australia, Kenneth Bowron of EnergySafety, was unable to procure a copy. *'It is held very confidential and nobody has divulged that'*, he told the Inquiry.⁸⁴

- 3.63 However, and in spite of the confidence of SAI Global's representatives, it would be counter-intuitive if the membership of Standards Australia, including the Government of Western Australia through its nominee, and all of the other represented governments, had no say in 2018 as to whether to grant to SAI Global the additional five year term. The Committee is of the view that the Government's representative on Standards Australia, the Department of Commerce, should seek to arrange a general meeting of members, requiring the support of 5 per cent of the membership, in order to resolve these doubts in advance of the purported renewal date of the PLA.
- 3.64 It is the further view of the Committee that the Commonwealth, State and Territory Governments that are represented as members of Standards Australia should consider at this stage how they intend to deal with the issue, through the appropriate channel, the Council of Australian Governments (COAG) Industry and Skills Council.

Recommendation 1: The Committee recommends that the Department of Commerce, representing the Government of Western Australia as a member of Standards Australia, works with other members as soon as possible to bring about a general meeting of Standards Australia under Article 20 of its constitution, for the purposes of settling the options open to Standards Australia (if any) when the option clause in the Publishing Licensing Agreement is considered in 2018.

Recommendation 2: The Committee recommends that the Minister for Commerce, as a member of the Industry and Skills Council of the Council of Australian Governments, seeks to have placed on the agenda of that Council a discussion with Commonwealth, State and Territory colleagues regarding the options open to Standards Australia (if any) when the option clause in the Publishing Licensing Agreement is considered in 2018.

⁸⁴ Kenneth Bowron, Executive Director, EnergySafety, Department of Commerce *Transcript of Evidence*, 18 November 2015, p 2.

CHAPTER 4

PRODUCTIVITY COMMISSION REPORT – STANDARD SETTING AND LABORATORY ACCREDITATION

- 4.1 Three years into the new relationship between Standards Australia and SAI Global, on 2 November 2006, the Commonwealth's Productivity Commission (the Commission) published its report '*Standard Setting and Laboratory Accreditation*'⁸⁵, the most significant investigation into the development and use of Standards up to now.
- 4.2 The Commission was quick to recognise, as this Committee does, the important role that Standards played. In the overview to its report, it said:

The use of standards is high and growing because:

- *they play a pivotal role in facilitating market exchange: distant parties unknown to each other are able to share expectations on the qualities of products and processes, and ensure compatibility;*
- *international standards facilitate international trade, global transport, communication and technological innovation;*
- *they provide consumers with greater certainty about the quality and safety of products; and*
- *they are increasingly used by governments to address concerns about social issues and the environment.*⁸⁶

- 4.3 The report was generally complimentary about Standards Australia, noting in particular its strong presence and reputation internationally, and describing its processes used in developing Standards as generally sound.⁸⁷ However, a number of ongoing concerns were expressed (some of which had been outlined in the Kean Report, mentioned earlier, some 11 years previously). The most significant of these, for the purposes of this Inquiry, are outlined here.

⁸⁵ *Standard Setting and Laboratory Accreditation, Productivity Commission Research Report*, Commonwealth of Australia, Canberra, 2006.

⁸⁶ Ibid. p xv.

⁸⁷ Ibid. p 61.

Constraints on Standards Australia and perverse incentive effects arising from the legal relationship between Standards Australia and SAI Global

4.4 The Commission felt that the commercial separation agreement between Standards Australia and SAI Global had resulted in:

- *reducing Standards Australia's flexibility to deliver satisfactory access to, and promotion of, standards for clients due to SAI Global's exclusive publishing and distribution rights to Australian Standards; and*
- *biasing Standards Australia towards delivering a quantum of standards rather than best meeting industry and community needs, due to the requirement to produce new standards material in any year that corresponds to 7 per cent of the stock of Australian Standards.*⁸⁸

4.5 The Commission found no clear evidence of inappropriate Standard development motivated by these contractual obligations or other commercial incentives provided by the new relationship. It did express concerns though that there was a potential for this to happen, and even a perception amongst submitters to that review that it did happen.

The need for more rigorous impact assessment when Standards are referenced in regulation

4.6 The memorandum of understanding between the Commonwealth Government and Standards Australia contained the following undertaking:

Article 5.4

Where Government seeks the development of Australian Standards for regulatory purposes, Standards Australia will endeavour to ensure that they are drafted in a form suitable for referencing in legislation/regulation and that they represent a minimum effective solution.

4.7 The Commission made the point that Standards are developed for a variety of purposes and interests which do not necessarily translate into targeted regulatory objectives. In its view, vigorous regulatory impact analysis should be conducted on Standards before they are adopted in legislation, and regulators should ensure that only the 'minimum necessary' provisions of those Standards should be made mandatory. Those that are made mandatory should be performance or outcome-based, perhaps with 'deemed-to-comply' provisions (that is, regulatory measures which

⁸⁸ Ibid. p XXIII.

provide that, should the person to whom the regulation is addressed comply with a stated alternative method of meeting the terms of a given Standard, then the Standard is deemed to have been complied with and the regulatory requirement is accepted as having been satisfied).

- 4.8 Thus, Recommendation 7.2 of the Commission stated (insofar as is relevant):

For standards that are to be referenced in regulation, or for significant amendments to standards that are already referenced in regulation, rigorous impact analysis must be undertaken by the Australian Government and other governments in compliance with the requirements of the relevant jurisdiction (or COAG requirements for intergovernmental action).

- 4.9 That particular theme had been taken up earlier in the same year by the Taskforce on Reducing Regulatory Burdens on Business, in its report ‘*Rethinking Regulation*’.⁸⁹

- 4.10 The issue of the desirability of regulatory impact analyses, in order to satisfy the principle that regulatory Standards must represent minimum effective solutions, and the possibility of alternative ‘deemed-to-comply’ outcomes, will be dealt with more fully later in this report.

The accessibility, and in particular the cost, of Australian Standards

- 4.11 The Commission commented on accessibility and cost. It was again reiterated that governments use Standards to mandate requirements to meet safety, environmental and other objectives, and that businesses need to access those Standards in order to meet regulatory requirements. It said:

*Accessibility of legal requirements is a fundamental aspect of regulatory transparency.*⁹⁰

- 4.12 It continued, on the same page:

Successful implementation of regulations, and achievement of the objectives they embody, relies on a high level of compliance by those industry participants whose conduct it seeks to influence. High compliance, in turn, is dependent on a high level of awareness and understanding of the standards. Easier access to the referenced standards is in the ‘public interest’ as it facilitates greater awareness — or conversely, to the extent that charges discourage access, they

⁸⁹ *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*: Commonwealth of Australia. January 2006.

⁹⁰ *Ibid.* p 126.

are likely to contribute to reduced awareness and poorer compliance, compromising the achievement of the regulations' objectives.

- 4.13 Its solution was that Government should fund access to Standards which are referenced in regulations. It stated:

*Another common complaint is the cost of accessing regulatory standards. This both increases the costs to business of complying with legal requirements and limits the capacity of consumers to keep track of their legal entitlements. As a general principle, the law of the land should be readily available to all citizens, and the Commission considers that whenever a government department or agency makes an Australian Standard mandatory by way of regulation that it should provide the funding necessary to ensure free or low-cost access. By bearing some of the costs of the standards, government bodies will have added incentives to fully assess the case for referencing them in regulation.*⁹¹

- 4.14 Thus, Recommendation 7.3 of the Commission was:

*Mindful of the fundamental principle of transparency and accessibility of legal requirements, the Australian Government and other governments (through their agencies) should fund free or low-cost access to Australian Standards made mandatory by way of regulation.*⁹²

- 4.15 The question of whether a lack of public access creates fundamental problems is the subject of Chapter 6 of this report. The cost of accessing those Standards, insofar as it can be measured, is explored at Chapter 7.

Too many standards?

- 4.16 The Commission heard complaints from several participants in its review about the cost to businesses of needing to purchase large numbers of individual Standards in order to keep up to date, either because those Standards relevant to them were regularly reviewed, amended and republished, but also because of the common practice of cross-referencing Standards within other Standards. As noted earlier, some were of the cynical view that this was a by-product of the commercial relationship between Standards Australia and SAI Global.

- 4.17 Thus, Recommendation 7.4 of the Commission was:

⁹¹ Ibid. p XXIII.

⁹² Ibid. p 130.

The Australian Government and other governments should seek to minimise the number of referenced standards and cross references to other standards which make it necessary to purchase multiple Australian Standards.

- 4.18 The memorandum of understanding of 17 May 2013 between the Commonwealth Government and Standards Australia contained the following general provision (in so far as is relevant):

6.3 Standards Australia will have regard to the following principles in the preparation of new or revised Australian Standards:

6.3.3 unnecessary references to other standards will be avoided.

- 4.19 As set out at paragraph 3.36, at article 8.8 of that memorandum, Standards Australia accepted that Standards referenced in legislation would, wherever possible, be standalone documents to minimise duplication and cross referencing, and that the referencing of secondary and tertiary standards would be limited, where practical, by including information in the primary standard.

- 4.20 Regrettably, the practice of cross-referencing continues seemingly unabated.

- 4.21 What is also regrettable is the continuing suspicion, justified or not, of profit motive following the flotation of SAI Global in 2003. In a current policy document on Australian Standards, the Housing Industry Association (HIA) states:

With the creation of Standards Australia as a private company (sic), its public good role appears to have been overshadowed by the commercial pressure to recover costs, leading to more and more standards being produced.

The enthusiasm for "best practice" standards sits uneasily with minimum effective regulation. It is contrary to Standards Australia's obligations under its Memorandum of Understanding (MOU) with the Commonwealth which requires the company to develop minimum effective solutions. It conflicts with the objective of the NCC to set minimum acceptable technical requirements for ensuring the health, safety, amenity and sustainability of new buildings.⁹³

⁹³ Tabled by John Gelavis, Executive Director, Housing Industry Association of Western Australia, during hearing held on 14 August 2015, p 1.

Public participation

- 4.22 An interesting observation made by the Commission was that a possible unintended consequence of the arrangements between Standards Australia and SAI Global was a decline in volunteer numbers. As mentioned previously, Standards are produced by committees of experts in their given field, taken from stakeholders, governments, universities and the like, who give of their time freely. The Commission discussed whether a decline in the number of government representatives was due to restrictions on public resources. The same consideration might apply to academics, it was thought.
- 4.23 However, it is possible that those previously seemingly abundant volunteers merely felt aggrieved that, after 2003, the fruits of their knowledge and endeavour were being enjoyed by the shareholders of SAI Global. The Commission felt that they did. It said:

There has been a decline in volunteer participation on standards committees due to the costs of participation; changes in the imperatives facing business, academics, public servants and consumers; and some disaffection from seeing SAI Global and its shareholders profit from the intellectual property contributed by volunteers (notwithstanding the upfront consideration paid by SAI Global to Standards Australia for the distribution rights).⁹⁴

- 4.24 At its hearings on 14 August 2015, we asked Adam Stingemore, General Manager, Stakeholder Engagement and Public Affairs of Standards Australia, about the apparent disincentive to volunteers who, having worked to produce a Standard, still have to purchase copies from SAI Global, like anyone else. As noted at paragraph 3.10, those volunteers do receive a free copy of the Standard on which they worked, as well as a certificate of appreciation. As for any further reward, Mr Stingemore said:

our technical contributors come to work with us to make a difference to Australian life. That is why they come – to add to the net benefit of the Australian community.⁹⁵

⁹⁴ *Standard Setting and Laboratory Accreditation, Productivity Commission Research Report*, Commonwealth of Australia, Canberra, 2006, p XXIII.

⁹⁵ Adam Stingemore, General Manager, Stakeholder Engagement and Public Affairs, Standards Australia, *Transcript of Evidence*, 14 August 2015, p 15.

CHAPTER 5

COPYRIGHT AND LICENCE ISSUES

COPYRIGHT

Copyright Act 1968 (Cth)

- 5.1 Standards are protected by copyright under the *Copyright Act 1968* (Cth) (the Act), which is a Commonwealth statute, and is thus outside the remit of the Committee for the purposes of making any recommendations.
- 5.2 The Act covers matters including what material can be subject to copyright as well as the rights of copyright owners. Copyright over literary works, such as Standards, gives the owner exclusive rights to reproduce the work in a material form, publish it, communicate it to the public, make an adaptation of it, and enter into a commercial licensing agreement governing the conditions under which others may use the copyrighted works. Some exceptions and a statutory licence regime provides for some government use of copyright documents without infringing copyright.
- 5.3 Generally, a person will infringe copyright by a number of acts, including reproducing, or authorising the reproduction, without the permission of the owner, of the material which is the subject of the copyright. This therefore prevents members of the public or businesses from reproducing any material that is subject to copyright, such as Standards.
- 5.4 There are established defences to claims of infringement of the Act, including:
- fair dealing – this is a recognised limitation on the exclusive rights granted by copyright law to the author, such as reproduction for the purposes of study/research (section 40 of the Act), for review and criticism (section 41), for reporting of the news (section 42) and for the purpose of judicial proceedings or professional advice (section 43)
 - a statutory licence regime whereby government use of copyright material does not infringe copyright if the acts are done ‘*for the services of the Commonwealth or State*’ (section 183(1)).

This does not require the permission of the owner but is or may be subject to the payment of reasonable consideration.

- 5.5 The Act also provides an exception to parliamentary libraries, including State Parliament libraries (under the definition in section 12) and inter-library loans for the purpose of assisting members of Parliament (section 50(1)(aa)). Section 48A states:

Copying by Parliamentary libraries for members of Parliament

The copyright in a work is not infringed by anything done, for the sole purpose of assisting a person who is a member of a Parliament in the performance of the person's duties as such a member, by an authorized officer of a library, being a library the principal purpose of which is to provide library services for members of that Parliament.

- 5.6 It is clear, however, that the genesis of this provision was not to protect parliamentarians, but to assist and protect librarians in their function of providing parliamentarians with access to important information (see Chapter 15 of the Australian Law Reform Commission (ALRC) Report, discussed at paragraphs 5.9 to 5.17). The Act does not include an exception for the use of copyright material for parliamentary proceedings, including Committee proceedings.

Other jurisdictions

- 5.7 By way of contrast to the law applying to the Australian parliaments, New Zealand legislation includes an exception to copyright infringement for parliamentary proceedings. Section 59 of the *Copyright Act 1994* (NZ) provides:

Parliamentary and judicial proceedings

- (1) Copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings.*
- (2) Copyright is not infringed by anything done for the purposes of reporting parliamentary or judicial proceedings.*

- 5.8 Section 45 of the United Kingdom's *Copyright, Designs and Patents Act 1988* contains a similar provision:

Parliamentary and Judicial Proceedings

- (1) Copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings.*
- (2) Copyright is not infringed by anything done for the purposes of reporting such proceedings, but this shall not be construed as authorising the copying of a work which is itself a published report of the proceedings.*

The Australian Law Reform Commission Report

- 5.9 In 2013, the ALRC published a report entitled *Copyright and the Digital Economy*.⁹⁶ In Chapter 15 of that report, the ALRC discussed the statutory arrangements regarding government use (including the parliamentary, executive and judicial arms of government), exceptions to the general law regarding breaches of copyright and possible reform. It stressed that:

*It is unclear whether the fair dealing exceptions in pt. III div 3 of the Copyright Act are available to governments in Australia. It is also unclear whether a government can rely upon an implied licence to use copyright material.*⁹⁷

- 5.10 The ALRC acknowledged that there exists a problem in respect of parliamentary matters. It said:

*Copyright material is sometimes provided in evidence, in a report, or otherwise presented ('tabled') before a parliament or a parliamentary committee. The Copyright Act does not currently include an exception for use of material for parliamentary proceedings or reporting on parliamentary proceedings.*⁹⁸

- 5.11 The report discussed whether a new statutory form of the 'fair use' exception (based on the US model) could apply to government use of copyright material, based on four 'fairness factors', being the purpose and character of the use, the nature of the copyright material, the amount and substantiality of the part used and the effect of the use upon the potential market for, or value of, the copyright material. Unlike fair dealing, where the action of reproduction must fall within one of the categories of use listed in the Act (paragraph 5.4), courts in the US enjoy more discretion in ruling on breaches or otherwise of copyright.
- 5.12 In conclusion, the ALRC recommended statutory reform, including the introduction of that new exception of 'fair use' in Australia or, failing that, an expansion of the defence of fair dealing which, if legislated, might have the effect of expanding parliaments' and governments' use of copyright material, thereby improving public access to adopted standards.

- 5.13 In what is a rather unsatisfactory and open-ended summation, the ALRC stated:

⁹⁶ *Copyright and the Digital Economy: ALRC Report 122*. Australian Law Reform Commission. Commonwealth of Australia, 2013.

⁹⁷ *Ibid.* paragraph 15.7.

⁹⁸ *Copyright and the Digital Economy: ALRC Report 122*. Australian Law Reform Commission. Commonwealth of Australia, 2013, paragraph 15.33.

*Nearly all of the uses covered by the recommended exceptions are likely to be assessed as fair, if judged according to the four fairness factors. The purpose and nature of the use would be given great weight: the uses are intended to serve the public interest in the free flow of information between the three branches of government and the citizen. With regard to the fourth factor, it is not anticipated that the exceptions will have a significant impact on the market for material that is commercially available. There may be an occasional use that affects the copyright owners' market. However, if the use is essential to the functioning of the executive, the judiciary or the parliament, or to the principle of open government, it is likely that the use would be considered fair.*⁹⁹

- 5.14 This can only be classified, in the Committee's view, as a missed opportunity. The ALRC's use of the terms *nearly all*, *it is not anticipated* and *it is likely* in this one paragraph illustrates that amendments along these lines would have signalled a stream of court cases and a free-for-all for copyright lawyers, when for parliamentary purposes, a simple amendment along the lines of the statutory exceptions contained in the New Zealand and United Kingdom statutes would have sufficed.

- 5.15 Indeed, the ALRC went further by specifically not recommending a statutory exception for parliamentary proceedings. It said:

*There was some support among stakeholders for a specific exception for parliamentary records. There is a specific exception in the United Kingdom and New Zealand. However, there is insufficient evidence before the ALRC to justify such a recommendation. The current legal protections appear to be sufficient to permit parliaments to publish tabled material and records of proceedings.*¹⁰⁰

- 5.16 It concluded:

*The Australian Commonwealth, state and territory parliaments have sufficient powers to protect themselves from claims of copyright infringement and a specific exception in the Copyright Act is not necessary.*¹⁰¹

- 5.17 This was a reference to the protections provided by parliamentary privilege. They, however, are not inalienable.

⁹⁹ Ibid. paragraph 15.21.

¹⁰⁰ Ibid. paragraph 15.35.

¹⁰¹ Ibid. paragraph 15.36.

Parliamentary Privilege

- 5.18 The *Bill of Rights 1689* (UK) is incorporated into Western Australian law. Article 9 declares

That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

- 5.19 This was the origin of what is known as ‘parliamentary privilege’. This is a legal immunity for members of parliaments from civil or criminal liability for matters that occur in parliament. It allows members to speak freely without fear of legal consequences.
- 5.20 This privilege does not however afford any sort of protection to parliamentary papers or publications outside of parliamentary proceedings. This was decided in the British case of *Stockdale v Hansard*¹⁰², where the court held that papers printed by order of the House of Commons for the use of its members were protected by parliamentary privilege, but that this protection did not extend to papers made available outside of the House to members of the public.
- 5.21 In the UK, the decision in *Stockdale* was reversed by the *Parliamentary Papers Act 1840*, to allow for the public reporting of parliamentary debates, such as Hansard. It also provided protection for copies of such reports, papers, votes or proceedings published by Order of either House.
- 5.22 These provisions were reflected in Western Australia’s *Parliamentary Papers Act 1891*, section 1 of which prevents the continuation of civil litigation launched in respect of the publication of ‘any report, paper, votes or proceedings of the Legislative Council or the Legislative Assembly’. The same protection applies to copies of such authorised reports, etc., under section 2. Publication of any abstract or extract is afforded qualified privilege by section 3 – that is, the publication is protected provided it is done in good faith.
- 5.23 As noted though, such privilege does not extend to the re-publication of tabled papers, or papers supplied to parliaments, such as, for the purposes of this report, copies of Standards supplied by government agencies or local governments in accordance with the guidance of this Committee in respect of tabled instruments.
- 5.24 Whilst many cases have been reported in countries with the Westminster-style system of parliament, such as Western Australia, they are generally on the matter of defamatory publications or commission of criminal offences as a breach of privilege. In so far as the Committee is aware, there is no authority regarding the copyright

¹⁰²

(1839) 112 ER 1112.

consequences of re-publication outside of the Houses of material made available to members, but it is reasonably clear that the copyright belonging to Standards Australia could not be avoided by re-publication of copies of Standards by the Legislative Council or this Committee.

- 5.25 Consideration of matters such as this was included in the First Report of the UK Parliament's Joint Select Committee on Parliamentary Privilege, published on 30 March 1999.¹⁰³ Concern was expressed by what was seen as the increasing practice of papers being laid before the House of Commons and printed by Order of the House in order to attract privilege protection. The Joint Committee stated:

*One of the themes of our report is the importance of confining the absolute legal immunity afforded by parliamentary privilege to those areas which need this immunity if Parliament is to be effective. This principle should apply as much to the immunity afforded by the 1840 Act as to the immunity given to proceedings by article 9 of the Bill of Rights. The extent to which the House of Commons currently grants this privilege, as a matter of course, to papers laid before it under statute contradicts this principle.*¹⁰⁴

- 5.26 It's conclusion in this regard was:

*The Joint Committee considers the presumption should be that, unless there are strong reasons in the public interest, no paper other than one emanating from the House or its committees should be absolutely privileged. We **recommend** that the House of Commons procedure committee should act on this matter.*¹⁰⁵

- 5.27 Whilst the legal position regarding the re-publication of tabled documents is not fundamentally clear, the approach of the Victorian Parliament (copies of Standards referenced in delegated legislation must be tabled in both Houses of the Parliament, but unlike the instruments themselves, are not published online by the State Government – see Chapter 6 for more detail of the Victorian provisions) would indicate that it recognises the potential copyright issues. The same can be said in respect of the Government of New Zealand (paragraph 10.26).

- 5.28 The Committee raised this issue with the Acting Parliamentary Counsel. He said:

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

¹⁰³ <http://www.publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4302.htm>, paragraph 348. Viewed 28 August 2015.

¹⁰⁴ Ibid. paragraph 348.

¹⁰⁵ Ibid. paragraph 352.

*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.*¹⁰⁶

5.29 In light of all of this legal uncertainty, the Committee reiterates that the ALRC report was inadequate in this regard, and an opportunity to simply legislate a provision similar to that in the UK and New Zealand was missed. As the *Copyright Act* is Commonwealth legislation, as pointed out above, there is nothing that the Parliament of Western Australia can do to amend it, but the Government of Australia ought to be encouraged to overrule the findings of the Commission and look again at creating a clear statutory exemption for parliamentary proceedings.

5.30 It is remarkable that the law should provide a measure of protection against copyright infringement to governments and to judicial proceedings, but not to parliaments.

LICENCE TERMS

5.31 As noted above, the Act allows for some reproduction under the ‘fair dealing’ exemption. As Hanna Myllyoja of SAI Global told the Committee:

*there are a number of exemptions in the Copyright Act which do allow for copying and reproduction. In a fair dealing, research and that kind of thing, that is always permitted. That is law.*¹⁰⁷

5.32 However, licence terms imposed upon the purchase of a published product can be more restrictive than that. The ALRC report recognised that copyright issues are not the only restraint on Parliamentary libraries’ ability to copy and use material; concerns had also been expressed about contracts with publishers that appear to limit the scope of the exemptions. The report said:

‘Contracting out’ refers to an agreement between owners and users of copyright material that some or all of the statutory exceptions to copyright are not to apply—so that, for example, the user will

¹⁰⁶ Geoff Lawn, Acting Parliamentary Counsel, Parliamentary Counsel’s Office, *Transcript of Evidence*, 14 August 2015, p 5.

¹⁰⁷ Hanna Myllyoja, Group General Counsel and Company Secretary, SAI Global Ltd., *Transcript of Evidence*, 14 October 2015, p 5.

*remunerate the copyright owner for uses that would otherwise be covered by an unremunerated exception; or the user agrees not to use copyright material in ways that would constitute fair use or fair dealing.*¹⁰⁸

5.33 That report goes on to explain how this contracting out may operate:

Contractual terms in licensing and other agreements may require copyright users to contract out of exceptions—purporting to prevent users from relying on statutory exceptions and, for example, engaging in fair dealing with copyright materials.

*Copyright owners may also limit permissible uses of copyright materials by imposing technological protection measures (TPMs) which prevent, inhibit or restrict certain acts comprised in the copyright. The use and circumvention of TPMs raises similar policy issues to those raised by contracting out, and TPMs can be used to enforce the terms of licences and other agreements.*¹⁰⁹

5.34 The Inquiry received evidence from a number of submitters and witnesses regarding the extent to which licensing terms imposed by SAI Global, particular electronically, were, in their view, unduly restrictive.

5.35 As will be seen at paragraph 6.118, the State Library no longer subscribes to the SAI Global Standards database, in part due to proposed new overly restrictive terms of use. Indeed, before that subscription was terminated in April 2016, those terms were already unduly inhibitory.

5.36 The submission received from the State Library of Western Australia said, for instance:

The public library licence is quite restricted and allows:

- *the reading of one standard at a time;*
- *a limited printing facility for patrons - one page at a time up to a maximum number of pages per standard, which varies as per the length of the standard;*
- *no printing or archiving of the full standard by the library;*

¹⁰⁸ *Copyright and the Digital Economy: ALRC Report 122.* Australian Law Reform Commission. Commonwealth of Australia, 2013, paragraph 20.1.

¹⁰⁹ *Ibid.* paragraphs 20.8 and 20.9.

- *no inter library loans.*¹¹⁰

5.37 One of the consequences of this, as the submission added, was that:

For most online databases to which the State Library subscribes, access is available to members remotely i.e. from their home, work or educational institution. The State Library's collecting policy is to acquire electronic copies of resources rather than print and to make them available online so that everyone in Western Australia has access. However, SAI Global does not allow remote access through the public library licence and inter library loans are not allowed. This is a major disadvantage for people in rural and remote areas of Western Australia, or small businesses in the outer areas of Perth, who are unable to visit the State Library Building and could not afford to purchase a range of standards.

5.38 Alison Sutherland, Acting Chief Executive Officer and State Librarian, expanded on what had been said in the submission. She explained that only one page of a Standard could be printed at a time, due to those existing licence conditions (copyright law would allow up to 10 per cent of a document), and stressed that the State Library was not permitted to keep copies of electronic copies for archival purposes or for future use.

5.39 That evidence was supported at a national level by National and State Libraries Australasia (NSLA). Its submission stated:

Library subscriptions to Standards Australia via SAI Global contain restrictions that materiality limit the usefulness of their product:

- *The subscriptions allow on-site use only, within the subscribing library. State and Territory Libraries are legislated to serve the constituency of their state or territory but this subscription is effectively limited to those able to visit the library building. The majority of subscriptions to electronic databases allow off-site access for registered library members, and off-site access is a standard provision in the NSLA eResources Consortium's licensing principles. The restrictions imposed by SAI Global prevent the libraries - and by extension Standards Australia - from making this crucial material available to those who may need it across the states and territories and especially in rural and remote areas.*

¹¹⁰ Submission 13 from State Library of Western Australia, January 2015, p 4. Inter-library loans are otherwise permitted by sections 49 and 50 of the *Copyright Act 1968*.

- *When in the library, the number of concurrent users who can access the site is limited by the negotiated subscription, usually this means there is only access for one user at a time.*
- *The conditions for printing, as part of the subscription agreement, may vary but are consistently very limited and discourage printing. For example, one page only can be printed from each standard, with a nominated preference that the library provides 'read-only' access. Handwritten notes are permitted from the complete standard.*
- *The limitations on printing are not controlled technically so library staff are required to monitor and manage this requirement which is frequently counter to the needs of the user. They often require multiple pages or the complete standard to undertake their legal and business obligations, directed by legislation or statutory rules.*
- *Access to current and historical standards is only available through online subscription. Printed handbooks are not comprehensive.*

The subscription conditions and factors combine to result in a level of access to Australian Standards that frequently fails to meet the needs of the community, business and broader government sectors.

National & State Libraries Australasia, through the NSLA eResources Consortium, would welcome an opportunity to work with SAI Global to review and improve access for the community to Australian Standards.¹¹¹

- 5.40 A copy of the 'Full Terms and Conditions of Use' that were applicable to the licence between the State Library of Western Australia and SAI Global was tabled by Ms Sutherland, and is reproduced as **Appendix 3** to this report.
- 5.41 The ALRC report outlined at paragraphs 5.9 to 5.17 above concluded and recommended that the Act should be amended to provide that any contractual term that excludes or limits the libraries and archives exceptions is not enforceable.¹¹² This Committee would fully endorse that view.

¹¹¹ Submission 12 from National and State Libraries Australasia, 30 January 2015, p 1.

¹¹² *Copyright and the Digital Economy: ALRC Report 122*. Australian Law Reform Commission. Commonwealth of Australia, 2013, paragraph 15.27.

CHAPTER 6

ACCESS TO THE LAW FOR ALL

EXTENT OF FREE ACCESS

6.1 The Western Australian provisions allowing for the calling-up of external material in regulations and local laws, set out at paragraphs 2.45 to 2.49, make no mention of the future availability or otherwise of that material, which is also the case in other Australian jurisdictions (with the notable exception of Victoria - see below).

6.2 There are rare instances where an individual statute makes specific provision. Section 18 of the *Dangerous Goods Safety Act 2004*, for example, provides for the making of regulations on a plethora of subject matters, as listed in schedule 1 to the Act. Section 19 then goes on to state that the regulations may adopt a ‘code’ (the definition of which includes a standard) and then:

(4) If the regulations adopt a code or subsidiary legislation, the Chief Officer must —

(a) ensure that a copy of the code or subsidiary legislation, including any amendments made to it from time to time that have been adopted, is available, without charge, for public inspection;

(b) publish a notice in the Gazette giving details of where such documents may be inspected or obtained; and

(c) if the regulations adopt a code or subsidiary legislation as in force from time to time and the code or subsidiary legislation is subsequently amended, publish in the Gazette a notice of the amendment.

6.3 A provision with the same intent may be found at section 344A(3) of the *Health Act 1911* – the CEO of the Department of Health is to make available for inspection, free of charge, during normal office hours, any standard, rule, code or provision adopted either in regulations or in health local laws.

6.4 Provisions with similar effect, but with a different formulation, include:

- section 150 of the *Building Act 2011* – regulations may adopt the text of any published document. The adoption is of no effect unless it can be inspected at all reasonable times or purchased. The Building Commissioner must ensure

that the text may be inspected by the public at the Commissioner's office during business hours

- section 132 of the *Medicines and Poisons Act 2014* – the CEO of the Department of Health must ensure that all adopted documents are available for inspection by members of the public and can be acquired by members of the public.

6.5 Another provision of similar effect, with an effective 'get-out clause', is section 222(6) of the *Water Services Act 2012*. Any external text may be incorporated in regulations made under this Act, but the adoption is of no effect unless it can at all reasonable times be inspected or purchased by the public. The use of the wording *or purchased by the public* means that the simple availability of the adopted material for sale on SAI Global's website means that the statutory condition is complied with (this formulation is, of course, also used in the *Building Act*, above, but the provision is supplemented in that case by requirements placed on the Building Commissioner to have copies available for public inspection).

6.6 In any event, such provisions are the exception. Generally, the evidence and correspondence received during this course of the Inquiry revealed a deal of frustration and unease at the general lack of freely-available access to Standards that had been called-up. This frustration is not confined to Western Australia. For example, the Attorney-General of the Northern Territory, Hon John Elferink MLA, told us:

*The investigation conducted by the Department of the Attorney-General and Justice, in preparing a response to your correspondence, has identified some significant problems with the accessibility of Australian Standards adopted in delegated legislation in the Northern Territory.*¹¹³

6.7 The statutory position appears to be better in respect of local laws. Having specifically provided for the adoption of external documents, including Standards, in local laws (see paragraph 2.47), the *Local Government Act 1995* goes on to state that the public may attend the offices of a local government and inspect, free of charge, in the form or medium in which it is held by the local government:

any text that —

- (i) is adopted (whether directly or indirectly) by a local law of the local government or by a regulation that is to operate as if it were a local law of the local government; or*

¹¹³ Hon John Elferink MLA, Attorney-General and Minister for Justice, Northern Territory Government, Letter, 4 February 2015.

(ii) would be adopted by a proposed local law of which the local government has given Statewide public notice under section 3.12(3);

[section 5.94(j)]

- 6.8 There is doubt though as to whether this provision is as clear as it appears, thanks to the inclusion of the words *in the form or medium in which it is held*. As the Director General of the Department of Local Government and Communities pointed out to the Committee in her letter of 23 January 2015:

It is uncertain if section 5.94 ... would apply in situations where a local government does not possess a copy of an Australian Standard adopted by a local law. This is because section 5.94 allows a person to access information "in the form ... in which it is held by the local government".

The Act does not directly compel local governments to keep a copy of the standards they adopt in local laws. It is arguable that if a local government does not possess a standard, then there is no "text" capable of being inspected or copied for the purposes of section 5.94.¹¹⁴

- 6.9 This uncertainty ought to be resolved by Parliament, we suggest, by amending section 5.94 of the *Local Government Act 1995* so that those local governments that rely on referencing Standards in their local laws must be bound to have available for their ratepayers a copy of those Standards. Recommendation 5 of this report makes this point.
- 6.10 Section 5.96 then goes on to state that, where a document may be inspected, a member of the public may also request a copy of that document. The local government is specifically permitted to charge for such copies on a cost-recovery basis. This charge is unlikely to be the mere cost of photocopying though, and any fees payable to SAI Global under licence terms would doubtless need to be factored in.
- 6.11 This Committee has long sought to ensure that government departments, agencies and local governments advise the public on how Standards that have been referenced may be accessed, free of charge. As mentioned in Chapter 1, in this Committee's Annual Report for 2011, Recommendation 1 read:

The Committee recommends that the Government requires departments, agencies and local governments to advise on their

¹¹⁴

Submission 6 from Department of Local Government and Communities, 23 January 2015, p 2.

internet site where standards called up in subsidiary legislation can be accessed at no cost.

- 6.12 If a copy of the called-up document was not to be kept available at the organisation's premises, then this may have taken the form of mere advice on its website that the relevant Standard was kept and could be viewed at the State Library.
- 6.13 This policy has been enforced by the Committee subsequently. By way of example, in 2014, the Shire of Laverton made a fencing local law which adopted AS/NZS 3016:2002, regarding the installation and maintenance of electric security fences. The Committee sought and received a number of undertakings from the council, including that it:

post on its website details of where the public can access the Australian/New Zealand Standard AS/NZ 3016: 2002 at no cost.

- 6.14 Unfortunately, as mentioned, a posting on an organisation's website that a Standard is available for viewing at the State Library would no longer be correct.
- 6.15 A similar request to that at paragraph 6.13 was made of the Department of Environment Regulation with regard to the *Environment Protection (Noise) Amendment Regulations 2013*. That request elicited a response from Hon Albert Jacob MLA, Minister for Environment, dated 27 March 2014. In it, he stated:

Of the four Australian Standards referred to in the regulations, the one most likely to elicit enquiries is AS 2436-2010 Guide to noise and vibration control on construction, demolition and maintenance sites. On contacting the DER [Department of Environment Regulation] Library, the enquirer would be advised that they could either arrange to visit any DER office to view the complete Standard, or be sent a copy of section 4 of the Standard (the section referred to in the regulations) in either electronic or paper form. The royalty cost of this latter option would be borne by DER. The other three Standards are also available if requested, however they are of a technical nature and unlikely to be requested by the layperson.¹¹⁵ (Committee emphasis added)

- 6.16 In its submission to the Committee, that Department's Director General re-iterated what Minister Jacob had said in that letter, adding:

DER supports the provision of free public access to adopted Australian Standards in delegated legislation administered by the Department, and can provide electronic or paper access subject to the

¹¹⁵

Hon Albert Jacob MLA, Minister for Environment, Letter, 27 March 2014.

Australian Standards provider SAI Global licence conditions as to copyright.

To facilitate public access, DER's website advises persons interested in accessing an Australian Standard referred to in regulations to contact DER (email info@der.wa.gov.au).

On contacting DER, the enquirer is advised that they can either arrange to visit any DER office to view the complete Standard, or be sent a copy of the section referred to in the regulations in either electronic or paper form. The royalty fee for this latter option would be borne by DER.

*DER implements the measure outlined above to facilitate free public access to adopted Australian Standards through its subscription to SAI Global. This ensures compliance with SAI Global licence conditions and does not require amendments to legislation administered by DER.*¹¹⁶

- 6.17 The provision of this admirable service will be returned to later in this report.
- 6.18 On a practical level however, and regardless of the niceties of the rule of law and any right to access the law, the Committee needed to consider the extent to which there is a problem that requires addressing. In order to do so, the 'public' was broken down into categories of potential users – the general public, businesses, unions and other representative bodies, training providers, government agencies and local governments.

THE GENERAL PUBLIC

Is there a problem?

- 6.19 In response to questions raised by this Committee regarding the lack of free public access to Standards, the Commonwealth Minister for Industry and Science appeared unconcerned. He said:

*As with most, if not all developed economies, the Australian model is that the end-user pays to access Australian Standards. However, it is important to note that many standards may be accessed free of charge from many public libraries and the full suite of Australian Standards is available for viewing at all state and territory libraries across Australia.*¹¹⁷

¹¹⁶ Submission 20 from Department of Environment Regulation, 6 February 2015, p 2.

¹¹⁷ Hon Ian Macfarlane MP, Ministry for Industry and Science, Letter, 4 February 2015.

- 6.20 In its submission to the Committee, the Department of Local Government and Communities stated:

*Prior to the announcement of the Committee's inquiry, the Department has not received any feedback from stakeholders or the public sector indicating that increased public access to Australian Standards was necessary.*¹¹⁸

- 6.21 It is likely though that the Department's response (like Minister Macfarlane's) was predicated on the assertion (and many respondents drew attention to this) that public access to Standards was freely available at State and public libraries across the country. That is no longer true, and this report will deal with that issue below.

- 6.22 On a more positive note, the Department of Commerce told the Inquiry that it also maintains a library, which is freely available to the public, and which holds a licence allowing for access to the full suite of Standards. It said:

Access to the Australian Standards is available for free by attending the Department of Commerce library at its Cannington location, where the main divisions which administer laws citing the Australian Standards are located; the Building Commission, EnergySafety and Worksafe. Consumer Protection product safety standards may also be obtained through the library.

This library is publicly accessible Monday to Friday, where the librarian is able to assist with access to current versions of the Australian Standards online though a subscription purchased by the Department of Commerce. The Department of Commerce librarian can also assist with access to historic hard copies of some Australian Standards which we hold.

*Consequently, the Department of Commerce library provides free access to the Australian Standards to those who can travel to its Cannington office library.*¹¹⁹

- 6.23 Obviously, this is a useful facility. However, the final sentence draws attention to its limitations for the people of Western Australia – access can only be had through a physical appearance in Cannington.

- 6.24 The Committee received a submission from Ms Janine Freeman MLA, Member for Mirrabooka. On the matter of the Cannington library, she told us:

¹¹⁸ Submission 6 from Department of Local Government and Communities, 23 January 2015, p 4.

¹¹⁹ Submission 8 from Department of Commerce, 15 January 2015, p 1.

*it appears that the library is targeted to close and the librarian made redundant as part of \$1.9 million funding cuts to Worksafe.*¹²⁰

- 6.25 This was raised by the Committee when officials from the Department of Commerce appeared before it on 14 August 2015. Peter Gow, Executive Director, Building Commission, told us:

*There has been no firm decision on what is occurring with the library at this point. It is right that it has been identified as one area where we may need to make some savings to fit within our budget, but at the moment we are going through a process whereby we have identified the areas where we may potentially need to make some savings and the library is one of them. We have just completed a staff consultation process to get their views and we have received quite a number of suggestions of alternative measures we might be able to adopt, which we are in the process of considering before we make our final decision. So, at this point it is not possible to say that the library is definitely closing.*¹²¹

- 6.26 Subsequently, in an email received from Mr Gow of 12 February 2016, the Committee was informed that:

*The Department has not proceeded with the closure of the Cannington library. However it does remain subject to review as part of our obligations to provide an efficient and cost-effective service and to provide as much information on-line as possible.*¹²²

- 6.27 The State Library of Western Australia gave the Inquiry some figures as to the use by the public of its Standards database, whilst it held a subscription. It said:

*In 2014, there were 346 logins to the database and 516 searches to the Australian Standards database from the State Library Building.*¹²³

- 6.28 This does not sound like a lot. Taking into account the fees that were paid to SAI Global for access to this utility, the Committee calculates that this amounts to some \$64 per login. There may be any number of reasons for this – the fact that the database could only be accessed from the State Library building in Perth, for example, or the restriction on use of Standards once accessed.

¹²⁰ Ms Janine Freeman MLA, Member for Mirrabooka, Letter, 21 July 2015.

¹²¹ Peter Gow, Executive Director, Building Commission, Department of Commerce, *Transcript of Evidence*, 18 August 2015, p 8.

¹²² Peter Gow, Executive Director, Building Commission, Department of Commerce, Electronic Mail, 12 February 2016.

¹²³ Submission 13 from State Library of Western Australia, January 2015, p 4.

- 6.29 Regardless of this, however, the Committee is of the view that there is a clear issue that needs to be addressed. The very fact that what amounts to the law of the State can only be accessed on one site, between the hours of 9am and 4pm, Monday to Friday, in an area of some 2.6 million square kilometres, is a problem. Free access to the law is, and should be in the Committee's view, a right and a necessity.

Possible consequences of a lack of public access

- 6.30 In paragraph 2.17, the financial consequences of a lack of awareness of the contents of a Standard relating to the installation and maintenance of backflow devices in bathrooms was mentioned by way of example. It is far from uncommon for a failure to comply with a Standard referenced by regulations to attract penalties or sanctions when that Standard is adopted in delegated legislation.
- 6.31 Many of the instances, like that one, apply generally to businesses, be they sole traders or multi-nationals. Under the *Fair Trading Act 1987*, for example, mentioned at paragraph 2.12, if a product is supplied that fails to meet the safety Standards prescribed, or fails to comply with Standards that must be met regarding product information, product quality, packaging, etc., that must be complied with, a crime is committed. A contravention of any of these provisions is punishable with substantial fines (section 69 of that Act).
- 6.32 Some instances may punish individuals in a personal sense. Under regulation 222 of the *Road Traffic Code 2000*, for example, failure to wear a protective helmet '*that is, or is of a standard or type that is, approved by the CEO*' is an offence. Regulation 182 states that a vehicle may not be driven at night without lights and reflectors as prescribed by Vehicle Standards. Child restraints, safety harnesses, booster seats and the like must also meet those Vehicle Standards. For the purposes of the Code, 'Vehicle Standards' are standards contained in the *Road Traffic (Vehicles) Regulations 2014*, which cite variously Australian Standards, AS/NZ Standards and British Standards (for seatbelts).
- 6.33 Examples of such possible punishments being imposed for failure to comply with a Standard are numerous, but a less considered consequence could be the termination of an employment contract. Obviously, a person who breaches a health and safety regulation which incorporates Standards may be dismissed. The Committee received evidence from the Shop, Distributive and Allied Employees' Association of Western Australia (SDA), supplying an example of how employees may get caught out by Standards incorporated into employment contracts. Its submission to the Committee stated:

it is known that workers are impacted when their employers adopt Australian Standards. For example, Woolworths Limited released its Drug and Alcohol Procedure Guide on 1 May 2012 which refers to AS

4308 and AS 4760 for cut off levels for the range of drugs specified in the Australian Standards.

The cheapest price to purchase these Standards is \$111.02 and \$93.23 respectively. Were the union to purchase these Standards, even at a higher purchase price to allow for copying, it would be breaking copyright to publish the pertinent sections in our member magazine or even a mail-out to members employed by Woolworths and its subsidiaries. In order to disseminate the relevant information the union would have to pay a royalty for reproducing the content, and given the high turn-over of staff in the retail and associated sectors this could be a very costly exercise to repeat at regular intervals.

Given that workers can be disciplined or even sacked for failure to comply with Standards, it is both logical and imperative that the information be publicly available and easily accessible.¹²⁴

- 6.34 Individuals may also be impacted by Standards applied by local laws. For example, if a person erects a security fence that has not been approved because it fails to meet required Standards, he or she may incur a penalty.

Access in metropolitan and regional areas

- 6.35 Generally, at the time of writing, public access to the full suite of Standards in Western Australia is confined to the library at Cannington, run by the Department of Commerce, which is clearly a most valuable resource.
- 6.36 It must be recognised however that, even for people who live and work in Perth, it is not always a straightforward matter to attend at that place. As the SDA told the Inquiry (speaking then of State Library access):

Notwithstanding that such access does exist, it is at odds with modern expectations of access to information through electronic means. For many workers, particularly those in retail and associated industries, it's not practical to physically attend libraries to access information which may have direct impact on their working lives.¹²⁵

- 6.37 It goes without saying that access for people living outside of Perth is substantially more difficult.

¹²⁴ Submission 5 from Shop, Distributive and Allied Employees' Association of Western Australia, 19 January 2015, p 1.

¹²⁵ Ibid. p 2.

- 6.38 Mention has been made of the fact that the standard licensing terms and conditions that were imposed on the State Library prevented inter-library lending, meaning that regional libraries could not even seek to borrow copies of Standards upon receiving a request from a potential user. Nor was any type of remote access, by regional libraries or individuals, permitted.
- 6.39 The Committee is aware that it would be possible, should funding permit, for further licences to be taken out in respect of other, regional libraries. That is, of course, were the State Library subscriptions ever to be renewed. In fact, such a licence once existed. However, in the words of the State Library in its written submission:

*Access to the full range of printed standards was available only from the State Library Building, and they were not generally available on inter library loan. However, to ensure availability to Australian Standards for all Western Australians, a second subscription to the printed copies of Australian Standards was acquired from the public library materials budget so that they could be provided throughout the State on inter library loan through the public library network. In December 2005, the subscription to the second set of standards was cancelled due to cost pressures and low usage by public libraries.*¹²⁶

- 6.40 The Committee raised the cost of additional licences with the Chief Executive Officer of SAI Global. He informed us that, as of August 2015, the cost was \$14,000 for the first licence, then a further \$7,000 for each subsequent library.¹²⁷
- 6.41 The inconvenience, not to say risk, to people in regional areas of this lack of access to Standards becomes apparent from the submission received from the Shire of Mundaring. It stated:

*All Standards should be freely available for viewing (not necessarily downloading or printing) to any member of the public from a central web-library. It defeats the purpose that these guidelines, which can make the difference between life and death in some circumstances (bush fires for example), are only available by visiting public libraries and certain government offices or through purchase at a cost of \$100 or more.*¹²⁸

- 6.42 The Standard there mentioned, regarding construction in bushfire prone areas, will be discussed below. Due to its obvious importance, it is a Standard that has been purchased and stocked by public libraries in affected regional areas. There remain,

¹²⁶ Submission 13 from State Library of Western Australia, January 2015, p 3.

¹²⁷ Peter Mullins, Chief Executive Officer, SAI Global Ltd., *Transcript of Evidence*, 14 October 2015, p 6.

¹²⁸ Submission 2 from Shire of Mundaring, 5 January 2015, p 1.

however, limitations. As Debra Summers of Public Libraries Western Australia Inc. told us in evidence:

*Our local governments, our public libraries often purchase standards that are particularly relevant to our constituents. The example from City of Swan is a recent standard that was released about building construction in fire-prone areas. We purchased six copies, put one in each library; they were \$111 each. We were not allowed to photocopy one page for one resident who wanted to actually access that information.*¹²⁹

Finding 2: The Committee finds that, whilst departments and agencies are free to incorporate Standards into their delegated legislation as a matter of law, few of them provide adequate facilities for those affected by that legislation to access them free of charge. Administrative and financial provision could easily be made to remedy this situation.

Recommendation 3: The Committee recommends that the Government directs all departments and agencies within Western Australia to replicate the practice of the Department of Environment Regulation, in that where an Australian Standard or other external material is adopted into delegated legislation made by that department or agency, a copy of that Standard or other material, or of the relevant part of it, be supplied upon request free of charge, and that the department or agency bear the cost of doing so.

Bushfire Standard

- 6.43 The 2009 Victorian Bushfires Royal Commission was announced by the then Premier of Victoria, John Brumby, on 16 February 2009, in order to investigate the nature of the circumstances surrounding the series of bushfires around that State which claimed some 173 lives on 7 February 2009 (subsequently to become widely known as ‘Black Saturday’). The Royal Commission concluded on 31 July 2010.
- 6.44 Part 6.9 of the Final report dealt with building regulation.¹³⁰ It noted that building in bushfire-prone areas of Victoria was regulated by legislation (the *Building Act 1993* and the *Building Regulations 2006*), the NCC and by the Australian Standard adopted in the Code, AS 3959. It went on to describe the Standard and its evolution and

¹²⁹ Debra Summers, President, Public Libraries Western Australia (Inc.), *Transcript of Evidence*, 21 August 2015, pp 3-4.

¹³⁰ 2009 Victorian Bushfires Royal Commission, Final Report, Government Printer for the State of Victoria, July 2010, pp 252-261.

revisions, and criticised Standards Australia for not reacting with due urgency when required. It described the process of revision thus:

The full revision of AS 3959-1999 began in late 2001. Following the Canberra bushfires in January 2003, the Australian Building Codes Board stressed the importance of revising the standard in a timely manner to the committee undertaking the review. Even though it was expected that the new edition would be published in September 2003, the revised standard was not put to a final ballot of the committee until 27 February 2009, despite requests from the ABCB and a recommendation by COAG's 2004 National Inquiry on Bushfire Mitigation and Management that it be finalised as a matter of priority. There were several reasons for the long delay:

- *The committee responsible for the standard—the FP-020 Committee—had to review over 490 comments received on the original public consultation draft and more than 1,100 comments on a further draft issued in February 2005.*
- *Four subcommittees were established to consider specific matters in depth.*
- *Standards Australia was concurrently developing and publishing two important standards for testing the performance of building materials subjected to simulated bushfire attack (AS 1530.8.1 and AS 1530.8.2) that were to be extensively cited in the revised edition of AS 3959.*
- *Committee members disagreed about the flame temperature for the site assessment methodology and whether to include deemed-to-satisfy provisions for the Extreme and Flame Zone categories.*¹³¹

6.45 In the immediate aftermath of Black Saturday, further considerable pressure was brought to bear on Australian Standards, who initially offered to publish an interim Standard but, at the request of the Victorian Government, eventually published the revised Standard on 10 March 2009.

6.46 The Royal Commission did have something to say about the free availability of the regulatory materials in this regard. It bemoaned the fact that the NCC was only available at a cost; as seen above, this has now been remedied through the funding of governments. On the issue of Standards, however, the Final Report said:

¹³¹

Ibid. p 254.

In the report of its 2006 Review of Standard Setting and Laboratory Accreditation, the Productivity Commission recommended that the Australian Government and other governments fund free or low-cost access to standards made mandatory by regulation. The Commission agrees.

Standards Australia owns the copyright in the standards it develops. It receives royalties under an agreement with its publisher, SAI Global Ltd, but otherwise has no involvement in the pricing or sale of standards by SAI Global. The cost of access to AS 3959 is of concern: evidence before the Commission shows that the cost of access reduces compliance.

The Commission considers that bushfire-related standards mandated by legislation should be freely available and that any cost associated with this should be borne by the Commonwealth and state and territory government members of the Australian Building Codes Board. The Commission notes that the performance standard for private bushfire shelters, released by the ABCB on 30 April 2010, is available free of charge on the ABCB website. It welcomes this development.¹³²

6.47 Regrettably, to date, there is still no free access to this Standard, which is clearly of great importance to those who are planning to build in bushfire-prone areas in Western Australia, who may wish to voluntarily retrofit their homes for their protection and to those who are forced to rebuild their properties following a fire, as was recognised by the report of the Perth Hills Bushfire Review 2011.¹³³

6.48 Speaking of ongoing dialogue between the ABCB, Standards Australia and SAI Global, Mr Gow, representing the Department of Commerce, told this Inquiry:

The only actual request that I am aware of for free access to standards came after the Victorian bushfires, where the royal commission there made a recommendation that the bushfire resistant construction standard—I think it is AS3959—should be made available for free, particularly for people who were rebuilding after the Black Saturday fires there. Those discussions came to nothing, so there was no, if you like, giving away of their commercial product by SAI Global. So there have been discussions, but essentially the brutal

¹³² Ibid. p 257.

¹³³ Perth Hills Bushfire Review 2011, *A Shared Responsibility – The Report of the Perth Hills Bushfire February 2011 Review*, Government of Western Australia, 16 June 2011.

*commercial reality is that SAI Global makes money from it and they are not going to give it away.*¹³⁴

6.49 Adam Fennessy of the Victorian Department of Environment, Land, Water and Planning told us that ‘*progress towards making these Standards (being AS 3959, other Standards referred to in it and any other bushfire-related Standards) is a matter to be addressed in the context of the broader discussion about open access to standards used in the NCC*’.¹³⁵

6.50 In the meantime, the Department of Commerce in Western Australia engaged with SAI Global in order to seek to negotiate a deal whereby it could purchase sufficient copies of AS 3959 to supply one each to WA’s local governments (being unable, of course, to simply supply copies from its Cannington Library access). In an email dated 22 October 2015, Mr Gow told the Inquiry:

*The cost to the Building Commission was \$16,025.13 for the purchase of 145 hardcopies of AS 3959. In addition we had to pay an SAI Global membership fee of \$563.86. The total cost was therefore \$16,588.99.*¹³⁶

6.51 The advertised price for a hard copy of this Standard is \$129.03. Thus, the total saving to the Department of Commerce as a result of their negotiations was only \$2,684.22.

BUSINESS

Is there a problem?

6.52 Perhaps the industry most impacted by the proliferation of Standards applicable to it would be construction. For example, the Government of Tasmania told the Inquiry that, with reference to its Building Standards and Occupational Licences agency (BSOL):

*In total, BSOL estimates that up to 250 standards could apply to a building site (excluding standards adopted under Work Health and Safety laws).*¹³⁷

6.53 Most building products will have manufacturing, design and testing Standards. The average contractor probably does not need to refer to those, but there will also be installation and maintenance Standards for those products.

¹³⁴ Peter Gow, Executive Director, Building Commission, Department of Commerce, *Transcript of Evidence*, 14 August 2015, p 4.

¹³⁵ Submission 23 from Department of Environment, Land, Water and Planning (Vic), undated, p 2.

¹³⁶ Peter Gow, Executive Director, Building Commission, Department of Commerce, Electronic Mail, 22 October 2015.

¹³⁷ Hon Will Hodgman MP, Premier of Tasmania, Letter, 16 February 2015.

- 6.54 The Committee sought to explore the extent to which tradespeople or small businesses actually need to have copies of all of the Standards to which they may be subject. It received evidence from a number of witnesses who explained that, often, small businesses or tradespeople are able to obtain advice on the content of Standards from their peak bodies. They are not permitted to be given copies of those Standards free of charge, again for copyright and licensing reasons, but the peak or advisory bodies may explain to members the gist of those Standards.
- 6.55 The HIA, for example, provides advice and assistance to builders with a wide range of information and educational material regarding the NCC and its associated Standards. It has access to a full library of Standards and, though it cannot provide copies to members, it does provide advice and information sheets to members regarding updates and provides a technical advisory service.¹³⁸
- 6.56 Similarly, we heard that MEA provides an advisory service to its members based on the limited licence it holds with SAI Global. Its subscription gives access to only a preselected number of Standards, and further fees are payable for access to anything else outside of items covered by that licence.¹³⁹ It also provides an email notification service for members who wish to receive it, advising as to updates to any relevant Standards.
- 6.57 The Acting State Manager of MEA, Alan McCallum, told the Inquiry:

*To the best of our knowledge, we are the only way that our electrical contracting members can find out that relevant information, other than, of course, purchasing it themselves. As to keeping them up to date, again, without us they would probably have a limited way of finding out what has been changed or updated.*¹⁴⁰

- 6.58 The HIA recognises however that builders generally will not incur vast expense in purchasing Standards. It told the Inquiry:

The majority of builders and trade contractors will not purchase the NCC or the reference standards annually due to the high cost and limited use through most of the year. Builders will choose to purchase ad hoc standards that relate to specific areas of construction. For example, many builders will purchase a copy of AS 1684 Residential Timber Framing Code as a one off version. A new copy would only be purchased if a significant update was made. This standard provides

¹³⁸ John Gelavis, Executive Director, Housing Industry Association Ltd., *Transcript of Evidence*, 14 August 2015, p 2.

¹³⁹ Alan McCallum, Acting State Manager, Master Electricians Australia, *Transcript of Evidence*, 21 August 2015, pp 1-2 and answer to question on notice asked at hearing dated 21 August 2015, p 1.

¹⁴⁰ Ibid. p 2.

*specific details about the design of timber framing, and as many builders undertake this design work they see value in owning a copy. Whereas, a material standard such as AS 3999 Bulk thermal insulation would rarely be purchased as a standalone document as it relates to the manufacturing of the product, which the builder are not responsible for, and provides some technical details regarding installation. Builders will generally rely on the NCC to provide such installation requirements and therefore will not purchase a copy.*¹⁴¹

- 6.59 Mr McCallum also told us about the range of Standards he would expect members to actually possess. He told us:

*They vary. The common one electricians use would be AS 3000, which is the wiring rules. To buy a new copy of the wiring rules currently is around about \$200 to \$210—something like that. There are normally one, two or maybe three lots of amendments that come out over a period of time, and by that I mean a number of years, that they then have to purchase for around about \$60 to \$80 per amendment. Because it is a case of either sticking those amendments in your current book or losing track of them, they will purchase another book. Consequently, it can be an ongoing cost for just that particular standard, which in our industry we rely on as being our bible—that tells us what we can and cannot do from an install point of view.*¹⁴²

- 6.60 When asked whether it would be normal for an electrician to have copies of all of the Standards he or she would normally refer to, Mr McCallum said:

*It is not normal, no. It is normal for them to have standards of certain aspects of the industry that they might be working in within relation to the type of work they are doing, but they would not have every single standard relating to the electrical industry, no.*¹⁴³

- 6.61 The witnesses that appeared before the Committee on behalf of the Department of Commerce were relatively untroubled about the need for tradespeople to have available copies of Standards, and to have to pay for them. Kenneth Bowron, Executive Director of EnergySafety, told the Committee:

with gas and electricity they are licensed activities and only licensed people can do that work, so any licensed people need to access those standards. It is a tool of trade, it is tax-deductible and so it should not

¹⁴¹ Submission 10 from Housing Industry Association Ltd., 29 January 2015, pp 1- 2.

¹⁴² Alan McCallum, Acting State Manager, Master Electricians Australia, *Transcript of Evidence*, 21 August 2015, p 4.

¹⁴³ Ibid. p 3.

*affect the home builders because they should [not] be doing their own wiring or gas.*¹⁴⁴

6.62 With regard to electricians in particular, the Department of Commerce wrote:

*The cost is a tax deduction. EnergySafety has never received any complaints about the need to buy standards.*¹⁴⁵

6.63 On balance, the Committee is of the view that there is a problem to be addressed, though it may be limited in its scope. Perhaps the tradespeople referred to have available to them the Standards necessary for their particular and specialised tasks. These do come at a cost to them however, a cost that doubtless finds its way down the commercial chain to the customer.

Possible consequences

6.64 As referenced earlier (paragraph 6.58), with regard to tradesmen and women in the construction industry, the HIA's submission to the Inquiry stated that the majority of builders and trade contractors will not purchase the NCC or the reference standards annually due to the high cost and limited use through most of the year.

6.65 That submission went on:

*This approach does create potential risks for builders and trade contractors as they may not be aware of changes or the 'fine detail' of certain building requirements. This is not a preferred outcome, however, it is a direct result of the need to purchase these standards. It is essential for promoting ongoing high standards of building in the state, and equitable, given that compliance is a legal requirement, that builders have ready access to the technical standards they are mandated to meet under the regulations for no cost.*¹⁴⁶

6.66 It is obvious that failure to follow agreed Standards, produced by experts in their particular field, can have both quality and safety implications. It can also have severe legal and reputational implications.

6.67 Paragraph 6.59 described the 'wiring rules' (or AS/NZS 3000:2007), and the need for electricians to purchase or have regular access to them. Regulation 49 of the *Electricity (Licensing) Regulations 1991*, made pursuant to section 32 of the *Electricity Act 1945*, states:

¹⁴⁴ Kenneth Bowron, Executive Director, EnergySafety, Department of Commerce, *Transcript of Evidence*, 14 August 2015, p 7.

¹⁴⁵ Submission 8 from the Department of Commerce, 15 January 2015, p 2.

¹⁴⁶ Submission 10 from Housing Industry Association Ltd., 29 January 2015, p 2.

Electrical work, requirements for

Subject to subregulations (2B) and (2), a person shall carry out electrical work in accordance with the requirements of—

- (a) the Australian/New Zealand Wiring Rules as amended from time to time; and*
- (b) the W A Electrical Requirements as amended from time to time; and*
- (c) the standards specified in Schedule 2 as amended from time to time.*

- 6.68 The wiring rules mentioned in subregulation (1)(a) are contained in AS/NZS 3000. The WA Electrical Requirements (WAER), the latest iteration of which came into force on 1 January 2016, may be found free of charge on the EnergySafety website¹⁴⁷.
- 6.69 However, neither the wiring rules, nor the 23 sets of AS or AS/NZS Standards listed in Schedule 2 to the Regulations, are freely available to electricians. In speaking of the WAER, the website goes on to say:

The document makes frequent references to relevant Australian Standards. As a general rule, nothing in those standards is replicated in the WAER. The reader needs to refer to the quoted Australian Standards.

*Failure to comply with a requirement may result in prosecution under the Electricity (Licensing) Regulations 1991. It may also cause electricity connection delays.*¹⁴⁸

Indeed, regulation 52(3) states:

An electrical contractor who delivers a notice of completion to the relevant network operator in respect of notifiable work that has not been completed in accordance with regulations 49 and 49B commits an offence,

And regulation 65(2) completes the provision with:

Unless otherwise provided, a person who commits an offence under these regulations is liable to —

¹⁴⁷ http://www.commerce.wa.gov.au/sites/default/files/atoms/files/waer_december_2015_0.pdf. Viewed 4 January 2016.

¹⁴⁸ <http://www.commerce.wa.gov.au/publications/wa-electrical-requirements-waer>. Viewed 4 January 2016.

(a) for an individual, a fine of \$50 000; or

(b) for a body corporate, a fine of \$250 000.

6.70 Another example of where electricians may be impacted is under the *Occupational Health and Safety Regulations 1996*. To take one set of circumstances, regarding spray painting premises, regulation 3.101 provides that a person who is an employer, contractor or self-employed tradesperson must ensure that electrical equipment complies with AS 2268 (Electrostatic paint and powder sprayguns for explosive atmospheres) and AS/NZS 3000 (wiring rules) or be liable for a penalty of \$25,000 for a first offence (\$31,250 subsequently) in the case of an individual. The penalties for a body corporate are doubled.

6.71 As mentioned above, the HIA stated in its submission that builders would not generally purchase a whole suite of Standards, just those relevant to the particular job at hand. It will provide advice, but this is not a panacea, particularly when it comes to updates. It told the Inquiry:

*it is often not until a problem occurs on a building project that the builder or trade contractor become aware of changes to a particular standard.*¹⁴⁹

6.72 Alan McCallum, Acting State Manager of MEA, explained the importance of Standards to his members, particularly AS/NZS 3000:2007, the wiring rules:

*In a perfect world it would be great if every electrician, including apprentices, had their own copy, the reason being that when you are on the job site doing the work, that is your reference material. That is what tells you that you can leave that site and it is safe to do so, based on what those regulations and rules have told you. For them to have only one copy as part of a business would be very risky, which is the reason that standards exist, because that is what does tell you what is right from wrong, what you should and should not do, and when it is safe to leave or not safe to leave.*¹⁵⁰

6.73 As well as having easy access to the wiring rules, keeping abreast of updates is also a problem for electricians. As mentioned previously, MEA provides an email update service to members, but not all members are subscribers and not all electricians are members. Mr McCallum believes that the risk of these electricians not being entirely up to date is down to cost:

¹⁴⁹ Submission 10 from Housing Industry Association Ltd., 29 January 2015, p 2.

¹⁵⁰ Alan McCallum, Acting State Manager, Master Electricians Australia, *Transcript of Evidence*, 21 August 2015, p 5.

*One of the main reasons that occurs is not through inadvertently knowing, it is through cost. They have not purchased the amendments or the latest version as it has happened throughout the course. Nine times out of 10, that is because of the value they have to fork out for that particular upgrade. We are talking from apprentice level all the way up to tradie level.*¹⁵¹

6.74 He added:

*At the end of the day it is the price that decides what they can and cannot afford to do. It should not come down to that from a safety perspective at all. Having said that, it is very hard for a contractor to gain or get back the costs involved in those standards that they may have to purchase for any given job they may be doing. Again, it comes down to that availability and cost factor. If it could be put in a cheaper way access-wise, using the AS 3000 for argument's sake and the amendments, if you did not have to pay for the amendments on top of the book that actually told you how to do job properly. It is not the contractor or the electrician's fault that someone has found some changes that need to be made for safety reasons to a document that they then in turn have to then pay for on top of the document they bought originally.*¹⁵²

National Construction Code

6.75 Special mention should be made here of the NCC.

6.76 A number of witnesses and submitters made reference to the availability online of the NCC. As mentioned in Chapter 1, the 2015 version of the NCC is not a product of Standards Australia, but of the ACBC. The Code (together with any future digital editions) is now available free of charge to the public, through the ABCB's website.¹⁵³ This valuable tool became available on 1 May 2015, following a decision of the Australian Building Ministers' Forum on 30 May 2014. A press release issued at the time of this decision by Mr Bob Baldwin, Parliamentary Secretary to the Minister for Industry, stated:

The forum agreed in principle to make the 2015 National Construction Code (NCC) and future editions freely available and online, with details to be finalised in the coming months.

¹⁵¹ Ibid. p 5.

¹⁵² Ibid. p 6.

¹⁵³ <http://services.abcb.gov.au/NCCOnline/>. Viewed 23 December 2015.

It also agreed to measures that are expected to lead to greater consistency in building regulations across the states and territories, by limiting variations to the NCC.

Mr Baldwin said other reforms were eliminating the NCC's purchase price (almost \$400), improving small business' access to the NCC, and increasing the number of building and plumbing practitioners able to access using the NCC from 12,000 to around 200,000 across Australia.

"We shouldn't be charging our building industry to access these vital building codes, so today we took the first step to removing this burden on the building industry," Mr Baldwin said.

"This measure alone will significantly reduce red tape for Australia's building industry, improve the code's usability and reach, and ensure that Australia's building and construction industry continues to maintain high standards.

"Agreeing to eliminate costs associated with buying the code will make it more accessible to the industry and mean that the building and construction sector can keep abreast of the latest changes."

The NCC provides model regulations for buildings and plumbing and is given effect through state and territory legislation. It sets minimum requirements for the design, construction and performance of buildings throughout Australia.¹⁵⁴

- 6.77 Peter Gow, Executive Director of the Building Commission, explained the funding of this exercise. Approximately half of the funding of the ABCB (a joint creature of the States, Territories and Commonwealth Governments) was previously met from sales of the Code, with the other half provided by governments. In agreeing to place the Code online with free access, the governments effectively agreed to double their funding to make up the lost sales revenue. That increase in funding has, in most State and Territory jurisdictions, been met from building levies (the Commonwealth funds out of tax revenue).¹⁵⁵
- 6.78 The legislation through which volumes 1 and 2 of the NCC (commercial and residential buildings) takes effect in Western Australia is the *Building Regulations 2012*, made under sections 149 and 150 of the *Building Act 2011*. Section 150

¹⁵⁴ <http://minister.industry.gov.au/ministers/baldwin/media-releases/building-ministers-forum-agrees-national-construction-code-reforms>, Department of Industry, Innovation and Science. Viewed 23 December 2015.

¹⁵⁵ Peter Gow, Executive Director, Building Commission, Department of Commerce, *Transcript of Evidence*, 14 August 2015, pp 3-4.

explicitly provides that the regulations may refer to published documents. Volume 3, the Plumbing Code, is given force through the *Plumbers Licensing and Plumbing Standards Regulations 2000*, as amended in 2015, and made under the *Plumbers Licensing Act 2000*.

- 6.79 The NCC is a weighty tome. In hardcopy, it runs to 2680 pages.
- 6.80 Unfortunately, as mentioned earlier, it directly makes some 200 or so references to Standards, some of which then cross-refer to other Standards, and none of which are freely included on the ABCB website. The HIA *Policy on Australian Standards*, tabled by its Executive Director, John Gelavis, states:

The National Construction Code (NCC) calls up over 1,400 standards through primary, secondary and tertiary references.

*Businesses are obliged to comply with all these standards. The flood of standards places a heavy burden on builders and contractors. A copy of the NCC, inclusive of reference standards, can cost over \$1,500 and needs to be purchased annually. Standards should be readily available to the small businesses which need them.*¹⁵⁶

- 6.81 The HIA were a part of the long and ultimately successful campaign to have the NCC made freely available online. Whilst that organisation bemoans the fact that the associated Standards are not similarly available, its submission states that *HIA will continue to seek support for these standards to be freely available*.¹⁵⁷
- 6.82 However, as the Secretary to the Victorian Department of Environment, Land, Water and Planning, Adam Fennessy, told us:

*Any future, open access to the Australian Standards referenced in a freely available NCC would be a matter for consideration by the BMF [Building Ministers Forum of COAG], Commonwealth Government, the Australian Building Codes Board (ABCB), Standards Australia and SAI Global.*¹⁵⁸

TRADE UNIONS

Is there a problem?

- 6.83 The Inquiry received submissions and took evidence from Unions WA, which is Western Australia's peak trade union body, and separately from the SDA.

¹⁵⁶ Tabled by John Gelavis, Housing Industry Association of Western Australia, during hearing held on 14 August 2015, p 1.

¹⁵⁷ Submission 10 from Housing Industry Association, 29 January 2015, p 1.

¹⁵⁸ Submission 23 from Department of Environment, Land, Water and Planning (Vic), undated, p 2.

6.84 In the introduction to this report, it was noted that Standards might take legal effect without being adopted by regulations. This may occur, for example through a reference in a contract or in employment terms and conditions.

6.85 An example was provided to the Inquiry by the SDA, as was referenced in paragraph 6.33, where its submission bemoaned the lack of advice it is able to give to its members. Sarah Haynes, an Industrial Officer with the union, reiterated this point in evidence. She said:

*We would like to be able to send out a newsletter or post on the union notice board of that particular employer and that sort of stuff is breaking copyright; we are not allowed to do it.*¹⁵⁹

6.86 When asked whether she had taken the matter up with any employees, Ms Haynes added:

*I do not believe that the employer would be allowed to provide access to the standard any more than we would be able to.*¹⁶⁰

6.87 These sentiments were supported in the submission received by the Committee from Unions WA.¹⁶¹ That submission also expressed concerns regarding the occupational health and safety training aspects of its work, undertaken by its associated workplace health and safety training organisation, Unity Training Services. The submission states:

*While Unity as an organisation has access to standards, for an individual health and safety representative it is not necessarily easy or convenient to locate a ‘viewable’ version of a standard should the need arise. Given that Governments across Australia have been making substantial changes to Work Health and Safety laws as part of a harmonisation process – including a ‘Green Bill’ currently being drafted in WA – access to relevant information such as that contained in Australian Standards becomes all the more important.*¹⁶²

6.88 By way of example, Meredith Hammat, Secretary of Unions WA, spoke of guidance on workplace lifting, heavy machinery use and scaffolding hire. She said:

There are many other examples of workers’ standards and the expense of them. One might be the fall-arrest system and devices, a

¹⁵⁹ Sarah Haynes, Industrial Officer, Shop, Distributive and Allied Employees’ Association of Western Australia, *Transcript of Evidence*, 21 August 2015, p 2.

¹⁶⁰ Ibid. p 3.

¹⁶¹ Submission 11 from Unions WA, 30 January 2015, pp 1-2.

¹⁶² Ibid. p 3.

*really important safety standard, referenced in both legislation and codes of practice. The price to access that ranges from about \$188 through to about \$358. These are significantly expensive. These provide essential guidance to employers but also to employees and workplace health and safety reps on the safe way to go about their work. They are literally saving lives. It is quite simply wrong that those standards are not easily and freely available to the people who need them, in this case, not just employers but workers as well.*¹⁶³

- 6.89 Asked specifically whether Unions WA receives many complaints from members or organisers about their lack of access to Standards, or whether it was something that was just bubbling along under the surface, Ms Hammat told the Committee:

*I would take the view that it is bubbling along somewhat under the surface. Our concern would be that people do not know what they do not know.*¹⁶⁴

Possible consequences

- 6.90 It is an obvious point to make that, taking occupational health and safety requirements as the most important example, it is clear that any difficulties that union health and safety representatives on the ground, or associated trainers, have in accessing relevant information and guidance is dangerous.
- 6.91 The *Occupational Safety and Health Regulations 1996* were made under section 60 of the *Occupational Safety and Health Act 1984*. As well as the usual right enjoyed by the Governor to make regulations prescribing all matters that are necessary or convenient to be prescribed for giving effect to the purposes of this Act, Schedule 1 to the Act lists 31 specific topics about which regulations may be made.
- 6.92 Schedule 1 to those regulations lists 50 Australian or AS/NZ Standards or sets of Standards, plus supplements, which are directly referenced, and are thus given direct statutory effect, by the regulations themselves. They cover matters as diverse as noise management, protective garments and sunscreens, the use of cranes and hoists, lifts and escalators, tools and equipment and earth-moving machinery. Occupational protective gloves alone are covered by 13 Standards.
- 6.93 As Unions WA is the Western Australian branch of the Australian Council of Trade Unions (ACTU), the organisation itself is able to access one hardcopy of a Standard free of charge from ACTU through the latter's arrangement with SAI Global.

¹⁶³ Meredith Hammat, Secretary, Unions WA, *Transcript of Evidence*, 21 August 2015, p 2.

¹⁶⁴ Ibid. p 5.

However, under the copyright and licensing terms of that arrangement, those Standards may be copied no further.¹⁶⁵ Ms Hammat of Unions WA told us:

*Our concern, I guess, is that for many workers, many employees, who take on the role of a health and safety rep on top of their job—it is a role that they take on in addition to a normal work role—that the process of laying your hands on the appropriate standard is often just so complex and exhausting that many would give up before they got there. Although Unions WA and affiliate unions provide support to work health and safety reps and would assist to guide them through the process, we are really mindful that many workplaces would have perhaps not necessarily union members being workplace reps or it may be that they are not aware that the union can provide that level of practical assistance. For many workers, our concern is that they would give up rather than find their way through the system to the appropriate standard that would provide them with the information that they need.*¹⁶⁶

- 6.94 She later gave us a straightforward example of how a health and safety representative might be unduly affected by his or her lack of access to the full suite of appropriate Standards:

Just by way of simple illustration, a health and safety rep who perhaps has a question about wanting to inquire into the appropriate guards on high-risk machinery, for example. If they contact WorkSafe, they would be referred back to the manufacturer's guidelines for that machinery. For the most part, those guidelines refer quite extensively to standards, and probably not just one. There might be a number of standards that are referenced in that and, again, the person is no further progressed in how to get their hands on that standard. By way of further example—I apologise that we have not made copies for the committee, but I am happy to do that—this is a checklist and information for heavy machinery scaffolding hire from WorkSafe, so a safety note. It references eight Australian Standards in relation to scaffolding, and they are saying it must meet those Australian Standards. You can see that for work health and safety reps, it is not just a question of having to access one standard that might then contain everything that is relevant to that worksite;

¹⁶⁵ Dr Tim Dymond, Organising and Strategic Research Officer, Unions WA, *Transcript of Evidence*, 21 August 2015, p 4 and Answer to Questions on Notice asked at hearing held on 21 August 2016, p 3.

¹⁶⁶ Meredith Hammat, Secretary, Unions WA, *Transcript of Evidence*, 21 August 2015, p 3.

*there could be dozens of standards that are appropriate and very difficult then to find your way through them.*¹⁶⁷

- 6.95 The document referred to by Ms Hammat was tabled, and can be seen on the Inquiry's webpage alongside the transcript of her evidence.

TRAINING AND EDUCATION

- 6.96 A number of submissions made much of the fact that Standards are available for the use of students in many tertiary institutions. This would clearly be desirable in an educational establishment which has subjects such as engineering, construction or mining, for example, on its syllabus.
- 6.97 As ever, though, such access comes at a cost. By way of example, the Manager of Library Services at the Central Institute of Technology in Perth told the Inquiry that, at 2015 prices, a 3 concurrent user license cost \$37,632. This provides access to all Australian Standards, but only an index to the ISO. Some limited access copies may be made available to students for lecture use.¹⁶⁸

GOVERNMENT AND LEGAL

- 6.98 Most of the States and Territory Governments that have contacted the Committee during the course of this Inquiry informed us that they held no 'whole of government' agreement with SAI Global whereby all central government employees could gain access to Standards. Generally, individual departments or agencies held online subscriptions on a 'need to know' basis, covering access to Standards relevant to their individual portfolios.

- 6.99 The Queensland Government told the Inquiry:

Government agencies provide access only to their own officers, Various departments have online IP (Internet Protocol) authenticated access for departmental officers, DPC understands these departments are the Departments of: Main Roads and Trade; Housing and Public Works; Natural Resources and Mines/Environment and Heritage Protection (combined access); Agriculture, Fisheries and Forestry; Queensland Health; Disability Services within the Department of Communities, Child Safety and Disability Services; and the Public Safety Business Agency/Queensland Police Service/Queensland Fire and Emergency Services (combined access). Other government departments have access via the Government Research and

¹⁶⁷ Ibid. pp 5-6.

¹⁶⁸ Shane Egan, Manager of Library Services, Electronic Mail, 14 September 2015.

*Information Library (GRAIL) to print copies of standards as required.*¹⁶⁹

- 6.100 The ACT Government has a different arrangement, however. Acting Chief Minister Simon Corbell MLA told us in February 2015 that the Library of the Legislative Assembly had provided access to public sector employees and had increased its subscription costs in order to allow it to copy and paste up to 25 per cent of a Standard into an internal document. Then, in 2014, the library negotiated an agreement with SAI Global facilitating Government Internet Protocol (IP) access. The library was unable to fund the resulting increase in costs, but the four top Government Directorates (based on usage) contributed funding, with the library meeting the remainder, and then SAI Global covered the remaining Government Directorates (those with lower usage) for free. The net result is that this whole of Government approach is a cheaper option for the ACT Government than would be the case with each of its Directorates negotiating individually.¹⁷⁰
- 6.101 As is to be expected, this agreement allows for no public access. Even so, it is an option that might be considered by the Western Australian (and other State and Territory) Governments.
- 6.102 In Western Australia, those officers who work within the Department of Commerce or its associated agencies have access to Standards through the library in Cannington. Otherwise, there is no State-wide access for governmental officials. This results in a significant cost in monetary terms, as will be outlined in Chapter 7, but there is also an immeasurable opportunity cost.
- 6.103 To give an example, the officers charged with the drafting of primary legislation for introduction into Parliament, and the drafting of regulations for Ministers, are employed by the Parliamentary Counsel's Office. The Committee asked Geoff Lawn, then Acting Parliamentary Counsel, about their access to Standards when they are asked to incorporate them into legislation; he told us:

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

¹⁶⁹ Submission 24 from Queensland Government, 24 March 2015, p 3.

¹⁷⁰ Hon Simon Corbell MLA, Acting Chief Minister, Australian Capital Territory, Letter, 30 January 2015.

*the material there, subject to all the restrictions that are imposed on that.*¹⁷¹

6.104 The Committee finds this to be an astonishing state of affairs.

6.105 With regard to local governments and the making of local laws, the *Local Government Act 1995* requires councils to provide the Minister for Local Government and Communities with copies of draft laws made (see section 3.12(3)(b)). However, we heard from officers of his Department that advice on the adoption of Standards is not part of their remit. Brad Jolly, Executive Director, Sector Regulation and Support told the Inquiry:

*with regards to local governments making local laws, we do not provide local governments with advice on referencing standards. Our focus, in reviewing local laws that are submitted to the department, is on legal and drafting issues.*¹⁷²

6.106 Indeed, local governments are not even required to submit copies of external documents referenced in those draft laws to the Department.¹⁷³

6.107 Like most State government employees, those who work in local governments have no freely available access to Standards or to the SAI Global database either.

6.108 A submission was received from the Western Australia Local Government Association (WALGA) dated 12 October 2015. In it, Lynne Craigie, President, told the Inquiry:

*WALGA investigated the feasibility of developing a preferred supply arrangement with SAI Global Limited to permit Local Governments universal access to Australian Standards. However, it became apparent an aggregated scheme of this type would require the Association to design a proprietary system to permit member access and this proved both logistically difficult and counterproductive to achieving the cost benefits a preferred supply arrangement normally delivers.*¹⁷⁴

¹⁷¹ Geoff Lawn, Acting Parliamentary Counsel, Parliamentary Counsel's Office, *Transcript of Evidence*, 14 August 2015, p 4.

¹⁷² Brad Jolly, Executive Director, Sector Regulation and Support, Department of Local Government and Communities, *Transcript of Evidence*, 14 August 2015, p 2.

¹⁷³ Ibid. p 2.

¹⁷⁴ Lynne Craigie, President, Western Australian Local Government Association, Letter, 12 October 2015.

LIBRARIES

6.109 Many of the issues that were faced by libraries in the State have been mentioned in Chapter 5.

6.110 In its Annual Report 2010 (Report 44), this Committee stated:

The Committee is maintaining a watching brief in relation to all regulations that adopt the standards of Standards Australia. It will continue to inquire with government departments and agencies as to how they notify the public about how the information contained in the relevant standards can be accessed.

*The Committee is of the view that the Government should require its departments and agencies to include notification on their internet home pages that members of the public can obtain free access to the standards published by Standards Australia at the State Library of Western Australia.*¹⁷⁵

6.111 This recommendation held firm until the Committee was notified by the State Library of Western Australia on 7 January 2016 that it had decided not to renew its subscription to the Australian Standards On-line database.¹⁷⁶ On 11 February 2016, we were informed that a temporary agreement had been reached by the State Library with SAI Global, pending the outcome of negotiations on licensing and access agreements being pursued through the NSLA.¹⁷⁷ However, on 10 May 2016, and following the apparent cessation of those negotiations, the Committee was informed that the State Library no longer subscribes to the Standards online database.

6.112 The number of users of this database was comparatively small, so that cost-effectiveness was likely to be an issue. The Inquiry was told, for example, that the public library service in Canberra has not subscribed to it. Hon Simon Corbell, Deputy Chief Minister, said:

Libraries ACT have not purchased the SAI Global Online Public Library because of:

- *the usage limitation (onsite access only and 1 page at a time printing), and*

¹⁷⁵ Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, Report 44, *Annual Report 2010*, February 2011, p 20.

¹⁷⁶ Margaret Allen, Chief Executive Officer, State library of Western Australia and State Librarian, Electronic Mail, 7 January 2016.

¹⁷⁷ Margaret Allen, State Library of Western Australia, Electronic Mail, 11 February 2016.

- *lack of demand from the public, and*
- *the cost.*¹⁷⁸

6.113 Nevertheless, the reason given by the State Library of Western Australia for the non-renewal of its subscription was that negotiations conducted on its behalf by the NSLA E-resources Consortium (the Consortium) with SAI Global had broken down.

6.114 Conflicting evidence had been received regarding libraries' attempts to negotiate consortia deals with SAI Global in order to reduce costs. In its submission to us, NSLA said:

*SAI Global has an exclusive contract to sell and distribute Australian Standards. They are, and have been for many years, reluctant to deal with library consortia to negotiate subscription costs, which is an approach used by libraries for many subscription negotiations. The NSLA eResources Consortium manages this service for NSLA Libraries and the Council of Australian University Librarians (CAUL) manages this service for academic libraries. The lack of willingness to negotiate with consortia results in libraries being forced to deal individually with SAI Global without a transparent pricing model.*¹⁷⁹

6.115 This evidence was supported by the State Library of Western Australia. Its submission stated:

*Many of the State Library's electronic databases are purchased through a consortium of state and territory libraries and the National Library of Australia under the auspices of the National and State Libraries Australasia (NSLA) eResources Consortium. NSLA has enquired about a consortium arrangement for the purchase of Australian standards but this has up to now been refused. SAI Global prefer to negotiate with each library individually.*¹⁸⁰

6.116 SAI Global gave the Inquiry a different view. In a written submission tabled at the hearing attended by SAI Global officials, it was said:

No, this is not correct and we have indeed secured consortia licences (otherwise known as enterprise licences) with several bodies such as Municipal Association of Victoria for all local councils, NSW.Net representing all public libraries in NSW and are in discussions with

¹⁷⁸ Hon Simon Corbell MLA, Acting Chief Minister, Australian Capital Territory, Letter, 30 January 2015.

¹⁷⁹ Submission 12 from National and State Libraries Australasia, 30 January 2015, p 1.

¹⁸⁰ Submission 13 from State Library of Western Australia, January 2015, p 4.

*SA government, QLD and NSW local council associations. We also have agreements with industry bodies and associations to the benefit of their members, such as the Concrete Institute of Australia.*¹⁸¹

6.117 Peter Mullins, Chief Executive Officer of SAI Global, reiterated the point, adding:

*That is something that we are certainly not averse to doing, and we have done it before.*¹⁸²

6.118 In any event, following these submissions and hearings, it is clear that some negotiations did in fact take place. Between January and April 2016, SAI Global sought a commitment from all nine States and Territories (although neither ACT nor NT were subscribers at that point in time) as to price, remote access, subscription length and a move to a new electronic platform. Counter-negotiations continued but, ultimately, the State Library of WA removed its links to the SAI Global database on 28 April 2016.

6.119 Essentially, the sticking points for the Consortium, the Inquiry was told, were price (annual subscription fee increases of 5.5%, plus a charge for the migration to a new platform), and the locking-in of a 3 year term, but also the new platform itself and the conditions attaching to it – any form of downloading or printing was to be disallowed (apparently, to minimise the chances of copyright breaches). These restrictions were deemed to be inequitable to the Consortium and its members, and as a result there is, at the time of reporting, no longer any freely available public access to Standards in any of the State Libraries or in the National Library.

VICTORIAN LEGISLATION

6.120 Chapters 9 and 10 sets out in some detail the statutory provisions pertaining in a number of jurisdictions that are similar to Western Australia, but it is worth highlighting here the position in Victoria with regard to the publication of adopted material, including Standards, and the resultant public access.

6.121 Section 32 of the *Interpretation of Legislation Act 1984* (Vic) again allows for the application, adoption or incorporation of external material into legislative instruments. Subsections (3)(a) and (4)(a) deal with provision of such documentation to Parliament (see Chapter 10 of this report.)

6.122 However, subsection (3)(b) reads as follows:

¹⁸¹ Tabled by Peter Mullins, Chief Executive Officer, SAI Global Ltd., during hearing held on 14 October 2015, p 2.

¹⁸² Peter Mullins, Chief Executive Officer, SAI Global Ltd., *Transcript of Evidence*, 14 October 2015, p 6.

a copy of the matter so applied, adopted or incorporated must be kept available for inspection during normal office hours by members of the public without charge—

(i) in the case of a subordinate instrument that is a statutory rule, at the Department of the Minister administering the Act under which the subordinate instrument is made or at some other appropriate public office specified by the Minister by a notice published in the Government Gazette; and

(ii) in the case of a subordinate instrument that is not a statutory rule, at the principal office of the body which made the subordinate instrument or at some other appropriate public office specified by the Minister administering the Act under which it is made by a notice published in the Government Gazette.

6.123 Section 32(4)(c) makes similar provision for the public inspection of amendments to the material incorporated, where it had originally been adopted *as in force from time to time*.

6.124 Thus, the referenced document must be made available to the public at a specified place, that location being advertised in the Victorian *Government Gazette*. Clearly, this statute places much greater importance on public access to Standards and the like than pertains in Western Australia or indeed most other States and Territories.

6.125 Section 32(5) then states that a failure to comply with subsections (3) or (4) above does not affect the validity, operation or effect of the delegated legislation. Having said that, subsection (12) then goes on to say:

Despite subsection (5), a person—

(a) must not be convicted of an offence consisting of a contravention of a subordinate instrument made on or after the relevant day if it is proved that, at the time of the alleged contravention; and

(b) is not prejudicially affected or made subject to any liability by a subordinate instrument made on or after the relevant day if it is proved that, at the relevant time—

a copy of any matter contained in a document (not being an Act, Commonwealth Act, Code, statutory rule or statutory rule made under a Commonwealth Act) applied, adopted or incorporated by the subordinate instrument could not be inspected as provided by this section.

- 6.126 It should be emphasised that an important part of this provision is ‘*as provided by this section*’. Thus, it is arguable that difficulty in accessing material that forms part of a law does not form the defence to a criminal charge, for example, but only the failure of a responsible Minister to keep a copy of it available for inspection as prescribed.
- 6.127 On 16 and 18 September 2015, for instance, the Herald Sun and news.com.au websites reported a Magistrates Court hearing in Melbourne concerning the design of a motorcycle helmet, the specifications for which are set out in an Australian Standard. An argument that a person cannot be found guilty of a law that is not freely available failed.¹⁸³ On 12 February 2016, however, a website entitled motorbikewriter.com reported that the fine imposed on the rider for adapting his helmet beyond what was in the Standard had been overturned by the County Court of Victoria.¹⁸⁴ According to that article, the judge agreed with the argument that the fact that laws were not accessible was a defence. An internet blog written by the appellant’s solicitor confirmed that one of the arguments put forward was:

*that the Australian Standards are not publicly available at VicRoads. The standards need to be not just theoretically, but practically and actually available and accessible to the public.*¹⁸⁵

- 6.128 No transcript exists of that particular appeal hearing, or of the judge’s reasoning. Further judicial guidance in due course would be welcomed.

Finding 3: The Committee finds that it would not be unduly onerous to expect government departments or agencies to keep available for public inspection a copy of any Standard that it chooses to reference in delegated legislation. That should be provided in addition to the service recommended at Recommendation 3 above, which would clearly be more convenient for those people or businesses resident in regional areas.

¹⁸³ <http://www.heraldsun.com.au/news/law-order/motorcyclist-fights-fine-for-gopro-style-camera-on-helmet/story-fni0fee2-1227530445671?sv=cc3284f450afd0ea1a88e9945f97acdd> (Viewed 21 March 2016) and <http://www.news.com.au/technology/gadgets/motorbike-helmet-camera-debate-making-riders-heads-hurt/story-fnpjxpz3-1227533367245>. (Viewed 21 March 2016).

¹⁸⁴ <http://motorbikewriter.com/judge-dismisses-helmet-camera-fine/>. Viewed 21 March 2016.

¹⁸⁵ https://www.mauriceblackburn.com.au/blog/2016/january/04/what-are-the-legal-consequences-of-wearing-a-helmet-camera/?utm_source=Facebook&utm_medium=cpc+&utm_content=4&utm_campaign=Smidsy. Viewed 21 March 2016.

Recommendation 4: The Committee recommends that section 43 of the *Interpretation Act 1984*, or such other provision considered more suitable by Parliamentary Counsel, be amended so that departments or agencies that adopt an Australian Standard or other external material in delegated legislation be required to keep a copy of that Australian Standard or other material available at the entity's principal office or other convenient place, available to the public, free of charge, during office hours.

- 6.129 When it comes to local laws, section 112 of the *Local Government Act 1989* (Vic) again allows for incorporation by reference. Section 120 mandates councils to print every local law in force in their municipality, and to have copies available for public inspection and purchase. Section 120(3) then states:

A Council must ensure that a copy of every document incorporated by a local law under section 112 is available for inspection at the Council office during the Council office's office hours.

- 6.130 Possible shortcomings in the Western Australian equivalent of this provision were pointed out by the Director General of the Department of Local Government and Communities (see paragraph 6.8). We believe this should be clarified.

Finding 4: The Committee finds that the same duty to keep a copy of an Australian Standard available for public inspection should apply to local governments that choose to adopt them in local laws.

Recommendation 5: The Committee recommends that section 5.94 of the *Local Government Act 1995*, or such other provision considered more suitable by Parliamentary Counsel, be amended to make it clear that any local government that adopts an Australian Standard or any other external material in a local law must keep a copy of the same at its main offices, available for inspection free of charge during the Council's office hours.

- 6.131 As has been mentioned, this Committee has historically required local governments that cite Standards to use their websites to inform the public where the Standards may be viewed. To be clear, this was not a request to have copies of the Standard actually on the website. In 2014, the Shire of Laverton made enquiries of SAI Global with a view to publishing the Standards mentioned in its *Shire of Laverton Fencing Amendment Local Law 2014*, but decided not to do so on the grounds that it would incur a substantial licence fee.
- 6.132 The City of Wanneroo also offered to investigate the placing of relevant Standards on its website. Its submission to this Inquiry stated:

Should the City contemplate referencing Australian Standards in its local laws then the City would investigate the feasibility of purchasing a long- term license to use and reproduce the referenced Australian Standards content or extracts through its internet site. The City's Local Law referencing the Australian Standard will contain a link to the applicable Australian Standard. Additionally the City's internet site, Facebook and Customer Service Team will provide information on alternative means of acquiring the text, such as through the City's libraries or City offices.

- 6.133 This is an exemplary offer, but the Committee do not regard this as a necessary investment.
- 6.134 If Recommendation 5 is accepted by the Government, then a copy of the Standard in the council's main office would be required. If not, then local governments are requested to comply with the current practice of this Committee, and make a simple website reference to the free availability of the Standards in question, not at the State Library however, but at the Cannington facility.
- 6.135 Finally with regard to Victorian legislation, the Secretary of the Victorian Department of Environment, Land, Water and Planning informed the Committee that, on planning issues, the *Planning and Environment Act 1987* (Vic) requires any document applied or incorporated into the Victoria Planning Provisions, a planning scheme, or a planning scheme amendment, to be made available to the public for inspection, free of charge, during normal office hours at the office of the Minister, the Minister's department, and the relevant responsible authority and local council. These requirements may be found at sections 4G to 4I and sections 40-42.¹⁸⁶

¹⁸⁶

Submission 23 from Department of Environment, Land, Water and Planning (Victoria), undated, pp 1-2.

CHAPTER 7

COSTS OF A LACK OF ACCESS

COSTS GENERALLY

7.1 In its submission to the Inquiry, SAI Global made the point that:

*SAI Global is committed to providing certain Standards at no cost to the user. Presently, over 1,500 Australian and international Standards and other nominative publications, particularly on the subject of telecommunications and healthcare technology, are freely available on the SAI Global InfoStore.*¹⁸⁷

7.2 It is correct that some Standards are available free of charge to the user – a perusal of SAI Global’s website will reveal, for example, that AS 4700.6-2013 regarding the implementation of Health Level 7, or AS 2828.2(Int) - 2012 on health records system requirements, may indeed be downloaded free of charge (though it is noteworthy that licence conditions apply even then – three concurrent users, etc.).

7.3 However, the Committee regards this statement as potentially misleading, if strictly correct. Whilst the end-user, or reader, may be able to access these documents free of charge, they have not been produced by Standards Australia or published by SAI Global for altruistic reasons. Their development has in fact been funded by another, usually public, agency. With regard to the health Standards mentioned above, for example, that agency is the Commonwealth Department of Health. In its submission, Standards Australia said:

*In some circumstances, governments have funded access to particular standards to meet a policy objective. Notably, the Commonwealth Government through the Department of Health has entered into an arrangement whereby SAI Global Limited makes e-health related standards and specifications available at no cost to the end-user. Such arrangements are managed on a case-by-case basis and by way of negotiation with SAI Global Limited.*¹⁸⁸

7.4 Moreover, much has been made in submissions to the Inquiry that there exists free access to Standards for the public generally in State Libraries and for students in tertiary institutions. SAI Global’s submission went on:

¹⁸⁷ Submission 15 from SAI Global Ltd, January 2015, p 5.

¹⁸⁸ Submission 19 from Standards Australia, January 2015, p 5.

*In addition, Australian Standards are currently made available free of charge for public reference purposes through State and Territory libraries and for student reference purposes in many tertiary education institutions.*¹⁸⁹

- 7.5 Peter Mullins, the Chief Executive Officer of SAI Global, made the same point himself in evidence before the Committee (before, of course, the State Library subscription was cancelled). This too is potentially misleading. This access does not and did not come free of charge. Mr Mullins did acknowledge this:

*Obviously, it is being paid for, but it is being paid for by either the state government or the tertiary institution.*¹⁹⁰

PRIVATE SECTOR COSTS

- 7.6 The Committee has made no attempt to quantify what the cost of access to Standards may be for the private sector. Western Australia is of course home to a significant mining and resources sector, an industry that is subject to a great many regulations and (consequently) adopted Standards regarding mining safety, machinery, health and safety, explosives, etc.

- 7.7 This is but one example. Evidence has been mentioned of the ‘wiring rules’, or AS/NZS 3000:2007. Witnesses from both the Department of Commerce and MEA told of the need for all electricians to hold, at least, a copy of this Standard. Depending on format, this costs between \$88.28 and \$316.16. The Acting State Manager of MEA told the Inquiry:

I do know that there are approximately 4 500 contractors in WA, and there are probably around about 35 000 electricians within Western Australia. Again, that is an estimate; it is not a guaranteed figure.

- 7.8 Whilst the HIA accepted that most construction businesses would not generally purchase a full suite of Standards that might be applicable, even with the NCC now being available free of charge, it is obvious that there will be some cost to them in purchasing and maintaining those referenced Standards that directly refer to their individual specialties.

- 7.9 As for other construction industry professionals, the HIA said in its submission:

The costs associated with the purchase of NCC reference standards varies depending on the type of business. Building designers and building surveying professionals will generally purchase and

¹⁸⁹ Submission 15 from SAI Global Ltd., January 2015, p 5.

¹⁹⁰ Peter Mullins, Chief Executive Officer, SAI Global Ltd., *Transcript of Evidence*, 14 October 2016, p 3.

*maintain a full set of the NCC and the reference standards annually. A subscription to this service costs around \$2,000 per year.*¹⁹¹

7.10 Peter Mullins, Chief Executive Officer of SAI Global, said:

*looking at just Western Australia, of the corporations that buy standards from us, we make about \$5.5 million in revenue from WA per year.*¹⁹²

PUBLIC SECTOR COSTS

7.11 In his submission to the Inquiry, the Minister for Transport wrote:

As a result of a commercial arrangement, DOT has access to the Standards for its own use. However because of copyright considerations, it is not possible to enable open access to the public.

It is understood that with modern technology it is possible to provide hyperlinks from WA Legislation to the Standards and this is the most expedient route to follow, as the State Law Publisher Website is available to the public. However for this to occur, a cost benefit analysis would have to be undertaken.

7.12 The Committee undertook a cost benefit analysis of sorts, if rudimentary in nature, in August 2015. Letters were sent to all Western Australian Government Departments and local governments, seeking information on their financial outlay on copies of Standards or SAI Global subscriptions for the financial years 2012/13 and 2013/14. The financial year of 2014/15 was deliberately avoided as accounts for that period would have been under preparation at that time.

7.13 A full table of the figures supplied (rounded to the nearest dollar) may be found at **Appendix 4**.

7.14 Not all departments or their partner agencies responded. Nor did all of the local governments. However, 62 State Government departments or entities did so, as did 39 of the then 140 local governments across Western Australia. The totals of the figures submitted are as follows:

¹⁹¹ Submission 10 from the Housing Industry Association Ltd., 29 January 2015, p 1.

¹⁹² Peter Mullins, Chief Executive Officer, SAI Global Ltd., *Transcript of Evidence*, 14 October 2015, p 3.

	Departments and Agencies	Local Governments
2012-13	\$487,636	\$125,773
2013-14	\$490,133	\$161,702

- 7.15 From the figures supplied by the 39 local governments which responded to the Committee's request, including the nil returns, it is possible to come up with an average figure for all local governments in Western Australia of \$3,225 for the first of the two financial years and \$4,146 for the second. If that were applied State-wide, then \$451,500 would have been spent by the local government sector in 2012/13 and \$580,440 in 2013/14.
- 7.16 In terms of public sector spend overall, it should be noted that these figures do not include tertiary educational establishments. As mentioned before in this report, many of these (though by no means all) maintain a subscription with SAI Global in order to provide access to their students. By way of example, and as mentioned previously, the Inquiry was told by the Manager of Library Services at the Central Institute of Technology in Perth that in 2015, the college spent \$37,632 for a licence for three concurrent users.¹⁹³

OPPORTUNITY COSTS

- 7.17 Opportunity costs across both private and public sectors are, of course, incalculable. Evidence has been cited earlier from Parliamentary Counsel's Office regarding the need for the State's legislative draughtspersons to attend at the State Library in order to access Standards that they have been requested to incorporate into regulations and such like. Doubtless Counsel will now be forced to attend at the Cannington site. In any event, the financial cost of their time wasted can only be guessed at, but must also be extrapolated across most other departments and agencies.

¹⁹³

Shane Egan, Manager of Library Services, Electronic Mail, 14 September 2015.

CHAPTER 8

PARLIAMENTARY ACCESS

PARLIAMENTARY PRIVILEGE

8.1 Issues around parliamentary privilege are dealt with in Chapter 5.

COMMITTEE ACCESS

8.2 The lawfulness of adopting Standards by reference in delegated legislation is not in doubt. The issue for this Committee is the limitation on its ability to scrutinise regulations, local laws, orders, etc., in accordance with its duty to Parliament to assist.

8.3 That scrutiny role arises out of sections 41 and 42 of the *Interpretation Act 1984*, which state:

41. Publication and commencement of subsidiary legislation

(1) Where a written law confers power to make subsidiary legislation, all subsidiary legislation made under that power shall —

(a) be published in the Gazette;

(b) subject to section 42, come into operation on the day of publication, or where another day is specified or provided for in the subsidiary legislation, on that day.

(2) A power to fix a day on which subsidiary legislation shall come into operation does not include power to fix different days for different provisions of that legislation unless express provision is made in that behalf.

42. Laying regulations, rules, local laws and by-laws before Parliament, and disallowance

(1) All regulations shall be laid before each House of Parliament within 6 sitting days of such House next following publication of the regulations in the Gazette.

(2) Notwithstanding any provision in any Act to the contrary, if either House of Parliament passes a resolution disallowing any regulations of which resolution notice has been given

within 14 sitting days of such House after such regulations have been laid before it or if any regulations are not laid before both Houses of Parliament in accordance with subsection (1), such regulations shall thereupon cease to have effect, but without affecting the validity or curing the invalidity of anything done or of the omission of anything in the meantime.

(3) Subsection (2) applies notwithstanding that the period of 14 days referred to in that subsection, or part of that period, does not occur in the same session of Parliament or during the same Parliament as that in which the regulations are laid before the House concerned.

(4) Notwithstanding any provision in any Act to the contrary, if both Houses of Parliament at any time pass a resolution originating in either House amending any such regulations or substituting other regulations for that which has been disallowed by either House under subsection (2), then on the passing of any such resolution —

(a) amending regulations, the regulations so amended shall, after the expiration of 7 days from the publication in the Gazette of the notice provided for in subsection (5), take effect as so amended;

(b) substituting regulations in place of regulations disallowed, the regulations so substituted shall, after the expiration of 7 days from the publication in the Gazette of the notice provided for in subsection (5), take effect in place of that for which the regulations are so substituted.

(5) When a resolution has been passed under subsection (2) or (4), notice of such resolution shall be published in the Gazette within 21 days of the passing of the resolution.

(6) Notwithstanding section 37(1), where —

(a) regulations are disallowed under this section or are not laid before both Houses of Parliament in accordance with subsection (1); and

-
- (b) *those regulations amended or repealed regulations that were in operation immediately before the first-mentioned regulations came into operation,*
- (c) *the disallowance or failure to comply with subsection (1) revives the previous regulations on and after the day of the disallowance or, in the case of failure to comply with subsection (1), on and after the day next following the last day for compliance with subsection (1).*
- (7) *If a written law empowers or directs the making of regulations by a person other than the Governor and requires that the regulations be confirmed or approved by the Governor or by any other person or authority before having the force of law, subsection (1) does not apply to such regulations unless they have been confirmed or approved as so required.*
- (8) *In this section —*
- (a) *a reference to regulations shall be construed as including a reference to a regulation or part of a regulation; and*
- (b) *regulations includes rules, local laws and by-laws.*

- 8.4 Upon its publication, whether under section 41(1)(a) of this Act or under another written law, an item of subsidiary legislation stands referred to the Committee for consideration (Committee Term of Reference 10.5).

Requirements on responsible Ministers and local governments

- 8.5 The documentation that must be provided by the author of such subsidiary legislation as is made by the State, to allow for proper scrutiny by the Committee, is laid down in a Premier's Circular, issued by the Government of Western Australia. Its latest iteration, entitled '*Subsidiary Legislation – Explanatory Memoranda*', was issued in February 2014, and following on from the recommendations contained in Annual Reports published by the Committee (see Chapter 1), it recognises the need for referenced Standards to be supplied. Thus, the Circular explains that the Committee requires the following documentation within 10 working days of subsidiary legislation being published in the *Government Gazette*:

- one hard copy (double sided) and one electronic copy of the subsidiary legislation as published in the *Government Gazette*

- one hard copy (double sided) and one electronic copy of the explanatory memorandum, addressed to the JSCDL (Joint Stranding Committee on Delegated Legislation) signed by the CEO and initialled or signed by the relevant Minister
- an electronic copy of the principal legislation consolidated with all amendments up to the date immediately before the most recent amendments take effect, and
- an electronic copy of any new material called up (adopted) into regulations, including Australian/New Zealand Standards or other external documents.

8.6 Whilst this is an improvement on the position hitherto, where there was no requirement to supply referenced documents to either Parliament or to this Committee (see Premier's Circular 2007/14), it has its drawbacks. As has been mentioned, the Committee was recently called upon to scrutinise the Electricity (Network Safety) Regulations 2015 for example (see paragraph 2.16) which, amongst other things, require electricity network operators to develop and implement a safety management system that complies with AS 5577 – Electricity Network Safety Management Systems. This satisfied the Government's undertaking, made when the Intergovernmental Agreement on Energy Supply Industry Safety was signed in January 2012, that AS 5577 would be referenced in legislation applying to network safety.

8.7 In accordance with the requirements of the Premier's Circular, an electronic copy of the said AS 5577 was supplied to the Committee. However, when Committee staff sought to access that copy, they were met with the following alert:

This document has expired. To access the current document, please go to your on-line service.
Please note that material accessed via our on-line subscription services is not intended for off-line storage, and such storage is contrary to the licence under which the service is supplied.

8.8 This appeared to illustrate the restrictions placed on SAI Global website subscribers by licence conditions. Mr Mullins explained that this would have been done as part of SAI Global's 'Premium Service', and it did not mean that the downloaded (and paid for) document was suddenly lost after a short period of time. He said:

It is actually five days, I think. So the way that it is done is that if you have got the premium service, you can download the standard onto your PC, and there is some fairly clever software in there that will actually make it go blank after five days. But you can download it again ...

8.9 He added:

*The reason why that was put in there is that that is actually a request from a lot of large corporations where they want people going back to the source to access in case something has changed or in case there has been an upgrade. So you can download it and it will go blank after then. Then, after you have cursed your PC, you can download it again if you have got a premium.*¹⁹⁴

8.10 It would be fair to say that whilst the amendment to the Premier's Circular has brought with it compliance from some departments and agencies, it is by no means universal. Without the sort of statutory amendment recommended above to bring the Western Australian legislation into line with that in Victoria, compliance cannot be enforced, other than by threatening to move a Notice of Motion to disallow the instrument in question on the ground that the Committee is unable to properly fulfil its function of scrutinising the delegated legislation. That may, or may not, be appropriate in the circumstances.

8.11 With the benefit of hindsight, we believe that compliance may be improved should departments and agencies be asked to supply hard copies of Standards rather than electronic links, because:

- the Committee and its staff would not then be forced to wrestle with the licensing conditions that render a document inaccessible after a certain amount of time, even if it can be re-accessed by the subscriber, and
- the hard copy that forms part of the State's laws could be placed in the Parliamentary library, and then may be accessed by other Members of Parliament.

Recommendation 6: The Committee recommends that when Premier's Circular 2014/01 is reviewed in February 2017, the opportunity is taken to amend the Committee's requirements to include a hard copy of any Australian Standard or other external material called up (adopted) into delegated legislation, rather than an electronic copy.

8.12 The requirements on departments and agencies as contained in the Premier's Circular do not apply equally to local governments that reference Standards in local laws. The equivalent guidance on the preparation of explanatory memoranda for this Committee is contained in the *Local Laws Explanatory Memoranda Directions 2010*, made under section 3.12(7) of the *Local Government Act 1995*. The directions make no mention of providing the Committee with copies of referenced material.

¹⁹⁴

Peter Mullins, Chief Executive Officer, SAI Global Ltd., *Transcript of Evidence*, 14 October 2015, p 20.

- 8.13 It would be open for the Minister for Local Government to issue separate directions in this regard under the said section 3.12(7), which reads:

The Minister may give directions to local governments requiring them to provide to the Parliament copies of local laws they have made and any explanatory or other material relating to them.

- 8.14 However, the Committee takes the view that, for ease of reference and understanding, the 2010 Directions should simply be amended to add in a requirement to supply to the Committee hard copies of all referenced material, including Standards.

Recommendation 7: The Committee recommends that the amendment to the Premier's Circular recommended at Recommendation 6 be replicated for the purposes of the scrutiny of local laws by amending the *Local Laws Explanatory Memoranda Directions 2010* to include a requirement to supply the Committee with a hard copy of any Standard or other external material called up (adopted) in a local law.

CHAPTER 9

LEGISLATIVE ADOPTION OF STANDARDS IN OTHER COMPARABLE JURISDICTIONS

STANDARDS AND THEIR ADOPTION

- 9.1 Western Australia is not unique amongst Australian jurisdictions in permitting the incorporation of external material into subordinate legislation. Indeed, it is commonplace. Section 14 of the *Legislation Act 2003* (Cth) (until 5 March 2016, the *Legislative Instruments Act 2003* (Cth)) provides for such adoption in Commonwealth legislation. Comparable international jurisdictions have similar provisions.
- 9.2 Nor, it would seem, is Australia unique amongst comparable international jurisdictions in having the publishing and marketing arm of its standards setting operation outsourced. Canada, for example, has a similar arrangement. However, nor is it the norm.

Canada

- 9.3 The Standards Council of Canada (SCC) is a federal Crown Corporation, created by the Canadian Government in 1970 with a mandate to promote efficient and effective standardisation in the country.¹⁹⁵ It was created with a statutory footing following a review in 1964 which identified a number of areas in need of improvement, including measures of coordination and long-term planning and a requirement for more organised international involvement. It reports to Parliament through the Minister for Industry.
- 9.4 In 1997, the SCC outsourced to an independent agent, HIS Inc., the publication and sales of Canadian Standards through a standards distribution agreement, and in 2005 launched a joint initiative, the www.StandardsStore.ca website. IHS Inc. is an American company which is registered on the New York Stock Exchange.
- 9.5 According to the SCC's Annual Report for 2014-15, published in February 2016, there were some 5,000 references to standards in Canadian (including federal, provincial and territorial) regulations. They variously adopted 1,345 of the 2,944 standards then in publication. The SCC received just under CAD\$13 million (approximately AS\$13.65 million) in government funding and CAD\$1.08 million (approximately AS\$1.13) in royalties from standards sales, based on May 2016 exchange rates.

¹⁹⁵ <https://www.scc.ca/en>. Viewed 9 October 2015.

- 9.6 By virtue of sections 18.1 and 18.2 of the *Statutory Instruments Act* of Canada, documents may be incorporated by reference in regulations. It reads (insofar as is relevant):

18.1 Power to incorporate documents by reference

(1) Subject to subsection (2), the power to make a regulation includes the power to incorporate in it by reference a document – or part of a document – as it exists on a particular date or as it is amended from time to time.

18.2 Impact of section 18.1

The powers conferred by section 18.1 are in addition to any power to incorporate by reference that is conferred by the Act under which a regulation is made and that section does not limit such a power.

United Kingdom

- 9.7 The British Standards Institution (BSI) began life in 1901, when Sir John Woolf Barry (the designer of Tower Bridge) instigated the Engineering Standards Committee of the Council of the Institution of Civil Engineers. By 1903, there was an acceptance that buyers should be able to be comfortable that goods were ‘up to the mark’, which led to the creation of the British Standard Mark, more famously known as the Kitemark. The Committee was assigned a Royal Charter in 1929, and then a supplemental Charter in 1931 changing its name to the British Standards Institution. It was recognised as the sole organisation for issuing national standards in 1942.

- 9.8 The objects and purposes of BSI, as set out in Article 3 of its Charter (last supplemented in 2008) are:

(a) to coordinate the efforts of companies and persons for the improvement, standardisation and simplification of materials, products and processes, so as to simplify production and distribution, and for the improvement, standardisation and simplification of systems for the management of business, safety, technology, services and the environment and to eliminate the wastage of time and material involved in the production of an unnecessary variety of patterns and sizes of articles for one and the same purpose;

(b) to set up, sell and distribute standards of quality for goods, services and management systems and prepare and promote the general adoption of British and international standards and schedules in connection therewith and from time to time revise,

alter and amend such standards and schedules as experience and circumstances may require;

(c) to register, in the name of the Institution, marks of all descriptions, and to prove and affix or licence the affixing of such marks or other proof, letter, name, description or device;

(d) to advertise, promote, sell and deliver the services of systems assessment, registration, product and materials inspection, testing and certification, training, consultancy and arbitration, provided that this object shall not be pursued in a manner that would prejudice the objects set out in paragraphs (a) to (c) of this Article.

- 9.9 Since 1998, BSI has undertaken a strategy of international acquisition, taking over businesses all over the world. One of BSI Group's acquisitions, in 2006, was Benchmark Certification Pty Ltd., then said to be Australia's second largest certification body. BSI Group now claims 58 offices serving over 80,000 clients in 172 countries.¹⁹⁶
- 9.10 A rudimentary search of the official UK legislation website (www.legislation.gov.uk) carried out in May 2016 revealed approximately 400 items of legislation which had adopted British Standards, relating to issues as diverse as motorcycle helmet design, supply of optical lenses and specifications for petrol grading and pricing.
- 9.11 BSI's 2015 Annual Report shows revenue of £254.6 million (around AS\$499 million) with underlying profits of £32 million (or AS\$62.7 million), based on May 2016 exchange rates. Some 19 per cent of that revenue appears to have come from the 'Knowledge' business stream of standard development and sales.
- 9.12 As BSI is a Royal Charter Company, it has no share capital. It is a non-profit distributing company, not unlike Standards Australia, in that all of its profits are re-invested in the business. It is independent of Government, though its relations with Government are recognised through a memorandum of understanding. Royal Charter Companies in the modern age are generally those that work in the public interest, such as the British Broadcasting Corporation and many universities.

New Zealand

- 9.13 Standards New Zealand (SNZ) was created following the worst earthquake in the country's history. On 3 February 1931, a quake measuring 7.8 on the Richter Scale hit the Hawkes Bay region, killing 256 and destroying many buildings in Napier and Hastings. The organisation was established with a view to ensuring that such future

¹⁹⁶ <http://www.bsigroup.com/en-GB/contact-us/>. Viewed 8 June 2016.

events did not result in the same loss of life, and it published its first earthquake standard in 1935.¹⁹⁷

- 9.14 SNZ was effectively the trading arm of the Standards Council, an autonomous Crown entity whose functions (as set out in the *Standards Act 1988* (NZ)) were to develop, promote and facilitate the use of standards and standardisation in order to assist in delivering a broad spectrum of social and economic benefits.
- 9.15 However, recognising that it was operating under a business model that was not sustainable in the medium to long term, it was recommended by the Standards Council that the New Zealand Government undertake a review of the standards system in the country. This review (*Review of the New Zealand Standards and Conformance Infrastructure 2012*, Ministry of Business, Innovation and Employment) led to a Cabinet announcement in October 2013 that new arrangements for standards development, maintenance, approval and access would be developed through legislation.
- 9.16 The result of that was the *Standards and Accreditation Act 2015*, which came substantially into force of 1 March 2016.
- 9.17 Key aspects of this legislation include:
- SNZ and the Standards Council of New Zealand are disestablished, to be replaced by institutional arrangements within the Department of Business, Innovation and Employment
 - the appointment of the NZ Standards Executive, an employee of the Department – the whole function is effectively brought ‘in-house’. The production, etc., of standards will be overseen by a Board appointed by the Minister. It is anticipated that these arrangements will allow for better alignment with Government objectives
 - the Minister responsible for an item of delegated legislation must be informed before any standard that has been adopted into that legislation is amended
 - the previous cost-recovery model continues, so that fees will be charged for copies of, or online access to, standards. The new Executive function should be self-funding on a user-pays basis, reflecting a ‘full lifecycle costing’
 - fees will be set according to a strict formula set out in sections 26 to 28 of the Act – the recoverable costs include interaction with international standards agencies and the like and licence fees and royalties payable to such bodies where, for example, the NZ Standards Executive incorporate International

¹⁹⁷

<http://www.standards.co.nz/about-us/our-history/>. Viewed 12 October 2015.

Standards in NZ Standards. Five principles of cost recovery are clearly established in section 28, being:

- equity
- efficiency
- justification
- transparency
- flexibility.

9.18 According to the Standards Council Annual Report 2014/15:

As at 30 June 2015, there were 1232 New Zealand and joint Australian/New Zealand standards incorporated by reference in 262 Acts, Regulations, and other legislative instruments. In addition, New Zealand regulators reference at least 1050 overseas and international standards in 175 Acts, Regulations, and other legislative instruments.

9.19 The incorporation of NZ Standards in delegated legislation is now provided for in section 30 of the 2015 Act:

Regulations or bylaws may be made by referring to or incorporating New Zealand Standards

- (1) Regulations and bylaws made under any Act may be made by referring (with or without modification) to any New Zealand Standard relating to goods, services, processes, or practices of any kind.*
- (2) Regulations and bylaws made under any Act may, subject to any copyright, be made by incorporating in whole or in part (and with or without modification) any New Zealand Standard relating to goods, services, processes, or practices of any kind.*

CHAPTER 10

ACCESS TO STANDARDS IN OTHER COMPARABLE JURISDICTIONS

PUBLIC ACCESS

- 10.1 Some other jurisdictions, Australian and international, in addition to specifically permitting the adoption in statutory instruments or other external material, make provision of varying degrees for ensuring a measure of free public access to the content of that material. As mentioned above, such a provision, or indeed practice, is rare in Western Australia.

Commonwealth

- 10.2 The Report of the *2008 Review of the Legislative Instruments Act 2003*, undertaken by the Legislative Instruments Act Review Committee and published by the Commonwealth Government in 2009, made reference to the recommendations of the Productivity Commission as outlined at Chapter 4. The report said (at pages 28 to 30):

It is inconsistent with the fundamental aims of the LIA [Legislative Instruments Act 2003] for a legislative instrument to adopt text by reference from another document that is not readily available, or to otherwise make an understanding of the rights and obligations created by the legislative instrument dependent on being able to refer to such a document.

The incorporation of documents that are not freely available may increase the cost of compliance for the community and the risk of non-compliance with legislative instruments. While some persons affected by instruments that incorporate particular documents may purchase those documents as part of their general operations, not all are able to do so.

In the Committee's view, while agencies should consider the implications of mandating compliance with standards as part of the regulatory impact analysis for an instrument, more should be done to ensure that the complete text of the law, in the form of documents incorporated by reference, is readily available. This could include measures to:

- *limit the incorporation of documents that are not readily available*

- *provide free or low-cost access to incorporated documents, such as Australian Standards, for individuals or businesses required to comply with them, and*
- *ensure the availability of hard copies of incorporated documents in major libraries through the Australian Government's Commonwealth Library Deposit and free Issue Schemes.*

10.3 The Parliament of Australia recently gave effect to some recommendations of that Committee, making the *Acts and Instruments (Framework Reform) Act 2015*. It came into force on 5 March 2016, and amends the name of the *Legislative Instruments Act 2003* to the *Legislation Act 2003*. It created a new Federal Register of Legislation, to replace the Federal Register of Legislative Instruments, which contains:

- Acts
- legislative instruments and notifiable instruments as made [Nb: notifiable instruments is a new category of document; they are not legislative in character, and not subject to disallowance. No examples appear as yet on the Register, to be found at legislation.gov.au]
- compilations of Acts, legislative and notifiable instruments
- explanatory statements for legislative instruments
- other relevant documents and information which the First Parliamentary Counsel considers to be useful to users.

10.4 No amendments have been made which directly affect the accessibility or otherwise of Standards called-up in legislative instruments. However, as noted above, the new Federal Register of Legislation will contain, as the previous one did, explanatory statements for legislative instruments, by virtue of section 15J. Section 15J(2) sets out the requirements for such statements; amongst other things, they must:

(c) if any documents are incorporated in the instrument by reference—contain a description of the incorporated documents and indicate how they may be obtained.

10.5 Given that these explanatory statements are publicly available on the Register, this is at least progress – both Parliament and the public will have access to some sort of description of the material called-up, if not the material itself.

Victoria

- 10.6 The statutory provisions have been outlined in paragraphs 6.120 to 6.135.
- 10.7 The Victorian Office of Chief Parliamentary Counsel (OCPC) has produced guidance to drafters of subordinate legislation, which draws their attention to the need to consider matters of access to the law for those affected by it. This guidance is set out at paragraph 10.43.

Northern Territory

- 10.8 As with most States and Territories, there is no central and overriding statutory provision regarding access to the public for referenced material – rather, it is left to the department or agency responsible for administering the statute in question to decide for itself if and how the issue might be addressed.
- 10.9 For example, the *Swimming Pool Safety Regulations* (NT legislation doesn't cite a particular year) adopt two sets of Standards relating to pool fencing, under the authority of section 10(1)(a)(iii) of the authorising statute, the *Swimming Pool Safety Act*. Section 10(2) then states:

The Authority must ensure that copies of the following are made available for viewing by members of the public:

(a) diagrams illustrating how subsection 1(a)(i) and (ii) may be applied;

(b) the standards prescribed under section 1(a)(iii).

- 10.10 The Department of Lands, Planning and the Environment (the Authority in question) fulfils this duty by making hard copies of the Standards available at its office.
- 10.11 Regulations made under the *Work Health and Safety (National Uniform Legislation) Act* cite a Standard relating to electrical installations on construction sites. The Act itself does not address the question of public access to this standard – however, such access is facilitated by NT Worksafe, which allows viewing of a hard or electronic copy of it at its office.
- 10.12 In both of these instances though, whilst members of the public might view these documents free of charge, they may not take a copy of them, due to licence restrictions. Their only option if they wish to hold a copy is to purchase them through SAI Global.
- 10.13 Similar to many educational institutions in other States and Territories, the Charles Darwin University holds an online subscription, but this may only be used by staff and students. The Northern Territory Library, open to all members of the public, had no

subscription on financial grounds, even before the recent breakdown in negotiations between the NSLA and SAI Global.

- 10.14 The net result is that Standards adopted in, for example, the *Fire and Emergency Regulations* or the *Road Traffic Regulations*, which conceivably are of concern to the public at large, cannot be read by them without purchase.

Queensland

- 10.15 The Queensland Government's submission to the Inquiry stated that an electronic search of the Queensland legislation website revealed some 196 references to Standards across 44 pieces of legislation.¹⁹⁸ There is no provision in the *Statutory Instruments Act 1992* or elsewhere for free publication or access. The submission said:

*It is not common for Queensland legislation to refer to Australian Standards being available for inspection by the public. However, an editor's note in the Explosives Regulation 2003 suggests that copies of Australian Standards mentioned in that regulation are available for inspection at the administering agency's office.*¹⁹⁹

- 10.16 The submission went on:

*Notwithstanding the reference to the Explosives Regulation above, DPC is not aware of agencies routinely keeping Australian Standards available for inspection by the public or making Australian Standards otherwise routinely available. Agencies giving public access to Australian Standards might contravene usage licences. (We would suggest that usage conditions, and any restrictions such conditions place on public access, is a matter worthy of further exploration by the Committee).*²⁰⁰

- 10.17 An interesting provision from Queensland that perfectly illustrates the issue of concern to this Committee is regulation 4 of the *Petroleum and Gas (Production and Safety) Regulation 2004*, which states:

Where documents mentioned in this regulation can be inspected

(1) A document mentioned in this regulation, other than a standard, may be inspected free of charge at the department's office at 61 Mary Street, Brisbane.

¹⁹⁸ Submission 24 from Queensland Government, 24 March 2015, p 1.

¹⁹⁹ Ibid. p 2.

²⁰⁰ Ibid. p 3.

Editor's note—Standards are available for purchase through the SAI Global website at <<http://infostore.saiglobal.com/store/>>.

(1) *In this section—*

***standard** means a standard published—*

(a) by Standards Australia; or

(b) jointly by Standards Australia and Standards New Zealand; or

(c) jointly by Standards Australia and the International Electrotechnical Commission; or

(d) by the International Organisation for Standardisation.

- 10.18 As can be seen from the quotation at paragraph 10.16, the Queensland Government has taken these provisions to mean that the fact that Standards are pointedly dealt with differently from other external reference documents means that not even public viewing is allowed under licence conditions.

New Zealand

- 10.19 The new legislative regime in New Zealand was outlined in the previous chapter.
- 10.20 Like all of the other jurisdictions mentioned in this report, the New Zealand Government would prefer that public access to standards was free. In the Minister's first reading speech, introducing the new legislation into Parliament in 2015, he indicated that the changes to be brought about might make free access more readily available. However, in the end, the fact that fees have to be payable in order to access and/or adopt international standards, for instance, means that this is more difficult than it appears.
- 10.21 One interesting initiative in New Zealand is that there existed some arrangements between SNZ and some professional regulators whereby, as part of their annual compulsory practicing or membership fee, tradespeople such as electricians obtained online access to relevant standards. This has been brought about as a result of a deal reached between SNZ and the appropriate regulators. This is not the sort of arrangement that has been mentioned by witnesses to this Inquiry, and could be of benefit to a number of professionals and tradespersons (and their regulators).
- 10.22 Subpart 2 of Part 3 of the *Legislation Act 2012* (NZ) deals with incorporation by reference into subordinate legislation. Section 49 makes this entirely permissible, and for the avoidance of doubt, section 49(4) points out that material incorporated in this way has legal effect as part of the instrument that incorporates it.

- 10.23 However, before any material such as a standard may be incorporated, it must be subjected to a fairly onerous consultation regime (section 51). Copies must be made publicly available for inspection, free of charge, at defined sites, and information regarding the purchase of the material must also be published. People are thus free to comment on whether a standard should be incorporated or not. Copies of the material should be also made available, free of charge, on an internet site maintained by or on behalf of the administering department, *unless doing so would infringe copyright*. The availability of these opportunities to inspect the material must be advertised in the *Government Gazette*.
- 10.24 Once the instrument comes into force, similar opportunities to access the incorporated material must be afforded. Section 52 reads:

Access to material incorporated by reference

- (1) *This section applies if an instrument incorporating material by reference in reliance on section 49 is made*
- (2) *The chief executive must —*
- (a) *make the material (the **incorporated material**) available for inspection during working hours free of charge at the inspection sites [Nb: this is defined as the head office of the administering department and any other places its Chief Executive deems appropriate]; and*
 - (b) *state where copies of the incorporated material are available for purchase; and*
 - (c) *make copies of the incorporated material available, free of charge, on an Internet site maintained by or on behalf of the administering department, unless doing so would infringe copyright; and*
 - (d) *give notice in the Gazette stating —*
 - (i) *that the incorporated material is incorporated in the instrument and stating the date on which the instrument was made; and*
 - (ii) *that the incorporated material is available for inspection during working hours, free*

of charge, and stating the places at which it can be inspected; and

(iii) that copies of the incorporated material can be purchased and stating the place at which they can be purchased; and

(iv) if applicable, that the incorporated material is available on the Internet, free of charge, and state the Internet site address.

(3) The chief executive —

(a) may make copies of the incorporated material available in any other way that he or she considers appropriate in the circumstances; and

(b) must, if paragraph (a) applies, give notice in the Gazette stating that the incorporated material is available in other ways and giving details of where or how it can be accessed or obtained.

(4) The chief executive may comply with subsection (2)(c) (if applicable) by providing a hypertext link from an Internet site maintained by or on behalf of the administering department to a copy of the incorporated material this is available, free of charge, on an Internet site that is maintained by or on behalf of someone else.

(5) The reference in this section to material are to —

(a) material incorporated by reference in the instrument; and

(b) if the material is not in an official New Zealand language, the material itself together with an accurate translation in an official New Zealand language of the material.

(6) A failure to comply with this section does not invalidate an instrument that incorporates material by reference.

(7) For the purposes of subsection (2)(c), a chief executive may not rely on section 66 of the Copyright Act 1994 [Nb: this is a copyright exemption for acts done under statutory authority]

as authority to make the incorporated material available on an Internet site.

- 10.25 This Part of the *Legislation Act 2012* does not apply to bylaws made by local authorities under the *Bylaws Act 1910* (section 48(1)). For those, reference must be made to sections 29-31 of the 2015 Act. Previously, and by way of interest, section 22 of the *Standards Act 1988* provided that where a bylaw was made referring to a New Zealand Standard, then subsection (2)(a) applied. It read:

no resolution making the bylaw and no copy of the bylaw shall be deemed to be complete unless it has attached to it a copy of the standard or the part of the standard referred to (together with any text that the standard or part incorporates by reference) and states or shows any modification made to it by the person or body making the bylaw.

- 10.26 This provision had been met by attaching a copy of the standard to the formal bylaw. This has now been omitted in the new legislation though, in order to clarify the point that copyright applies (section 30(2)), and any further publication or distribution of the bylaw will not usually attach that standard without breaching that copyright.
- 10.27 For completeness, it is worth noting that, by virtue of section 29, where a standard is cited by number or title, it is deemed to refer to the latest iteration of that standard. Essentially, the same as the ‘*as made from time to time*’ provisions noted earlier in this report.

PARLIAMENTARY ACCESS

Commonwealth

- 10.28 In 1992, the Commonwealth Administrative Review Council published a report to the Attorney-General entitled *Rule Making by Commonwealth Agencies*.²⁰¹ It discussed in Chapter 6 the effect of section 49A (since repealed) which allowed for the adoption or incorporation in regulations of any matter contained in any external document that existed at the time the regulations came into effect. The Council recognised that this was an efficient way of incorporating material of a highly technical nature, avoiding having to re-write what had already been written.
- 10.29 It did identify however a number of drawbacks, the first being the availability of the material which, unlike the regulations themselves, was not required to be published.²⁰² The Council thus made the following recommendation:

²⁰¹ *Rule Making by Commonwealth Agencies*; Administrative Review Council; Australian Government Publishing Service; Canberra; 1992

²⁰² *Ibid.* p 51.

Recommendation 22

(1) The Legislative Instruments Act should require the text of any document applied, adopted or incorporated by reference to be tabled with the delegated legislation. Failure to table the incorporated document with the legislative instrument should mean that the incorporating provision should cease to have effect.

(2) The document that is applied, adopted or incorporated by reference should be scrutinised to allow the Parliament to determine whether the provision allowing for the application, adoption or incorporation should be disallowed.

- 10.30 Eventually, some of the recommendations of the Council were incorporated into the *Legislative Instruments Act 2003* (Cth), since 5 March 2016 renamed the *Legislation Act 2003* (Cth). Section 41 of that Act reads:

Incorporated material may be required to be made available

A House of the Parliament may, at any time while a legislative instrument is subject to disallowance, require any document incorporated by reference in the instrument to be made available for inspection by that House:

(a) at a place acceptable to the House; and

(b) at a time specified by the House.

- 10.31 Additionally, section 15J of that Act describes the requirements for ‘explanatory statements’. Amongst other things, if an instrument incorporates documents by reference, such an explanatory statement must (subsection (2)(c)):

contain a description of the incorporated documents and indicate how they may be obtained.

- 10.32 This is clearly a more acceptable position with regard to public access to incorporated materials than exists in Western Australia where, as has been explored, only limited provisions obtain. The Committee will return to this at the end of this Chapter.

- 10.33 At paragraph 2.51, mention was made of provisions that allowed the adoption of external material as made ‘*from time to time*’, or some such formulation. The Commonwealth provisions mentioned here would only assist parliamentary scrutiny with regard to the first iteration of such material, of course. Subsequent amendments to that material become automatically ‘quasi-legislation’ without further scrutiny.

- 10.34 In its report *The Work of the Committee in 2014*, the Australian Senate's Standing Committee for the Scrutiny of Bills expressed continued disquiet that that Parliament, in delegating powers to make regulations and the like, did not always properly address the question of how much oversight should be maintained over the exercise of that delegation.²⁰³
- 10.35 As mentioned previously, the Commonwealth *Legislation Act 2003* – at section 14(2) – allows for the application, adoption or incorporation, with or without modification, of any matter contained in any other instrument or writing as in force or existing at the time the instrument is made or existing from time to time (emphasis added), but in the latter case only if that intention is clearly stated.
- 10.36 The Senate Committee felt that the incorporation of such material was of concern from a scrutiny perspective because it:
- *allows a change in legal obligations to be imposed without the Parliament's knowledge and without the opportunity for Parliament to scrutinise the variation;*
 - *can create uncertainty in the law because those affected may not be aware that the law has changed; and*
 - *those obliged to obey the law may have inadequate access to its terms, depending on the nature of the material being incorporated.*²⁰⁴
- 10.37 The Committee's way of addressing this concern was expressed (on the same page of its report) as follows:
- The committee expects that the explanatory memorandum for a bill that includes a provision which seeks to incorporate non-legislative material 'as in force from time to time' will clearly and comprehensively explain the necessity for this approach and indicate how the concerns outlined above will be met.*
- 10.38 We note the misgivings of that Senate Committee. This Committee shares them. We recommend that a formula akin to section 14(2) be adopted in Western Australia, so that the formulation '*as made from time to time*' is not simply the adopted norm in new legislation, and is not inserted without proper consideration and explanation. It is clear that adopting the version of material as it stands at the date of the statutory instrument assists not only with parliamentary scrutiny but also with the ability of the

²⁰³ *The Work of the Committee in 2014*, the Australian Senate's Standing Committee for the Scrutiny of Bills, Commonwealth of Australia, 2015, p 47.

²⁰⁴ *Ibid.* p 48.

public to at least find current law (if not access it). Where that material is updated or replaced, then a simple amending instrument may be made by the relevant government department or agency to draw the public's (and our Committee's) attention to the fact that the delegated legislation has been effectively amended and to allow for scrutiny of the amended incorporated material. To that extent, any perception that the making of laws has been abdicated by allowing the adoption of third party documentation may be overcome.

Finding 5: The Committee finds that the legislative practice of allowing reference to Standards 'as existing from time to time' or 'as made from time to time' inhibits not only the proper scrutiny of delegated legislation by this Committee but also simple legislative research.

Recommendation 8: The Committee recommends that consideration be given to amending section 43 of the *Interpretation Act 1984*, or such other provision considered more suitable by Parliamentary Counsel, so that, unless the contrary intention is made clear on the face of an empowering statute, delegated legislation may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing 'as existing from time to time' or any similar statutory formulation.

- 10.39 Alternatively, the formulation in Victoria, requiring any future amendments to the incorporated material to be tabled – if a Standard is amended after it has been adopted as existing 'from time to time', the responsible Minister must lodge copies of those amendments with the Clerk of the Parliaments and publish a notice referencing those amendments in the Government Gazette – should be considered. This would at least alert Members to a change in the law.
- 10.40 Given the well-known administrative resource problems that are faced by many local governments across the State, however, we do not make a similar recommendation at this time in respect of section 3.8 of the *Local Government Act 1995*.

Victoria

- 10.41 By way of contrast to the position in Western Australia regarding Parliamentary access to referenced documents, section 32 of the Victorian *Interpretation of Legislation Act 1984* provides for direct provision to Parliament. After specifically allowing for the prescription of matters in subsidiary legislation by reference to other documents, as set out at paragraphs 6.121 to 6.123, the section goes on to say (insofar as is relevant):

(3) *If a subordinate instrument made on or after the relevant day is authorised or required to make, and does make, provision*

for or in relation to a matter by applying, adopting or incorporating any matter contained in a document (not being an Act, Commonwealth Act, Code, statutory rule or statutory rule made under a Commonwealth Act) whether as in force at a particular time or as in force from time to time —

(a) the Minister administering the Act under which the subordinate instrument was made must if the subordinate instrument is itself required to be laid before each House of the Parliament cause—

(i) a copy of the matter so applied, adopted or incorporated to be lodged with the Clerk of the Parliaments as soon as practicable after the subordinate instrument is required to be laid before each House of the Parliament; and

(ii) notice of the documents containing the matter so applied, adopted or incorporated and of the fact that a copy of the matter so applied, adopted or incorporated has been lodged with the Clerk of the Parliaments, to be published in the Government Gazette as soon as practicable after the copy of the matter has been lodged; and

(iii) a copy of the notice published in the Government Gazette to be laid before each House of the Parliament as soon as practicable after it is published; and

(4) If a subordinate instrument made on or after the relevant day is authorised or required to make, and does make, provision for or in relation to a matter by applying, adopting or incorporating any matter contained in a document (not being an Act, Commonwealth Act, Code, statutory rule or statutory rule made under a Commonwealth Act) as in force from time to time and after the subordinate instrument is made the matter so applied, adopted or incorporated is at any time amended —

(a) the Minister administering the Act under which the subordinate instrument was made must, if the

subordinate instrument is itself required to be laid before each House of the Parliament, cause—

- (i) a copy of the matter as so amended to be lodged with the Clerk of the Parliaments as soon as practicable after that amendment is made; and*
- (ii) notice of the amendment and the documents containing that amendment and of the fact that a copy of the matter as so amended has been lodged with the Clerk of the Parliaments, to be published in the Government Gazette as soon as practicable after the copy of the matter has been lodged; and*
- (iii) a copy of the notice published in the Government Gazette to be laid before each House of the Parliament as soon as practicable after it is published.*

10.42 Thus, a hard copy of the external material so referenced in the delegated legislation must be tabled in Parliament through lodgement with the Clerk of the Parliaments, whether it is material as referenced as in force at a particular time, or as in force from time to time (subsection (3)), or where it is referenced as in force from time to time and it is subsequently amended (subsection (4)).

10.43 As mentioned in paragraph 10.7, useful and accountable guidance for those entrusted with the preparation of subordinate legislation in Victoria is contained in *Notes for Guidance for the Preparation of Statutory Rules*, issued by OCPC and last issued in June 2015. That guidance states, at pages 17-18:

If you propose that a statutory rule will apply, adopt or incorporate material, the Department must consider the following—

- there must be express power in the authorising Act to empower the application, adoption or incorporation of material in a statutory rule;*
- members of the public affected by the rule must be able to access the incorporated document so that they can understand the contents and effect of the rule;*

- *whether the incorporated material is readily available at a reasonable cost;*
- *the requirements set out in section 32 of the Interpretation of Legislation Act 1984 which are designed to facilitate Parliamentary oversight of incorporation of material and to ensure that the material is publicly available.*

Remember that the incorporated material may not be a self-contained document and may apply, adopt or incorporate other material.

10.44 Of Standards in particular, the guidance goes on:

In drafting a statutory rule which refers to an Australian Standard, consideration should be given as to whether the reference to an Australian Standard should be to a specific standard or to a specific version of a standard by reference to its date. This may be constrained by the empowering provisions in the authorising Act. Some Acts authorise incorporation of a document as in force from time to time, whereas others are more limited and only permit incorporation of a document as at the date of publication of the document or the date of making of the statutory rule.

In deciding whether to incorporate material by reference, Departments need to take care to balance the drafting convenience with ease of access to the incorporated material and understanding of it by those affected by it or required to comply with it. Departments should reserve the use of incorporated detailed and extensive technical material to statutory rules concerning industries familiar with and using the material. In such cases Departments should also consider whether performance standards are a more appropriate means of regulation.

If you incorporate material such as Australian Standards, you will need to provide a copy of that material to OCPC during the course of settling the proposed statutory rule as OCPC need to be satisfied that there is power to incorporate material and will need to check the citation and publication details to ensure compliance with the requirements of the Subordinate Legislation Regulations.

OCPC will also check that the document is suitable for incorporation in a law but, due to the technical nature of some of these documents, we can only examine the documents from the perspective of whether or not it sets out a clear obligation if offences flow from contravention of the incorporated material, rather than recommendations which are

*not enforceable or certain. It is preferable that a copy of the material be sent to OCPC with the first draft of the statutory rules for settling.*²⁰⁵

- 10.45 This, in the view of this Committee, is particularly useful and well-written. Victoria is alone amongst Australian State and Territory governments (so far as we are aware) in that it is officers of responsible departments that produce draft regulations, rather than Parliamentary Counsel (though the latter does need to certify that the draft regulations are within power and, indeed does assist in their settling). That being so, perhaps more detailed guidance is necessary. Nevertheless, we are aware that the Western Australian Parliamentary Counsel's Office is keen to produce something similar. Geoff Lawn, then Acting Parliamentary Counsel, told the Committee:

*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.*²⁰⁶

- 10.46 The Committee endorses this approach and encourages Mr Lawn and his colleagues in this endeavour.

Northern Territory

- 10.47 The Attorney-General and Minister for Justice of the Northern Territory, Hon John Elferink MLA, told us:

There is no formal requirement for explanatory materials to delegated legislation to refer to Australian Standards adopted in legislation or for an agency to provide a copy of the adopted standard to Parliament to aid in the scrutiny of the legislation.

*Accordingly, the decision to provide a copy of the relevant standard would rest with the agency responsible for that legislation.*²⁰⁷

Queensland

- 10.48 The Queensland Government told the Inquiry:

²⁰⁵ This Guidance may be viewed at <http://www.legislation.vic.gov.au/>. Viewed 12 April 2016.

²⁰⁶ Geoff Lawn, Acting Parliamentary Counsel, Parliamentary Counsel's Office, *Transcript of Evidence*, 14 August 2015, p 4.

²⁰⁷ Hon John Elferink MLA, Attorney-General and Minister for Justice, Northern Territory Government, Letter, 4 February 2015.

*Explanatory notes accompanying subordinate legislation are required to cover the matters listed in section 24 of the Legislative Standards Act 1992. That provision does not require explanatory notes to include or make reference to applied, adopted or incorporated documents (e. g. Australian Standards). Explanatory notes are prepared under the authority of the responsible Minister and it is a matter for each Minister to decide upon the content of the explanatory notes accompanying draft legislation. During the scrutiny of legislation, nothing prevents a Parliamentary Committee from seeking access to relevant Australian Standards.*²⁰⁸

New Zealand

- 10.49 Section 41 of the *Legislation Act 2012* states that all legislative and otherwise disallowable instruments (as defined) must be presented to the House of Representatives not later than the 16th sitting day of the House after the day on which they are made. However, section 55 of that Act states:

Application of subpart 1 of Part 2 to instrument and material incorporated by reference

(1) Subpart 1 of Part 2 (which deals with the publishing, availability, etc. of legislation) does not apply to material that is for the time being incorporated by reference in an instrument in reliance on section 49, even if the instrument is a legislative instrument.

(2) To avoid doubt, the material does not have to be presented to the House of Representatives under section 41 even though the instrument is a disallowable instrument by virtue of section 56. [Emphasis added].

- 10.50 Members of the House would be free, of course, to inspect the material referenced, free of charge, like any other member of the public, under the public consultation provisions of section 51 (see paragraph 10.23).

Finding 6: The Committee finds that inadequate explanation is currently provided by departments and agencies as to why the adoption of a particular Standard is either necessary or preferable, given the outlined difficulties in accessing those Standards.

²⁰⁸

Submission 24 from Queensland Government, 24 March 2015, p 3.

Finding 7: The Committee finds that, given the length and complexity of some Standards that are adopted in delegated legislation, a simple explanation or description of the material so adopted should be provided in the accompanying explanatory memoranda.

Recommendation 9: The Committee recommends that Premier's Circular 2014/01, when reviewed in January 2017, be expanded to include a requirement that, if any documents are incorporated in delegated legislation by reference, then the accompanying explanatory memorandum supplied to the Committee must contain an explanation as to the necessity or desirability of the incorporation and a description of the documents so incorporated.

Finding 8: The Committee finds that it would not be unduly expensive or onerous to expect that a hard copy of Standards should be tabled in the Houses of Parliament alongside the instruments into which they are adopted. It is open to any Member of Parliament to move a motion to disallow an instrument, not only Members of this Committee, and accordingly every Member should be entitled to free and easy access to such adopted material.

Recommendation 10: The Committee recommends that section 42 of the *Interpretation Act 1984*, and/or such other provision considered more suitable by Parliamentary Counsel, be amended so that departments, agencies or local governments that adopt an Australian Standard or other external material in delegated legislation be required to table a copy of that Standard or other material in each House of the Parliament.

- 10.51 Were Recommendation 10 to be acted upon, then this would appear to render Recommendation 9 as unnecessary. However, as has been outlined earlier in this report, Standards referenced are often very long and highly technical. Therefore, as well as recommending that a copy of any adopted Standard be tabled in Parliament, the Committee would like to see departments and agencies mandated to incorporate, within the supplied explanatory memorandum, an explanation of the effect of the Standard. Not only would this assist the Committee in its scrutiny duty, it may also serve to concentrate the minds of the authors of the delegated legislation who might have adopted Standards with little or no thought as to possible alternatives during the course of preparing the draft or the instructions to Parliamentary Counsel.
- 10.52 Copies of Standards tabled in accordance with such a provision as is recommended at Recommendation 10 could not be placed on the Parliament of Western Australia website, however, as is usually the case with tabled documents, due to copyright restrictions.

CHAPTER 11

POSSIBLE SOLUTIONS

- 11.1 Referring back to the terms of reference for this Inquiry, the second was:

whether amendments to legislation are required to improve public access to adopted Australian Standards.

- 11.2 Many respondents pointed out to the Committee, quite rightly, that the most efficient solution to the problem of access, in a legal sense, would be amendments to the *Copyright Act 1968*, but that this was not possible for the Parliament of Western Australia to achieve because it is a Commonwealth statute. Section 109 of the Constitution of the Commonwealth of Australia states:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

- 11.3 This report has outlined some legislative measures that might be considered by Government – some would assist with public access, some parliamentary access, some both. All are tinkering at the edges of the problem though.
- 11.4 In this Chapter, the Committee seeks to explore some other practical responses to the problem of access that might be added to the mix.

REGULATORY IMPACT ASSESSMENTS

- 11.5 Standards Australia made the perfectly valid point, in its submission to the Inquiry, that:

*The decision to adopt (or ‘reference’) Australian Standards for regulatory purposes is made by governments on a case-by-case basis. The cost of access to an Australian Standard referenced in regulation should form part of the initial regulatory impact assessment process when developing and reviewing regulation.*²⁰⁹

- 11.6 The submission went on to say:

Where there is a need to reference a particular technical specification in regulation, the cost of compliance, including the cost of purchasing

²⁰⁹ Submission 19 from Standards Australia, January 2015, p 2.

*and licensing any third-party referenced material, should be taken into account at the time of the initial regulatory assessment.*²¹⁰

- 11.7 The 2006 report of the Productivity Commission has been considered earlier in Chapter 4. One of the key points outlined in the Commission's Overview was that:

*All government bodies should rigorously analyse impacts before making a standard mandatory by way of regulation and ensure it is the minimum necessary to achieve the policy objective.*²¹¹

- 11.8 The Commission concluded, at page 118 of its report:

The Commission considers that for new standards that are to be referenced in regulations (or for significant amendments to standards already referenced), a rigorous impact assessment must be undertaken in compliance with the RIS requirements of the relevant jurisdiction (or COAG requirements for intergovernmental action). The level of analysis would need to be commensurate with the significance of the likely impacts of the proposed measure. In order to best facilitate consideration of other regulatory and non-regulatory alternatives, RISs must be commenced at the earliest practicable opportunity. Wherever possible the RIS process should be undertaken in parallel with the development of the standard, although where existing standards are being referenced this will not be possible.

- 11.9 The Housing Industry Association agreed. It said in its submission:

*HIA believes that any standard referenced in delegated legislation, either as a direct reference, such as the electrical and plumbing regulations which refer to AS 3000 and AS 3500 series, or as a secondary reference through the NCC, should be subject to the same scrutiny as the regulations when being drafted and adopted. These standards should require the preparation of a Regulation Impact Assessment prior to their referencing to ensure that they deliver a net cost benefit to the community.*²¹²

- 11.10 Finally, these views were supported by the Minister for Transport, Hon Dean Nalder MLA, in his letter to the Committee dated 12 February 2015. Mr Nalder said:

²¹⁰ Ibid. p 4.

²¹¹ *Standard Setting and Laboratory Accreditation: Productivity Commission Research Report Overview*; Commonwealth of Australia, Canberra, 2006, p XIV.

²¹² Submission 10 from Housing Industry Association Ltd., 29 January 2015, p 2.

It is also suggested that where it is intended to include a Standard in delegated legislation, some form of assessment process be followed (for example the Regulatory Impact Statement process used for Cabinet Submissions) to determine whether any other options exist to enhance access to the Standards.

- 11.11 The Committee takes the Minister's point, though it seems to us that the real issue is whether such a regulatory impact process should be used to determine whether the citation of a Standard was absolutely necessary, or whether it was the least expensive option, taking into account the cost of purchasing the Standard multiplied by the potential number of users affected, in addition to simply determining options to access a Standard.
- 11.12 The process described by Minister Nalder is set out in the Regulatory Impact Assessment (RIA) Guidelines, which came into force on 1 December 2009 under cover of Premier's Circular 2009/06. The program was designed to ensure that all new and amending legislation is only implemented where it is demonstrated that a clear assessment of alternatives has been undertaken, and that the benefits of the proposal outweigh the costs or negative impacts. As outlined in that Premier's Circular, the program applies to:
- all regulatory proposals submitted to the Cabinet (including primary legislation and other regulatory proposals)
 - most forms of subordinate legislation enacted by submission to the Governor in Executive Council and/or by publication in the Government Gazette
 - some quasi regulatory instruments (such as industry Codes of Practice, Ministerial and departmental Guidelines and other regulatory instruments imposed by industry governing bodies) that go to Cabinet.
- 11.13 The program is administered by the Regulatory Gatekeeping Unit (RGU), part of the Department of Finance.
- 11.14 Within the RIA Guidelines is a list of exemptions²¹³, where it is felt by the RGU that a full impact assessment would be of limited value. A short registration process is completed, with the relevant agency providing a justification for the exemption applying. Examples of instruments covered by this exemption include Standing Rules and Orders of Parliament, machinery of government instruments and proposals relating to police powers and rules of court. That list of exemptions also includes, at number six:

²¹³ *Regulatory Impact Guidelines for Western Australia (updated July 2010)*, Government of Western Australia, p 12.

Regulatory proposals involving the adoption of an Australian or international protocol, standard, code or Intergovernmental Agreement if an adequate assessment of the costs and benefits has already been made and the assessment was made for, or is relevant to, Western Australia.

- 11.15 It is not entirely clear from this guidance whether the RGU is content to rely in this instance on an assessment undertaken by another jurisdiction, or whether it references the preparatory work undertaken by Standards Australia in making Standards.
- 11.16 The Committee is aware that, in developing Standards, Standards Australia place great importance on the achievement of *net benefit*.²¹⁴ The organisation's website describes net benefit in the following way.²¹⁵

What is Net Benefit?

Every Australian Standard, regardless of who develops it, must demonstrate positive Net Benefit to the community as a whole. All Australian Standards must provide a value or benefit that exceeds the costs likely to be imposed on suppliers, users and other parties in the community as a result of its development or adoption and implementation.

Net Benefit is a core component of how Standards Australia operates.

For simplicity and to align the Productivity Commission's recommendations with ABSDO's requirements, Standards Australia has defined Net Benefit to mean "having an overall positive impact on relevant communities".

Net Benefit takes into account the costs and benefits related to the following criteria:

- *Public health and safety;*
- *Social and community impact;*
- *Environmental impact;*
- *Competition; and*

²¹⁴ Submission 19 from Standards Australia, January 2015, p 2 and Adam Stingemore, General Manager, Stakeholder Engagement and Public Affairs, Standards Australia, *Transcript of Evidence*, 14 August 2015, pp 1, 2, 4, 7, 11, 13, 15.

²¹⁵ Standards Australia, available at: http://www.standards.org.au/StandardsDevelopment/What_is_a_Standard/Pages/Net-Benefit.aspx. Viewed 3 March 2016.

- *Economic impact.*

These measures align with Australian Government Office of Best Practice Regulation (OBPR) and provide a level playing field for all proposals for Standards development projects.

More information about Net Benefit can be found in the Guide to Net Benefit.

Standards must deliver Net Benefit

The Accreditation Board for Standards Development Organisations (ABSDO), which oversees all Standards Development Organisations (SDOs) has incorporated the demonstration of Net Benefit into the requirements for developing an Australian Standard.

All SDOs, including Standards Australia, need to satisfy these requirements in order to develop Australian Standards.

This requirement aligns to the recommendation arising from the Productivity Commission report into standards in 2006¹, and also reflects the Memorandum of Understanding between Standards Australia and the Commonwealth Government.

¹*Standard Setting and Laboratory Accreditation: Productivity Commission Research Report, November 2006*

- 11.17 Thus, it would be reasonable for the RGU to conclude that, as this process (said to align with the requirements of the *Commonwealth Government's Office of Best Practice Regulation* (OBPR)) has been undertaken, it is unnecessary to repeat such a process for instruments that adopt such Standards in Western Australia, hence the exemption.
- 11.18 The *Australian Government Guide to Regulation*, having cited Standards (voluntary, compulsory or performance-based) as an example of alternatives to primary or subordinate legislation as a means of regulation, states:

*RIS requirements apply to the development of standards used for regulatory purposes, even if they have been developed by Standards Australia or other third parties.*²¹⁶

- 11.19 The OBPR apparently will not simply accept that a commissioned Standard has been subjected to a net benefit analysis by Standards Australia as a substitute for a

²¹⁶ *Australian Government Guide to Regulation*, Commonwealth of Australia, Department of Prime Minister and Cabinet, 2014, p 29.

regulatory impact analysis to be reported in an Australian Government Regulation Impact Statement. Indeed, the Guide, on the same page, goes on to say:

If any of the options involve establishing or amending standards in areas where international standards already apply, you should document whether (and why) the standards being proposed differ from the international standard.

- 11.20 In the Committee's view, the Government should re-evaluate and clarify the Guidelines issues under Premier's Circular 2009/06, and in particular provide for the anticipated costs of purchasing Standards by a projected number of affected users to be taken into account in the process. In the meantime, the Committee would like to receive some measure of impact analysis from the authors of regulations that have adopted Standards, to be included in Explanatory Memoranda.

Recommendation 11: The Committee recommends that Premier's Circular 2014/01, when reviewed in January 2017, be expanded to include, where a Standard is called-up in delegated legislation, an estimate of the number of people or businesses that will be required to access that Standard, and at what projected cost.

- 11.21 Should the Committee's Recommendation 4 not be acted upon, and the legislation not be amended requiring local governments to keep available for public reference any Standard adopted in a local law, then the Local Laws Explanatory memoranda Directions 2010 should be similarly expanded.

DEEMED TO COMPLY PROVISIONS

- 11.22 Some witnesses told us of what they termed 'deemed to comply' or 'deemed to satisfy' provisions contained in, for example, the Building Code and the Plumbing Code. These, we were informed, were a way in which builders or plumbers could meet regulatory requirements applicable to them without following the strict terms of a Standard, but by using alternative means. Adam Stingemore of Standards Australia spoke of these in evidence. He said:

the other alternative that government has at the time that regulations are being developed is to look to performance-based regulatory frameworks, which allows for consumer and user choice, in terms of how they demonstrate compliance. The Australian Building Codes Board, which publishes the National Construction Code, is a very good example of a performance-based regulation that allows for people to make a choice as to how they comply with the regulation, and the harmonised national work, health and safety model code that

*has been adopted, I think, in some states, again, moved to a model whereby there is choice, in terms of compliance.*²¹⁷

11.23 The Productivity Commission had mentioned such regulatory devices in 2006:

*A growing trend is for a government agency to write the performance-based standard and rely on Standards Australia to provide optional, prescriptive 'deemed-to-comply' standards or supplementary standards which may assist in demonstrating compliance.*²¹⁸

11.24 This Committee would encourage the use of any method that provides flexibility in meeting regulatory requirements in this way. However, we fail to see how this materially assists in solving the problem of a lack of access to Standards, which seems to be the inference made by Mr Stingemore. In order to consider what solutions may be acceptable as an alternative to following the strict terms of a Standard, surely a conscientious tradesman would compare the two (or more) alternatives, which of course requires some sort of access to the Standard.

LESS RELIANCE ON INCORPORATION

11.25 In its written submission to the Committee, the Department of Commerce pointed out that a partial solution to the problem of a lack of access to Standards which have quasi-legislative status would be to simply reduce references in legislation; it said:

*The need to access Australian Standards is partially driven by the need to attain legal compliance. Consequently, a mechanism for reducing the community concern about freedom of access to the standards is to reduce, as far as practicable, the reliance on Australian Standards when drafting delegated legislation. However, the wholesale adoption of such an approach would likely require significant legislative amendment.*²¹⁹

11.26 To this end, the Department told us:

By way of example, this is the approach that has been adopted with the model Work Health and Safety ('WHS') laws. The WHS laws have specifically been designed to minimise, as far as possible, the citation

²¹⁷ Adam Stingemore, General Manager, Stakeholder Engagement and Public Affairs, Standards Australia, *Transcript of Evidence*, 14 August 2015, p 8.

²¹⁸ *Standard Setting and Laboratory Accreditation, Productivity Commission Research Report*, Commonwealth of Australia, Canberra, 2006, at p XIX.

²¹⁹ Submission 8 from Department of Commerce, 15 January 2015, pp 2-3.

*of Australian Standards and thereby provide clarity and certainty about compliance requirements.*²²⁰

11.27 In oral evidence before the Committee, both Ian Munns, Acting Executive Director, Worksafe, and Peter Gow, Executive Director, Building Commission, told us that all staff in their policy areas with responsibility for the production of delegated legislation were mindful of the need to avoid citing Standards unless absolutely necessary, due to the general unavailability of those documents.²²¹

11.28 The Department of Mines and Petroleum echoed this sentiment in its submission, stating:

*I can advise that in future, DMP intends to lessen the reliance on the use of Australian Standards in regulations. An example of this is in the mining industry where a new, modernised Work Health and Safety (Mines) Bill will replace the Mines Safety and Inspection Act 1994. DMP is currently preparing this legislation which is based on the national Model Work Health and Safety Act 2011 to harmonise work health and safety laws.*²²²

11.29 This approach is to be applauded. Unfortunately, as has been identified earlier in this report, many instruments are so convoluted and technical that they do not easily lend themselves to the approach indicated here. In contrast to the evidence given by Messrs Munns and Gow, Kenneth Bowron of EnergySafety told the Committee:

*It is slightly different in EnergySafety because we deal with gas and electricity safety – they are both technically exact areas – and we have found that not overuse, but the judicial use of standards meets the purposes of our industry a lot better – the process of standards tends to have been done involving regulators and every other party right through to the consumers, and so they are a robust instrument and it is technically precise, and that is what we need in our industry.*²²³

11.30 Clearly, there will always be areas where the incorporation of Standards will still need to be relied upon, either to avoid making the delegated legislation overly-complex or perhaps for national for consistency purposes. As the Department of Commerce said in its written submission:

²²⁰ Ibid. p 3.

²²¹ Ian Munns, Acting Executive Director, Worksafe, and Peter Gow, Executive Director, Building Commission, Department of Commerce, *Transcript of Evidence*, 14 August 2015, pp 1-2.

²²² Submission 7 from Department of Mines and Petroleum, 23 January 2015.

²²³ Kenneth Bowron, Executive Director, EnergySafety, Department of Commerce, *Transcript of Evidence*, 14 August 2015, p 2.

*There are some areas of regulations, such as consumer protection, electricity, gas, plumbing and building which will always need to rely heavily on citation of Australian Standards to ensure consistency of high quality service delivery. Product safety standards for consumer protection are also adopted nationally and so reference to Australian Standards ensures consistency across jurisdictions.*²²⁴

USE OF MORE INTERNATIONAL STANDARDS

- 11.31 In his letter to us of 4 February 2015, Hon Ian Macfarlane MP, then Federal Minister for Industry and Science, said:

*A key part of the Government's Industry Innovation and Competitiveness Agenda is the principle that, where appropriate, governments and regulators should adopt international standards and not impose additional regulatory burdens. My department has advised that the charges associated with purchasing Australian standards are relative to those of other countries. I have also been advised that where Australia adopts international standards they can be purchased from a number of standards publishers at competitive rates.*²²⁵

- 11.32 Clearly, what the Minister says is beneficial to both regulators and regulated, but it is not a solution to the problem of a lack of free access to Standards, be they Australian, international or otherwise.
- 11.33 SAI Global's submission to this Inquiry informed us that 42 per cent of all Australian Standards are merely adopted versions of international standards produced by the ISO and the IEC. Notwithstanding which entity produces those Standards though, they still need to be purchased. It is true that ISO Standards, for example, may be purchased from distributors other than SAI Global (unlike Australian Standards), such as Thomson Reuters. They are still relatively expensive publications, however, and may not be lawfully referenced anywhere free of charge.

GOVERNMENT FUNDED ACCESS

- 11.34 The Productivity Commission, in its 2006 report, considered whether access to Standards should be made available at no cost to the end-user through public financing, particularly those that are made mandatory by way of adoption in regulation. This, it said:

²²⁴ Submission 8 from Department of Commerce, 15 January 2015, p3.

²²⁵ Hon Ian Macfarlane MP, Ministry for Industry and Science, Letter, 4 February 2015.

*is likely to generate some improvement in awareness and compliance.*²²⁶

11.35 The Commission went on to suggest that:

- *the Australian Government could pay SAI Global an appropriate royalty for the right to publish referenced mandatory standards online; or*
- *SAI Global could provide access on a free subscription basis and then receive compensation from the Australian Government for revenue foregone (i.e. based on the number of subscribers).*²²⁷

11.36 Indirectly, the cost to governments of subsidising access could have the effect of reducing the number of regulatory references, ensuring that Standards are only adopted when clearly justified, as the Commission pointed out. In conclusion, therefore, it recommended (at Recommendation 7.3):

*Mindful of the fundamental principle of transparency and accessibility of legal requirements, the Australian Government and other governments (through their agencies) should fund free or low-cost access to Australian Standards made mandatory by way of regulation.*²²⁸

11.37 As the figures in Chapter 7 illustrate, governments are already paying significant sums of money to SAI Global, but in return enjoy only limited access for their own staff with restricted abilities to copy or distribute. For not significantly more public cost outlay, universal access could be achieved, and indeed should be achieved, which brings the Committee to its preferred option for resolving the problems outlined and its final, and overall, recommendation.

²²⁶ *Standard Setting and Laboratory Accreditation, Productivity Commission Research Report*, Commonwealth of Australia, Canberra, 2006, at p 127.

²²⁷ *Ibid.* p 128.

²²⁸ *Ibid.* p 128.

CHAPTER 12

CONCLUSION

- 12.1 Alison Sutherland of the State Library of Western Australia told the Inquiry:

*The restrictive nature of the business model of SAI Global in relation to the publication and availability of Australian Standards is now starting to see alternative models come into vogue. I was thinking particularly of the National Construction Code. I think the value of Australian Standards is going to decline because of the unavailability of Australian Standards, because people are going to try and work around it. I heard recently—just then—a reference to a similar thing. Australian Standards are really important, I think. I think it is a shame if that value gets diluted just because of the access.*²²⁹

- 12.2 This Committee agrees with Ms Sutherland. We have heard a good deal of praise for Standards Australia and largely for the work it produces. Mr Stingemore mounted a robust defence of the organisation although, as this report said, the Committee has no complaint about the body that is Standards Australia. We heard of volunteers who are happy to give of their time to assist in the production of Standards that assist their fellow professionals and colleagues, that keep the public safe from harm and that assist in environmental protection. The Committee acknowledges their efforts.
- 12.3 However, the Committee would like to see a change in the overall current model of charging the public, businesses, governments and parliaments to access this invaluable knowledge and guidance and, in many cases, law. We would like to see the cost of that access borne by Governments centrally, allowing universal free access. This will be more fully explained below, ahead of the Committee's main recommendation.
- 12.4 It seems to the Committee that what still exists is a model that was established a comparatively long time ago, where an agency that is a private enterprise (i.e. SAI Global) was printing off large volumes of hard copies of standards that had been developed by Standards Australia. Today, fewer of those hard copies are being produced. The vast majority of SAI Global's work now is simply publishing the Standards in digital format. What has effectively happened is that their overheads have dropped significantly. SAI Global will point out that much effort is put into advertising or marketing, but this is unnecessary, and done purely with a profit motive. As Chapter 7 illustrates, governments and public bodies (not to mention the

²²⁹ Alison Sutherland, Acting Chief Executive Officer and State Librarian, State Library of Western Australia, *Transcript of Evidence*, 21 August 2015, p 3.

public) continue to pay large sums of money to the end producer for a business model that is no longer relevant to modern Australia.

- 12.5 It is possible that changes to this model will occur organically. There is, it seems, increased access to Standards that have been posted online illegally by persons who may have purchased a Standard perfectly properly, but then decided to share the contents through a publicly available website. We are aware that SAI Global jealously defends the copyright in Standards owned by Standards Australia, but its staff are facing an uphill struggle. In the meantime, however, this Committee would like to ameliorate the problems of a lack of free access.

- 12.6 To sum up this report by returning to the terms of reference listed at page 1:

- *The levels of free access to adopted Australian Standards in metropolitan and regional Western Australia.*

Minimal in Perth, particularly now following the non-renewal of the State Library's subscription with SAI Global, but virtually non-existent for those living outside the capital. Limitations on library sharing clearly do not assist in this, but in the modern age, where information as important as that contained in Standards is generally widely available online to users accessing it from their homes, this is clearly an unacceptable state of affairs.

- *Whether amendments to legislation are required to improve public access to adopted Australian Standards.*

As reported, the *Copyright Act 1968* (Cth) is a Federal statute that cannot be amended by the Western Australian Parliament. The Committee has recommended that those bodies who adopt Standards in regulations or local laws be mandated to keep a copy available for public viewing during office hours, but this is only mildly ameliorative of the problem. In a State as large as ours, those offices may be a long way away from the putative user, and availability during only office hours may be inconvenient even for those who live closer by.

- *Other measures to improve public access to adopted Australian Standard.*

Some of the recommendations made in this report would ameliorate the problem, such as ensuring that copies of adopted Standards are at least held somewhere with public access. However, the Committee's final recommendation below would, if implemented with the assistance of Commonwealth, State and Territory colleagues, provide a solution for all people with computer access.

- *Measures to improve access to adopted Australian Standards to the Joint Standing Committee on Delegated Legislation.*

In lieu of an overall solution to the problems of free access, our recommendations 9 and 10 would greatly assist this Committee in having access to Standards called up in instruments, thereby improving our ability to scrutinise delegated legislation.

- *Other related matters that arise during the course of the inquiry.*

The Committee has commented on the continued use of instruments that cite, with the full authority of the empowering statute, Standards or other written material ‘*as made from time to time*’. Even if the Committee were afforded full access to the Standards adopted, then further amendments to them that automatically become law without further parliamentary influence should be restricted, in our view. If not, then provision should be made for those amendments to be tabled in Parliament.

- 12.7 Looking back on the system and the model that exists for the creation and publication of Standards, whilst it is not for this Committee to dictate to a private company domiciled in another jurisdiction how it should act, it would be remiss of this Committee not to comment on one aspect of the SAI Global operation.
- 12.8 As a publicly listed company, SAI Global is heavily regulated, and its main concern must be for the generation of profit for its shareholders. On the other hand, it is not uncommon for such organisations to adopt practices for the good of the public as a whole, if only for reasons of favourable publicity.
- 12.9 Doubtless, if Standards were not there to be adopted, governments (and the public purse) would need to incur costs in creating standards of its own. That is the balance that is struck in allowing public servants to serve on committees. However, it would be refreshing to see some limited community payback from Standards Australia and SAI Global jointly by way of a relaxation of copyright or licensing terms to allow for some greater public access in return for all of the volunteers freely giving of their time to produce the Standards in the first place.
- 12.10 The Committee has in mind, by way of example, the bushfire Standard, a document that could prove to be vital to some. It was disappointing to hear that, as mentioned earlier at paragraph 6.50, following somewhat lengthy negotiations with SAI Global, the cost to Western Australia’s Building Commission of 145 hardcopies of AS 3959 (so that each local government could be provided with a copy of this potentially life-

saving guidance) was \$16,025.13.²³⁰ Free provision of Standards such as this to local governments or public libraries would be a welcome gesture.

12.11 There are other ways in which SAI Global could assist the public good at little cost to itself. A relaxation of library licence terms, for example, to allow for something that is already permitted by the *Copyright Act 1968* (Cth), i.e. the sharing with other regional libraries to assist people living in or companies based in rural areas.

12.12 In terms of assisting with access to regional areas, the Committee did consider whether, instead of having to pay online subscriptions for access to a document or a suite of documents, it might be possible to have a system whereby usage was paid for on a timed pro rata basis, for example paid access to the website facilities from a personal computer based on a meter system or the like. The Committee put this possibility to SAI Global. Its response was:

*Can some form of user pays method be devised, password protected, based on internet time usage? No. At present we do not have the appropriate technology.*²³¹

12.13 This is despite the fact that, as Peter Mullins told the Committee in evidence:

*on the IT side, in financial year 2016–17—so this financial year and next financial year—we are scheduled to spend around about \$15 million on totally refreshing our digital website and our e-commerce capability.*²³²

12.14 Pressed further on the matter of whether some sort of user pays method could be devised, password protected, based on internet time usage, Mr Mullins went on:

*It is not part of the design at the moment. The design assumes that we have search engines that help you. So a lot of the work we are doing is making it easier to identify a standard that you need and to significantly improve the way that you search, and using metadata and things to get in there. That is not part of the design at the moment. It is not something that we have thought about, because, again, how would we control copyright if you do that?*²³³

²³⁰ Peter Gow, Executive Director, Building Commission, Department of Commerce, Electronic Mail, 22 October 2015.

²³¹ Tabled by Peter Mullins, Chief Executive Officer, SAI Global Ltd., during hearing held on 14 October 2015, p 2.

²³² Peter Mullins, Chief Executive Officer, SAI Global Ltd., *Transcript of Evidence*, 14 October 2015, p 3.

²³³ *Ibid.* p 19.

USER PAYS

As with most, if not all developed economies, the Australian model is that the end-user pays to access Australian Standards.

- 12.15 This was pointed out to us by the then Commonwealth Minister for Industry and Science, Hon Ian Macfarlane MP.²³⁴ The model applies a pricing approach based on the idea that the most efficient method of allocating resources occurs when the consumer pays the full cost of the goods they consume or access. From this point of view, it may be said that the calling-up of Standards is cost effective for government, in that it is able to cite Standards free of charge and it is only those who wish to read those Standards who pay, ultimately, for their production.
- 12.16 This model simply identifies the public as the ‘users’. However, in terms of adopted Standards, they are only users to the extent that they are forced to be users to access laws that should otherwise be freely available on rule of law principles.
- 12.17 This Committee believes that identifying the public as the *user* is overly simplistic in these circumstances. Governments, in adopting ready-made Standards, rather than having to go to the trouble and expense of developing the detail to insert into regulatory instruments, should be more readily regarded as being the *user* in the sense intended. Acceptance of this might then lead to the adoption of a fairer model.
- 12.18 As the Water Corporation put it in its submission to the Inquiry (having mentioned a number of Standards):

*As compliance with aspects of these standards is required by law, and non-compliance may constitute an offence, the Corporation considers that they should be freely available, along with other delegated legislation.*²³⁵

MAIN RECOMMENDATION

- 12.19 The Committee accepts that there is no such thing as a ‘free lunch’ – someone, somewhere has to pay for it. However, in terms of community benefit, and indeed simplicity of process, governments ought to fund the entire process so that the public does not have to pay to access the Standards.
- 12.20 We heard evidence from the Department of Commerce and from the Secretary to the Victorian Department of Environment, Land, Water and Planning that, when it was decided that the National Construction Code should be freely available to all through an online presence, governments nationwide got together through the Building

²³⁴ Hon Ian Macfarlane MP, Minister for Industry and Science, Letter, 4 February 2015.

²³⁵ Submission 1 from The Water Corporation, 24 December 2014, p 1.

Minister's Forum of COAG to make it happen.²³⁶ Compensation was duly paid to the authors through contributions from all of the Australian jurisdictions, and the system is now recognised as a cost-effective model of transparency and efficiency.

- 12.21 Whilst the timing of a similar arrangement in respect of the catalogue of Standards owned by Standards Australia may depend on the outcome of the option clause in the agreement between Standards Australia and SAI Global (hence, our Recommendations 1 and 2 regarding early action to be taken in respect of that clause), to avoid if possible any just compensation as may be payable, immediate steps should be taken towards facilitating and funding a national arrangement for complete and free online access.
- 12.22 Taking a long-term view, it appears to the Committee that this can only bring financial advantages. Chapter 7 sets out the cost of access currently, perhaps close to \$1 million per year for the public sector of WA, some \$5.5 million overall in revenue per year to SAI Global (see paragraph 7.10) from Western Australia alone. Other more populous States across the country may extrapolate from those figures the estimated cost to themselves and their citizens on an annual basis.
- 12.23 At the same time, the financial figures published by Standards Australia indicate that the organisation as it currently exists requires perhaps only \$5 to \$7 million per annum to operate (total revenue of \$22.8 million, including around \$14.5 investment income, expenses of \$17.6 million in 2014/15), and adding some expenses that would be incurred in taking on the publishing role. Not much more than the total annual spend in Western Australia alone.
- 12.24 According to SAI Global's evidence, Standards Australia would probably need to expend a further \$10 million per year (if SAI Global were no longer part of the model) in '*marketing, sales, IT, help desks...*'.²³⁷ That figure must be in some doubt, as marketing and sales, for example, would no longer be necessary.
- 12.25 In any event, the financial benefits to governments as well as to businesses, the education sector and to the public of adopting a publicly-funded model are clear when applied nationwide. Furthermore, as well as providing free universal access to the public in both metropolitan and regional areas, there may be a number of other beneficial side effects, in that:
- the cost or provision overall may become cheaper. The financial imperatives placed on Standards Australia to '*regularly review and revise its collection of Australian Standards*' and to '*use best endeavours to produce new material*

²³⁶ Peter Gow, Executive Director, Building Commissioner, Department of Commerce, *Transcript of Evidence*, 14 August 2015, p 3 and Submission 23, Adam Fennessy, Secretary, Department of Environment, Land, Water and Planning, Victoria, undated p 2.

²³⁷ Peter Mullins, Chief Executive Officer, SAI Global Ltd., *Transcript of Evidence*, 14 October 2015, p 3.

that in any year corresponds to at least 7% of current Australian Standards at the start of the year', as apparently mandated by the PLA to protect the profits of SAI Global, need no longer apply

- businesses and other users need no longer suspect that Standards are being produced or updated needlessly for profit
- as pointed out by the Productivity Commission, in bearing the cost of producing Standards, governments will have the added incentive to consider more fully whether Standards should be referenced at all, improving the process of regulatory impact assessment
- free access is likely to increase compliance with Standards.

12.26 For all of these reasons, the Committee recommends that the Minister for Commerce seeks to arrange to have this matter placed on the agenda of the Industry and Skills Council of COAG as soon as possible, in the hope that the governments of the Commonwealth and other States and Territories might reach an agreement whereby universal free access is achieved through a nationwide publicly-funded model.

Finding 9: The Committee finds that, taking into account the monies spent annually by public bodies in Western Australia on copies of Australian Standards or access to the SAI Global Ltd. website, and extrapolating those figures across the country, there is a clear economic case to be made for governments centrally and jointly providing for the direct funding needs of Standards Australia at the conclusion of its arrangements with SAI Global Ltd. When the current costs to business and other organisations are added to this, the case for such direct provision is strengthened inordinately. Therefore, it is contemplated, universal public availability could be achieved, with accompanying greater compliance, at a reduced cost overall.

Recommendation 12: The Committee recommends that the Minister for Commerce works with his colleagues on the Industry and Skills Council of the Council of Australian Governments with a view to agreeing to a fully publicly-funded model for online access to the full suite of information in which copyright is currently held by Standards Australia, upon the cessation of the Publishing Licensing Agreement between Standards Australia and SAI Global Ltd., with an implementation target of either 2018 or 2023 depending on the terms of that agreement.



Mr Peter Abetz MLA
Chairman

16 June 2016

APPENDIX 1

STAKEHOLDERS, SUBMISSIONS AND HEARINGS

STAKEHOLDERS INVITED TO MAKE A SUBMISSION

The following stakeholders were invited to provide a submission:

- 1 Parliament of Victoria
- 2 Parliament of South Australia
- 3 Parliament of New South Wales
- 4 Parliament of Queensland
- 5 Parliament of Tasmania
- 6 Legislative Assembly of the Northern Territory
- 7 Legislative Assembly of the Australian Capital Territory
- 8 Parliament of Australia
- 9 Department of Mines and Petroleum
- 10 Department of Health
- 11 Department of Transport
- 12 Department of Education
- 13 Department of Environment Regulation
- 14 Department of Planning
- 15 Department of Fisheries
- 16 Department of Water
- 17 Department of Commerce
- 18 Worksafe
- 19 Department of Agriculture and Food
- 20 Department of Training and Development
- 21 Department of the Attorney General
- 22 Department of the Premier and Cabinet
- 23 Department of Local Government and Communities
- 24 State Solicitor's Office
- 25 Building Commission
- 26 State Law Publisher
- 27 Workcover
- 28 Water Corporation
- 29 State Library of Western Australia
- 30 Public Sector Commission
- 31 The Chamber of Commerce and Industry of Western Australia
- 32 The Chamber of Minerals and Energy of Western Australia
- 33 Australian Petroleum Production and Exploration Association
- 34 Engineers Australia

35	Independent Contractors of Australia
36	Master Builders Association of Western Australia
37	Housing Industry Association
38	Master Plumbers and Gasfitters Association Western Australia
39	Urban Development Institute of Australia, Western Australia Division Incorporated
40	Property Council of Australia, Western Australia
41	Australian Institute of Quantity Surveyors
42	Australian Institute of Building Surveyors
43	National Electrical and Communications Association Western Australia
44	Real Estate Institute of Australia
45	Motor Trade Association of Western Australia
46	Western Australia Road Transport Association
47	Law Society of Western Australia
48	IP Australia
49	Office of Parliamentary Counsel
50	Royal Automobile Club of Western Australia
51	Master Electricians Australia
52	Western Australia Police
53	Standards Australia
54	Media Entertainment and Arts Alliance - WA Branch
55	Western Australian Local Government Association
56	Australian Nursing Federation WA Branch
57	SAI Global Ltd.
58	Supreme Court of Western Australia
59	ChemCentre
60	Australian Federal Police
61	Australian Institute of Marine & Power Engineers
62	Australian Meat Industry Employees Union
63	Australian Meat Industry Employees Union SA & WA
64	Australian Maritime Officers Union (WA Area)
65	Australian Manufacturing Workers' Union
66	Professionals Australia & Media Entertainment and Arts Alliance
67	Australian Services Union
68	Australian Workers' Union
69	Breweries & Bottleyards Employees Industry Union
70	Communications Electrical Plumbing Union - Communication Workers Union
71	Communications Electrical Plumbing Union - Electrical and Plumbing
72	Construction, Forestry, Mining & Energy Union
73	Construction, Forestry, Mining & Energy Union - Mining & Energy Division WA
74	Construction, Forestry, Mining & Energy Union - Forestry & Furnishing Products Division
75	Civil Service Association
76	Community & Public Sector Union

77	Flight Attendants' Association - Domestic Division
78	Finance Sector Union
79	Health Services Union Western Australia
80	Independent Education Union
81	Maritime Union of Australia
82	National Tertiary Education Industry Union
83	National Union of Workers
84	Rail, Tram & Bus Industry Union
85	Shop Distributive and Allied Union
86	The Food Preservers' Union of Western Australia Union of Workers
87	State School Teachers' Union
88	Transport Workers' Union
89	Union of Christmas Island Workers
90	United Fire fighters' Union
91	United Voice
92	WA Grain Handling Salaried Officers Association
93	WA Prison Officers' Union
94	WA Police Union
95	Unions WA
96	All local governments within Western Australia

SUBMISSIONS RECEIVED

Submissions were received from the following parties. The submissions are available for viewing on the Committee's website at <http://www.parliament.wa.gov.au/del>

1	Water Corporation
2	Shire of Mundaring
3	Shire of Irwin
4	City of Nedlands
5	The Shop, Distributive and Allied Employee's Association, Western Australia
6	Department of Local Government and Communities
7	Department of Mines and Petroleum
8	Department of Commerce
9	City of Joondalup
10	Housing Industry Association
11	Unions WA
12	National and State Libraries Australasia
13	State Library of Western Australia
14	Australian Library and Information Association
15	SAI Global Ltd.
16	Department of Water
17	Urban Development Institute of Australia, Western Australia
18	City of Wanneroo

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| 19 | Standards Australia |
| 20 | Department of Environment Regulation |
| 21 | Public Libraries Western Australia Inc |
| 22 | Hon Dean Nalder MLA, Minister for Transport |
| 23 | Mr Andy Robinson, Marianne Robinson Real Estate |
| 24 | Ms Janine Freeman MLA, Member for Mirrabooka |
| 25 | Hon Simon Corbell MLA, Acting Chief Minister, Australian Capital Territory |
| 26 | Hon Ian Macfarlane MP, Federal Minister for Industry and Science |
| 27 | Hon John Elferink MLA, Attorney-General, Minister for Justice, Northern Territory |
| 28 | Hon Will Hodgman MP, Premier, Tasmania |
| 29 | Mr Adam Fennessy, Secretary, Department of Environment, Land, Water and Planning, Victoria |
| 30 | Mr Dave Stewart, Director General, Department of Premier and Cabinet, Queensland |

PUBLIC HEARINGS

The Committee held public hearings for interested parties, in Perth on 14 August 2015, 21 August 2015, 14 October 2015 and 18 November 2015. A Summary of the witnesses who appeared before the Committee is set out below. Transcripts of the public hearings are available on the Committee's website at <http://www.parliament.wa.gov.au/del>

14 August 2016

Standards Australia

Mr Adam Stingemore, General Manager, Stakeholder Engagement and Public Affairs

Department of Commerce

Mr Ian Munns, Acting Executive Director, WorkSafe

Mr Peter Gow, Executive Director, Building Commission

Mr Kenneth Bowron, Executive Director, EnergySafety

Department of Local Government and Communities

Mr Brad Jolly, Executive Director, Sector Regulation and Support

Ms Mary Adam, Director, Legislation and Statutory Support

Parliamentary Counsel's Office, Department of the Attorney General

Mr Geoff Lawn, Acting Parliamentary Counsel

Department of the Premier and Cabinet

Mr David Smith, Deputy Director General

Housing Industry Association

Mr John Gelavis, Executive Director

21 August 2016

Master Electricians Australia

Mr Alan McCallum, Acting State Manager

The Shop Distributive and Allied Employee's Association of Western Australia

Ms Sarah Haynes, Industrial Officer

Public Libraries Western Australia; State Library of Western Australia; National and State Libraries Australasia

Ms Debra Summers, President, Public Libraries Western Australia (Inc)

Ms Alison Sutherland, Acting Chief Executive Officer and State Librarian, State Library of Western Australia

Ms Libby Cass, Manager – National and State Libraries Australasia eResources Consortium, National Library of Australia

Unions WA

Ms Meredith Hammat, Secretary

Dr Tim Dymond, Organising and Strategic Research Officer

14 October 2015

SAI Global Limited

Mr Peter Mullins, Chief Executive Officer

Ms Hanna Myllyoja, Group General Counsel and Company Secretary

18 November 2015

WA Nominee on the Board of Standards Australia

Mr Kenneth Bowron, Executive Director, EnergySafety, Department of Commerce

APPENDIX 2

STANDARDS AUSTRALIA MEMBERS

STANDARDS AUSTRALIA MEMBERS (AS AT 11 MAY 2016)²³⁸

Australasian Fire and Emergency
Australian Institute of Mining and Metallurgy
Australian Acoustical Society
Australian Aluminium Council Ltd.
Australian Automobile Association
Australian Building Codes Board
Australian Chamber of Commerce and Industry
Australian Communication Consumer Action Network
Australian Computer Society Inc.
Australian Council on Healthcare Standards
Australian Council of Trade Unions
Australian Dental Association Inc.
Australian Industry Group
Australian Information Industry Association
Australian Institute of Architects
Australian Institute of Building
Australian Institute of Petroleum
Australian Medical Association
Australian Nursing Federation and Midwifery Federation
Australian Organisation for Quality Inc.
Australian Paint Manufacturers Federation
Australian Retailers Association
Australian Steel Institute
Australian Window Association
Australian Procurement and Construction Council Inc.
Austroads Ltd.
Bureau of Steel Manufacturers of Australia
Cement Concrete and Aggregates Australia
CHOICE
Civil Contractors Federation
Communications Alliance
Concrete Institute of Australia
Concrete Pipe Association of Australasia
Concrete Information Systems Australia Pty Ltd.

²³⁸ <http://www.standards.org.au/OurOrganisation/AboutUs/Pages/Member-Organisations.aspx>.
Viewed 11 May 2016.

Consult Australia
Consumer Electronics Suppliers Association
Council of Small Business Organisations of Australia Ltd.
Council of Textile and Fashion Industries of Australia Ltd.
Department of Industry
Energy Networks Association
Engineers Australia
Exemplar Global
Federal Chamber of Automotive Industries
Fire Protection Association Australia
Forest and Wood Products Australia Ltd.
Furntech
Galvanizers Association of Australia
Gas Energy Australia
Government of South Australia
Housing Industry Association
Insurance Council of Australia
JAS-ANZ
Lighting Council of Australia
Master Builders Australia
Master Plumbers Australia
Materials Australia
Medical Technology Association of Australia
Minerals Council of Australia
National Association of Testing Authorities Australia
National Electrical and Communications Australia
National Retail Association
National Safety Council of Australia
NSW Business Chamber
NSW Fair Trading
Packaging Council of Australia
Plastics and Chemicals Industries Association
Plastics Industry Pipe Association of Australia Ltd.
Property Council of Australia
Royal Australian Chemical Institute Inc.
Telstra Corporation Ltd.
The Australasian Corrosion Association Inc.
Energy Safe Victoria
WA Government, Office of Energy Safety
Water Services Association of Australia Inc.
Welding Technology Institute of Australia

APPENDIX 3

TERMS OF USE OF STANDARDS ONLINE SERVICE

Full Terms and Conditions of Use

By using this Standards On-Line service, you the **Licensee**, are agreeing to the terms and conditions of this contract.

The **Service** is supplied by SAI Global Limited ABN 67 050 611 642, 286 Sussex Street, Sydney NSW 2000, Australia (**Licensor**)

The **Service** is the provision of online, web-based access to a **Licensee**-nominated collection of current **Publications** in electronic format.

1. Definitions and Interpretations

Publications means Standards and other publications for which the **Licensor** is an authorised distributor for:

- AAMI - Association for Advancement of Medical Instrumentation.
- AENOR - Asociacion Espanola de Normalizacion.
- AHAM - Association of Home Appliance Manufacturers.
- ANSI - American National Standards Institute.
- ANSTAT - SAI Global.
- API - American Petroleum Institute.
- ARI - Air-conditioning, Heating and Refrigeration Institute.
- ASA - Acoustical Society of America.
- ASHRAE - American Society of Heating, Refrigeration & Air Conditioning Engineers.
- AWWA - American Water Works Association.
- CEI - Comitato Elettrotecnico Italiano.
- CIA - Concrete Institute of Australia.
- DEFFORM - UK Ministry of Defence.
- DEFSTAN - UK Ministry of Defence.
- ENA - Energy Networks Association.
- ETSI - European Telecommunications Standards Institute.
- Ford - Ford Motor Company.
- GEIA - Government Electronics and Information Technology Association.
- EN - as adopted and published by the National Standards Authority of Ireland.
- ISO - International Organization for Standardization.
- IEC - International Electrotechnical Commission.
- JSA - Japanese Standards Association.
- MIL - US Military.
- NACE - National Association of Corrosion Engineers.
- NETA - International Electrical Testing Association.
- NFPAS - National Fluid Power Association.
- NSAI - National Standards Authority of Ireland.
- SAI Global - SAI Global.
- Safety Culture - Safety Culture.

- Standards Australia - Australian Standards, Joint ISO/Australian Standards, Joint NZ/Australian Standards, current Draft Australian Standards, and amendments to Australian Standards. Australian Standard® is the registered trademark of Standards Australia Limited. Australian Standard® branded standards and other publications are distributed by the Licensor under licence.
- Wood Solutions - Forest and Wood Products Australia.

Commencement Date means the date that the **Service** is initially provided to the **Licensee**, as set out in section 4.

Initial Term is the initial 12 months of the agreement from the **Commencement Date**.

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Internal Use means use of the **Service** within the **Licensee** that is the company or other legal entity identified by, for example in Australia, the Australian Business Number (ABN) provided.

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Licensor means the supplier of the **Service**.

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The **Licensor** is not liable to indemnify the **Licensee** and must not be joined by the **Licensee** in relation to any claim or proceedings made or brought by the **Licensee** arising from the use or inability to use the **Service**.

The **Licensee** agrees to indemnify and keep indemnified the **Licensor** against any claim by a third party (whether in negligence or otherwise) for loss or damage of any kind arising from the **Licensee's** use or inability to use the **Service**.

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3. Right of Licensor to vary the agreement

The **Licensor** may make the following variations to the **Service** or the terms of this Agreement without notice at any time:

1. Adjustment of pricing due to an increase of Government charges or taxes;
2. Adjustment of pricing for the Services where there is a variation to the Services required by the **Licensee**.

6. GST

Unless expressly included, the consideration for any supply made under or in connection with this agreement does not include GST. To the extent that any supply made under or in connection with this agreement is a taxable supply, the consideration for that supply is increased by amount equal to that consideration multiplied by the rate at which GST is imposed in respect of that supply. For the purposes of this term, GST means the GST as defined in the *A New Tax System (Goods and Services Tax) Act 1999* and words used in this term that have a defined meaning in that Act have the same meaning in this term unless the context requires otherwise.

7. Optional Extended Copy / Paste Licence

Please contact your Librarian / Knowledge Manager / System Administrator to understand if your organisation has this extended licence.

These additional Terms and Conditions pertain to a **Licensee** who has extended the Terms & Conditions of the **Service** to be able to reproduce content from Australian Standards.

Licensee is permitted to copy and paste up to 25% of the content from the Australian Standards into **Licensee's** internal documents for internal use only.

For reproduction of >25% of any Australian Standard, or distribution of content outside **Licensee's** organisation, **Licensee** must seek permission in writing from the SAI Global, Copyright Officer at copyright@saiglobal.com.

All content copied from an Australian Standard must be clearly identified as such in the **Licensee's** internal document and be accompanied by the following statement for each and every instance of the copied content, e.g. under the copied text/diagram or in the footer as appropriate for formatting integrity:

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If the **Licensee** wishes to continue reproducing Australian Standards content, the **Licensee** can choose to either:

- Renew the **Service**, including the Extended Copy/Paste Licence; or
- Establish a separate copyright licence by contacting the SAI Global, Copyright Officer at copyright@saiglobal.com.

The **Licensor** may vary all other terms and conditions of this agreement and the annual **Subscription** fee payable for the **Service** by notice not less than 30 days before the next anniversary of the **Commencement Date**, to take effect from that date

4. Term and termination or suspension of the Service

The **Service** will not commence until the **Licensor** has received the full **Subscription** amount for the **Initial Term** and the **Licensee** has elected the form of electronic access to the **Service**. The **Commencement Date** for the **Service** is, as applicable, the date that the log-in and password is emailed to the **Licensee** or the day on which the IP address(es) is provided to the **Licensor** by the **Licensee**.

This agreement is for the **Initial Term**, and may be renewed annually by the **Licensee** by payment of a further 12 months subscription fee on or before the due date, which, unless otherwise agreed, is the anniversary of the **Commencement Date**. Irrespective of any days of grace that may be allowed by the **Licensor**, the **Licensor** reserves the right to suspend the provision of the **Service** and terminate the agreement if payment is not received by this date. Subscriptions are non-refundable.

Without prejudice to any other remedies the **Licensor** may have against the **Licensee** for breach of this agreement, the **Licensor** may terminate this agreement or suspend the **Service** immediately if the **Licensee** commits any breach of this agreement not capable of remedy or does not remedy a breach capable of remedy within 14 days of the receipt of a notice specifying the breach.

The **Licensor** may terminate the agreement, and provision of the **Service**, by giving notice to the **Licensee** not less than 30 days before the next anniversary of the **Commencement Date**.

Printed or downloaded electronic copies of any part of the **Service** must be removed or destroyed on non-renewal of the **Service** subscription or termination of this agreement. At its discretion, the **Licensor** may require the **Licensee** at its own cost to provide a certificate that removal or destruction has occurred.

From the date of termination, the licence granted under this agreement also terminates.

5. Governing Law

This agreement is governed by and must be construed in accordance with the laws of the State of New South Wales.

The **Licensee** acknowledges that some Australian Standards contain content that is not the copyright of Standards Australia. Where this is the case, the Australian Standard clearly states this. This non-Standards Australia copyright content is not to be reproduced under this Extended Copy / Paste Licence.

APPENDIX 4

TABLES OF SPEND ON AUSTRALIAN STANDARDS

STATE GOVERNMENT DEPARTMENTS (INCLUDING PORTFOLIO BODIES)

Department	2012/13 (\$)	2013/14 (\$)
Aboriginal Affairs	0	0
Agriculture and Food	31,451	6,130
Attorney General	2,836	3,766
Building and Construction Industry Training Fund	0	0
Busselton Water	2,596	1,790
Child Protection and Family Support	206	82
Combat Sports Commission	0	0
Commerce	54,968	59,527
Corrective Services	0	0
Country High Schools Hostels Authority	0	0
Culture and the Arts	84	1,258
Disability Services Commission	1,032	468
Education	1,654	2,224
Education Services	0	404
Electoral Affairs	0	0
Environment Regulation	N/A	6,352
Finance (Building Works and Management)	9,249	9,556
Finance (Public Utilities Office)	1,116	149
Fire and Emergency Services	6,359	9,255
Fisheries	0	0
Forest Products Commission	283	8,440
Gascoyne Development Commission	0	0
Great Southern Development Commission	0	0
Goldfields Esperance Development Commission	0	0
Health and Disability Services	0	128
Housing Authority	19,131	12,887
Kimberley Development Commission	0	164
Landcorp	590	2,679
Landgate	5,956	5,845
Lands	0	0
Local Government and Communities (inc. Women's Interests)	0	150
Main Roads WA	47,840	51,203
Mental Health Commission	0	0
Metropolitan Redevelopment Authority	0	2,473
Mid-West Development Commission	0	0
Mines and Petroleum	43,515	47,692
Parks and Wildlife	13,383	6,580
Peel Development Commission	85	0
Perth Zoo	367	379

Pilbara Development Commission	0	0
Planning	2,596	4,030
Police	5,819	3,057
Public Transport Authority	30,240	39,363
Public Utilities Office, Department of Finance	1,116	149
Racing, Gaming and Liquor	0	290
Regional Development	2,226	1,036
Rottnest Island Authority	675	702
School Curriculum and Standards Authority	84	144
Small Business Development Corporation	268	0
South West Development Commission	0	0
Sport and Recreation	1,537	2,402
State Emergency Management Committee	0	0
State Library	18,456	15,069
Training and Workforce Development	629	1,221
Transport	15,104	17,658
Treasury	2,458	1,365
Venues West	0	449
Water	4,806	5,951
Water Corporation	56,017	52,425
WA Health	102,904	105,241
WA Institute of Sport	0	0
Wheatbelt Development Commission	0	0

LOCAL GOVERNMENTS

Local Government	2012/13 (\$)	2013/14 (\$)
Town of Bassendean	654	788
City of Bayswater	3,191	3,968
City of Belmont	5,460	6,822
Shire of Bridgetown-Greenbushes	1,277	879
City of Bunbury	4,800	6,404
City of Busselton	1,895	2,256
Shire of Capel	3,431	3,346
City of Cockburn	Not known	20,535
Shire of Collie	1,501	402
Shire of Cue	0	0
Shire of Dardanup	0	0
Shire of Denmark	1,889	1,974
Shire of Derby West Kimberley	0	2,436
Shire of Donnybrook-Balingup	2,590	2,698
Town of East Fremantle	118	0
Shire of Gingin	0	0
City of Gosnells	8,348	8,611
City of Greater Geraldton	10,317	19,644
Shire of Harvey	0	0
Shire of Irwin-Dongara-Port Denison	0	0
City of Joondalup	6,825	7,545

Shire of Kalamunda	Not known	1,799
Shire of Kellerberrin	0	0
City of Kwinana	6,718	7,887
City of Mandurah	4,287	6,440
Shire of Manjimup	1,980	2,089
City of Melville	6,604	7,375
Shire of Menzies	0	0
Shire of Mundaring	3,546	6,478
Shire of Murray	2,803	3,645
Shire of Pingelly	0	0
Shire of Plantagenet	0	0
Shire of Ravensthorpe	0	0
City of Rockingham	18,680	11,478
City of Sterling	21,125	16,500
Shire of Toodyay	1,981	1,980
Town of Victoria Park	4,194	7,723
Shire of Wyalkatchem	1,559	0
Shire of Yalgoo	0	0