



THIRTY-NINTH PARLIAMENT

REPORT 88

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

**REVIEW OF THE GOVERNMENT RESPONSE TO
REPORT 84 - ACCESS TO AUSTRALIAN
STANDARDS ADOPTED IN DELEGATED
LEGISLATION**

Presented by:

Mr Peter Abetz MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chair)

September 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

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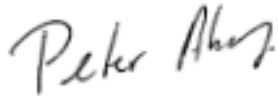
IBSN 978-1-925149-82-1

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

REPORT 88: REVIEW OF THE GOVERNMENT RESPONSE TO REPORT 84 - ACCESS TO AUSTRALIAN STANDARDS ADOPTED IN DELEGATED LEGISLATION

- 1.1 The Joint Standing Committee on Delegated Legislation (Committee) tabled its 84th Report, *Access to Australian Standards Adopted in Delegated Legislation*, in both Houses on 23 June 2016.
- 1.2 In accordance with Standing Order 191(1), the Committee requested a government response to that report, which was tabled in both Houses on 25 August 2016. The response is attached as **Appendix 1**.
- 1.3 The Committee acknowledges the Government's response to Report 84, and takes this opportunity to bring to the attention of both Houses the matters raised in that response.

Recommendation 1: The Committee recommends that both Houses of Parliament give consideration to the matters raised in the Government's response to Report 84 of the Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation*.



Mr Peter Abetz MLA
Chairman

8 September 2016

APPENDIX 1

GOVERNMENT RESPONSE

STATE GOVERNMENT RESPONSE TO JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION REPORT 84, ACCESS TO AUSTRALIAN STANDARDS ADOPTED IN DELEGATED LEGISLATION

RECOMMENDATION	RESPONSE
<p>Recommendation 1</p> <p>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.</p>	<p>Supported in principle</p> <p>Officials from Standards Australia have advised the Department of Commerce that the Committee's Report 84 has been raised, and that a general meeting of Standards Australia members to discuss future arrangements is supported.</p>
<p>Recommendation 2</p> <p>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.</p>	<p>Supported</p> <p>The Minister for Commerce has commenced action to have the matter listed for consideration at the next meeting of the Council of Australian Governments (COAG) Industry and Skills Council.</p>
<p>Recommendation 3</p> <p>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.</p>	<p>Supported in part</p> <p>A blanket Government requirement for agencies to supply and fund on request free copies of Standards to members of the public to keep is not supported. It would be onerous, and would fail to take account of the large variation between State agencies in the scope of standards referenced in legislation, the unknown levels of demand for public access to those standards and the rapidly changing digital information environment.</p> <p>However, a more flexible approach is supported. It would be based on case-by-case consideration of the estimated costs and benefits of accessing the Standards proposed to be referenced in particular legislation, and options for funding that access. (See response to Recommendation 11.) For example, some agencies will keep hard copies of Standards on their premises, or make available electronic copies for the public to consult or borrow. Where the decision is to support agency funded inspection or loan access to the Standards in question, data on usage over time could inform future funding decisions.</p>

RECOMMENDATION	RESPONSE
<p>Recommendation 4</p> <p>That section 43 of the <i>Interpretation Act 1984</i>, 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.</p>	<p>Greater flexibility should also be considered in the range of end-user products and cost options, including digital solutions, available to governments to support access to standards referenced in legislation. (The outcome of work undertaken nationally to give effect to Recommendation 12 may also address this issue.)</p> <p>Supported in principle</p> <p>Further consideration needs to be given as to how best to achieve this outcome legislatively, given the number and variety of existing provisions in Western Australian legislation that empower incorporation of material by reference. Some flexibility will be required to enable agencies to explore the most appropriate mechanism to enable a copy of the adopted material to be inspected by members of the public. It should also be a requirement that the relevant agency notify the public, in a suitable way (for example on their website), of the availability of the adopted material and where it can be inspected.</p>
<p>Recommendation 5</p> <p>That section 5.94 of the <i>Local Government Act 1995</i>, 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.</p>	<p>Not supported</p> <p>Local governments differ vastly in size and location. The proposal is likely to place significant costs on them, since they would have a duty to acquire and make available copies of every Standard mentioned in their local laws. There does not appear to be a strong demand by members of the general public to access these Standards. It is also uncertain whether accessing these documents will be useful to a layperson, given the complex technical information that Australian Standards tend to contain. At this stage, the likely costs of the proposal would seem to outweigh the perceived benefits.</p>
<p>Recommendation 6</p> <p>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.</p>	<p>Supported in principle</p> <p>The proposal will be considered when the Premier's Circular 2014/01 is reviewed in 2017. It is also noted that flexibility needs to be maintained to accommodate the likely future development of better digital solutions to support access to standards referenced in legislation.</p>
<p>Recommendation 7</p> <p>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.</p>	<p>Supported in principle</p> <p>The proposed amendments to the Local Laws Explanatory Memoranda Directions 2010 will be considered when the Premier's Circular 2014/01 is reviewed in 2017. It is also noted that flexibility needs to be maintained to accommodate the likely future development of better digital solutions to support access to standards referenced in legislation.</p>

RECOMMENDATION	RESPONSE
<p>Recommendation 8</p> <p>That consideration be given to amending section 43 of the <i>Interpretation Act 1984</i>, 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.</p>	<p>Supported in principle</p> <p>This default position for incorporation by reference is appropriate, and deviations should have to be justified. Further consideration needs to be given as to how best to achieve this outcome legislatively, given the number and variety of existing provisions in Western Australian legislation that empower incorporation of material by reference.</p>
<p>Recommendation 9</p> <p>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.</p>	<p>Supported</p> <p>The proposal will be considered when the Premier's Circular 2014/01 is reviewed in 2017.</p>
<p>Recommendation 10</p> <p>That section 42 of the <i>Interpretation Act 1984</i>, 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.</p>	<p>Supported in principle</p> <p>This is the approach adopted in Victoria. However, to achieve the same outcome in Western Australia, a different approach to the tabling process is required. The Parliamentary Counsel's Office currently provides copies of subsidiary legislation, extracted from the <i>Gazette</i>, to both Houses of Parliament for tabling on behalf of government agencies. Any additional material that the agency would be required to table would have to be provided to Parliamentary Counsel's Office, since the Parliamentary Counsel's Office could not source this material. It is also noted that flexibility needs to be maintained to accommodate the likely future development of better digital solutions to support access to standards referenced in legislation.</p>
<p>Recommendation 11</p> <p>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.</p>	<p>Supported in principle</p> <p>Whilst the costs of accessing standards should already be captured as part of the compliance costs of a regulatory proposal in the Regulatory Impact Assessment process (RIA), there is currently no requirement to identify them separately from other compliance costs. Therefore, to help ensure the appropriate use of Australian Standards referenced in legislation, these considerations will be made more explicit in the RIA process through updated guidance materials and ongoing education and training.</p>

RECOMMENDATION	RESPONSE
<p>Recommendation 12</p> <p>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.</p>	<p>Supported</p> <p>The Minister for Commerce has initiated action to have this matter listed for consideration at the next meeting of the COAG Industry and Skills Council.</p> <p>The solution to ensuring reasonable public access to Australian Standards adopted in delegated legislation is a national one. It requires agreement by all Australian Governments on consistent approaches to legislation that empowers incorporation of material by reference, and the support of Standards Australia in facilitating greater flexibility in the range of end-user products and cost options, including digital solutions, available to governments to support access to standards referenced in legislation.</p>