



AUSTRALIAN  
COMPETITION  
& CONSUMER  
COMMISSION

# Statement of Reasons

Notification CB10000484

lodged by

The National Copyright Unit on behalf of the Copyright  
Advisory Group for TAFEs (CAG TAFE)

in respect of

collective bargaining with Standards Australia Limited,  
SAI Global and Techstreet

Notification number: CB10000484

Date: 2 February 2023

Commissioners: Keogh  
Lowe  
Brakey

## Summary

The Australian Competition and Consumer Commission (**ACCC**) does not object to the collective bargaining notification CB10000484 lodged by The National Copyright Unit (**NCU**). Under the notification, the Notifying Parties seek to collectively negotiate licence agreements for access to standards in technical and further education institutions (**TAFEs**) with Standards Australia Limited, SAI Global Australia Pty Ltd and/or Techstreet LLC.

TAFEs need a licence from Standards Australia (or a third-party distributor) to use and refer to standards in courses with students to ensure students are aware of and are able to comply with relevant standards in their post-qualification work.

The ACCC is satisfied that the notified collective negotiations are likely to result in public benefits in the form of reduced overall transaction costs for the Notifying Parties and the negotiation of more efficient terms and conditions of access to standards by TAFEs. There is likely to be minimal, if any, public detriment.

The ACCC has decided to allow the notification to remain in force for a period of 10 years, as requested by NCU. The ACCC considers the likely benefits of the conduct will continue for the duration of the conduct. The extended notification period is also unlikely to increase the minimal public detriment which is likely to result from the conduct and the ACCC may act to remove the protection by the notification at a later stage. The notification was lodged on 15 November 2022 and the legal protection commenced on 29 November 2022. It will remain in force until 14 November 2032 unless or until the ACCC ends the protection provided by the notification or the notification is withdrawn by NCU.

The ACCC may revisit this assessment at any time if circumstances change or the ACCC receives information that suggests the public benefits no longer outweigh the public detriments.

## 1. The notification

1.1 On 15 November 2022, The National Copyright Unit (**NCU**), on behalf of the Copyright Advisory Group for TAFEs (**CAG TAFE**) and its members, Victorian TAFEs (as listed in Annexure A of the Notification) and other TAFE entities who may elect to join this group in the future (together, the **Notifying Parties**), lodged a notification to collectively bargain with Standards Australia Limited (**Standards Australia**), SAI Global Australia Pty Ltd (**SAI Global**) and/or Techstreet LLC (**Techstreet**).

1.2 Broadly, the Notifying Parties seek to:

- collectively bargain with Standards Australia, SAI Global and/or Techstreet (as relevant) a fit for purpose licence or licence terms for the use of standards in TAFEs; and
- authorise NCU to represent the Notifying Parties in the event of any dispute resolution process with Standards Australia, SAI Global and/or Techstreet

(the **Notified Conduct**).

- 1.3 The current CAG TAFE members are the entities listed in Annexure A of the Notification, other than Victorian TAFEs.<sup>1</sup> Although CAG TAFE is not responsible for copyright policy and administration for Victorian TAFEs; CAG TAFE and Victorian TAFEs intend to negotiate together for the purposes of the Notified Conduct.
- 1.4 The Notified Conduct does not include a collective boycott, and any Notifying Party that does not wish to participate in the Notified Conduct may negotiate with Standards Australia, SAI Global and/or Techstreet individually, and may cease to participate in the Notified Conduct at any time.
- 1.5 The Notifying Parties have requested that the notification remain in force for 10 years to ensure that negotiations can be facilitated in an effective manner, and to accommodate for negotiations in the short to medium term.
- 1.6 Businesses which meet certain criteria may lodge notifications to gain protection from legal action under the competition provisions in Part IV of the Competition and Consumer Act 2010 (the CCA) for arrangements that may otherwise risk breaching those provisions in the CCA, but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.7 By lodging a notification with the ACCC, the Notifying Parties seek legal protection to participate in collective bargaining that may otherwise breach competition laws because it involves joint action by competitors.
- 1.8 The Notifying Parties submit that standards are an essential input to the services that TAFEs offer. As such, the Notifying Parties submit the rationale for the Notified Conduct is, to some extent, to address the imbalance in bargaining power that currently exists between Standards Australia and each TAFE institution which is seeking to acquire an essential input for its business from Standards Australia (or SAI Global and/or Techstreet, as third-party distributors).

## 2. Background

- 2.1 NCU is the specialist copyright team that reports to and supports CAG TAFE. CAG TAFE is comprised of senior representatives from TAFE providers and is responsible for copyright policy and administration for TAFEs across Australia (except Victoria).
- 2.2 Standards cover a variety of subjects and set out specifications, procedures and guidelines aimed at ensuring that products, services, and systems are safe, consistent, and reliable. TAFEs need a licence from Standards Australia (or a third-party distributor) to use and refer to standards in courses with students to ensure students are aware of and are able to comply with relevant standards in their post-qualification work.
- 2.3 The targets in collective bargaining are Standards Australia, SAI Global and Techstreet. Standards Australia is the principal Australian body involved in the development of standards. SAI Global and Techstreet are third party distributors that provide access to standards developed by Standards Australia.

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<sup>1</sup> Victorian TAFEs are represented collectively for copyright purposes but operate separately from CAG TAFE.

### 3. Consultation

- 3.1 The ACCC invited submissions from each of Standards Australia, SAI Global and Techstreet. The ACCC received a submission from Standards Australia.
- 3.2 Standards Australia does not oppose the Notified Conduct, although it submits that 3 years is a more appropriate period for the notification. Broadly, Standards Australia states that:
- The period covered by the Notification should be a time sufficient to allow for completion of the design and implementation of the new licence (and entry into contracts).
  - Once a TAFE-specific licence has been developed, Standards Australia expects the licence to continue to be available through its distributors.
  - Future negotiations are likely to be limited to renewals, pricing, and TAFE-specific variations to the general licence.
- 3.3 Standards Australia also addressed a number of assertions and claims raised by the Notifying Parties in the Notification.
- 3.4 In response to Standards Australia's submission, the NCU submits that 10 years is an appropriate period of time for the notification to be in force as this would ensure that there is adequate time to negotiate new licence agreements and facilitate any ongoing negotiations and is reasonable given the complexity of the issues and the number of stakeholders involved. Some TAFE institutions have entered into multi-year agreements and a 3-year term would not account for the need to negotiate prior to, or upon, the expiry of those agreements.

### 4. ACCC's assessment

- 4.1 The Notified Conduct would or might constitute collective bargaining within the meaning of Division 1 of Part IV of the CCA. The ACCC has considered the Notified Conduct in accordance with section 93AC of the CCA, which requires the ACCC to consider the likely public benefits and public detriments.
- 4.2 In assessing the Notified Conduct, the ACCC considers that:
- the acquisition of standards occurs nationally, and
  - the likely future without the Notified Conduct is that TAFE providers and/or TAFE institutions will negotiate licence arrangements directly with Standards Australia, SAI Global and/or Techstreet, on an independent basis.

#### Public benefit

- 4.3 The CCA does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that in considering public benefits:

*...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by society including as*

*one of its principal elements ... the achievement of the economic goals of efficiency and progress.<sup>2</sup>*

- 4.4 The ACCC considers that the Notified Conduct is likely to result in public benefit by reducing transactions costs for the Notifying Parties (and potentially Standards Australia, SAI Global and Techstreet) when negotiating terms and conditions for access to standards. This is achieved by having a single negotiation between the Notifying Parties and each standards body for the bulk of terms and conditions rather than a series of separate negotiations.
- 4.5 By lowering the costs of participating in negotiations for each of the Notifying Parties, the ACCC considers the Notified Conduct will encourage more TAFEs to participate in negotiation of terms and conditions of access to standards. Lower negotiation costs will also make it more likely that the three Standards bodies will also participate in negotiations rather than offering standard terms and conditions. This is likely to result in the negotiation of terms of access that better reflect the educational use of standards. Further, individual TAFEs are also likely to be able to better focus individual negotiations (where necessary) only on those terms and conditions of access that are of specific relevance to them.
- 4.6 The ACCC therefore considers the Notified Conduct will result in public benefit through the negotiation of more efficient terms and conditions of access to standards by TAFEs at lower costs to all parties.

## Public detriment

- 4.7 The CCA does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>3</sup>*

- 4.8 The ACCC considers the Notified Conduct is likely to result in minimal, if any, public detriment arising from a reduction in competition between the Notifying Parties to acquire standards. In particular:
- Participation in the Notified Conduct is voluntary. If any of the Notifying Parties wish to negotiate directly with Standards Australia, SAI Global or Techstreet, they remain free to do so.
  - Participation in the Notified Conduct does not involve a collective boycott, so the targets will not be compelled to engage with or accept the terms offered collectively by the Notifying Parties.
  - The Notifying Parties represent a relatively small group of potential acquirers of standards, and customers other than the Notifying Parties will continue to deal separately with Standards Australia, SAI Global and/or

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<sup>2</sup> *Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.*

<sup>3</sup> *Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.*

Techstreet. Accordingly, the Notified Conduct is unlikely to have any material adverse effect on the business of the targets.

## Balance of public benefit and detriment

4.9 For the reasons outlined in this Statement of Reasons, the ACCC is satisfied that the Notified Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Notified Conduct.

## Period for which the notification will be in force

4.10 A collective bargaining notification (and therefore the protection it confers) will be in force for a period of 3 years from the date it is lodged unless the ACCC determines that another period is appropriate, or the notification is withdrawn or revoked.<sup>4</sup>

4.11 In this case, NCU requests the notification to be in force for a period of 10 years. SA submitted that 3 years was a more appropriate period.

4.12 The ACCC has determined that the notification will remain in force until 14 November 2032 (i.e. 10 years from the date it was lodged) for the following reasons:

- The likely benefits of the Notified Conduct will continue for the duration of the Notified Conduct. 10 years will provide adequate time to negotiate new licence agreements in the medium term without having to lodge another notification - particularly for those TAFE institutions that have existing multi-year agreements which may delay commencement of negotiations.
- The extended notification period is unlikely to increase the minimal public detriment which is likely to result from the Notified Conduct and the targets can choose not to negotiate with the collective at any time.
- The ACCC may act to remove the protection afforded by the notification at a later stage if it is satisfied that the public benefit does not outweigh the public detriment.<sup>5</sup>

## 5. Decision

5.1 The ACCC considers that the Notified Conduct is likely to result in public benefits that will outweigh the likely public detriment.

5.2 With respect to the period for which the notification will remain in force, for the reasons set out in paragraph 4.12, in accordance with s 93AD(5), the ACCC is satisfied that a 10-year notification period is appropriate in all the circumstances, being the period ending on 14 November 2032.

5.3 Accordingly, the ACCC does not object to the notification at this time. The protection provided by notification CB10000484 commenced on 29 November 2022 and will continue until 14 November 2032. However, the ACCC may

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<sup>4</sup> Section 93AD(3)(c) of the CCA.

<sup>5</sup> Section 93AC of the CCA.

revoke the notification at any time if it forms the view that the public benefits do not outweigh the public detriments.

- 5.4 This Statement of Reasons serves as the written notice and written statement of reasons for giving that notice required by section 93AD(6) of the CCA.