

PUBLIC VERSION

Our ref: TYZ\ROKE\1000-159-127
Partner: Tihana Zuk
Direct line: [REDACTED]
Email: [REDACTED]
Contact: Roderick Kennedy
Direct line: [REDACTED]
Email: [REDACTED]

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BY EMAIL

Mr David Hatfield
Australian Competition & Consumer Commission
27/135 King Street
SYDNEY NSW 2000

Ashurst Australia
Level 11
5 Martin Place
Sydney NSW 2000
Australia

GPO Box 9938
Sydney NSW 2001
Australia

Tel +61 2 9258 6000
Fax +61 2 9258 6999
DX 388 Sydney
www.ashurst.com



Dear Mr Hatfield,

CB10000484 - The National Copyright Unit – Standards Australia's submission

We act for Standards Australia Limited (**Standards Australia**).

Standards Australia appreciates the opportunity to provide a submission in relation to Collective Bargaining Notification CB10000484 (**Notification**) lodged by The National Copyright Unit (**NCU**) on behalf of the Copyright Advisory Group for TAFEs (**CAG TAFE**).¹ Standards Australia is committed to working in the public interest and facilitating access to Australian Standards and other licensed content. Standards Australia recognises there is public benefit in ensuring that educational institutions, like the TAFEs, are able to access Australian Standards on terms that enable them to incorporate standards in their teaching materials and provide educational services to students. Accordingly, Standards Australia does not oppose the Notification. However, it considers that a 10-year term is not justified. Standards Australia also disagrees with a number of assertions in the Notification and with the Notifying Parties' characterisation of the public benefits, and wishes to address these factual matters to assist the Commission's assessment of the Notified Conduct.

Confidentiality

Standards Australia's submission in this letter contains some confidential information, highlighted in green. Standards Australia regards this information as highly confidential and commercially sensitive, and requests that, subject to the terms set out in the paragraph below, the information identified as confidential not be disclosed to any third party without Standards Australia's prior written consent:

- there is no restriction on the internal use, including future use, that the Commission may make of the information consistent with its statutory functions;
- the confidential information may be disclosed to the Commission's external advisors and consultants on condition that each such advisor or consultant will be informed of the obligation to treat the information as confidential; and

¹ Unless otherwise indicated, we have adopted the definitions in the Collective Bargaining Notification dated 15 November 2022.

- the Commission may disclose the confidential information to third parties (in addition to its external advisors or consultants) if compelled by law or in accordance with section 155AAA of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

1. **BACKGROUND**

1.1 **Standards Australia's development and distribution arrangements**

Standards Australia is a not-for-profit public company limited by guarantee and is Australia's peak standards development body. Standards Australia develops Australian Standards and other materials (**Licensed Material**) and distributes the Licensed Material in Australia directly and via independent distributors. Standards Australia publishes voluntary standards. While State and Commonwealth governments may refer to and mandate standards in their legislation, this is a decision not made by Standards Australia.

Between 2003 and May 2019, SAI Global Limited (**SAI Global**) was the exclusive distributor of Standards Australia's Licensed Material. Since Standards Australia regained distribution rights in December 2018, it has been committed to developing a multi-channel distribution model and to enhancing competition in the supply of Licensed Material and access to Licensed Material.

In November 2019, following public consultation, Standards Australia's published its Distribution and Licensing Policy Framework (**Framework**).² The Framework reflects its desire to increase the reach and relevance of its content, increase awareness and use of standards in the community, ensure the long-term financial sustainability of Standards Australia and empower the organisation to operate as a modern and efficient public purpose organisation. In the Framework, Standards Australia has publicly committed to exploring "licensing arrangements that aim to make it easier for education providers and curriculum setters to incorporate standards in their teaching materials".³

By way of example, since May 2019, Standards Australia has:

- appointed four independent distributors (including SAI Global) to distribute Licensed Material on a non-exclusive basis; and
- opened its own Standards Australia Store to sell Licensed Material directly to end users.

Standards Australia continues to explore ways to develop its distribution arrangements and better achieve the objectives underpinning the Framework.

1.2 **Digital rights management**

Standards Australia is a registered not-for-profit operating in the public interest. Its interests in generating revenue from the sale of Licensed Material are to enable it to operate independently and sustainably, cover its operating costs and fund its ongoing standards development activities. Standards Australia's standards development work is funded primarily from royalties generated from the sale of Licensed Material. Standards Australia

² A copy of the Framework is available on Standards Australia's website at: <https://www.standards.org.au/getattachment/8b8551a9-e580-4dce-a6d7-6b953b44bf31/Standards-Australia-Distribution-and-Licensing-Policy-Framework-2019.pdf.aspx?lang=en-AU>

³ Standards Australia, *Distribution and Licensing Policy Framework*, p 8.

is working towards achieving financial sustainability but is currently loss-making, and relies on its financial reserves to fund its operations.

As a producer and distributor of Licensed Material, Standards Australia is vulnerable to unauthorised sharing of its intellectual property, which constitutes copyright infringement. Unauthorised sharing of its intellectual property reduces Standards Australia's income and therefore directly impacts its ability to cover the costs of its activities, including standards development, and operate as a self-sustaining organisation.

To reduce the risk of unauthorised sharing of the Licensed Material, Standards Australia (like other publishers of technical or other digital materials) relies on Digital Rights Management (**DRM**) requirements in the terms of its licences with distributors and customers. DRM requirements relate to the extent to which a digital product can be accessed, downloaded, shared, annotated, copied or printed, and also relate to the watermarking of the product.

DRM is typically implemented through software. Standards Australia does not mandate the use of particular DRM software by its distributors. Instead, it specifies the DRM requirements that its distributors must be capable of achieving. The choice of software to achieve these requirements rests with the distributor.

The Notification states that agreements between Distributors and the TAFEs raise issues including that the scope of rights granted is not sufficient or fit for purpose for TAFEs, and that DRM systems have been implemented which mean that TAFEs are unable to make use of standards in the way they require or may otherwise be able to make under the Statutory Licence and other exceptions in the *Copyright Act 1968* (Cth).⁴ However, it is important that these issues are considered not only from the perspective of the TAFEs, but also account for Standard Australia's legitimate interest in protecting its intellectual property from unauthorised sharing.

2. **ASSERTIONS IN THE NOTIFICATION**

In light of the above context, Standards Australia rejects the various assertions in the Notification to the effect that it:

- (a) has a "virtual monopoly with respect to the provision of licences for standards in Australia" or "effectively hold[s] a monopoly position in relation to the development of Standards and their distribution";⁵ or
- (b) benefits from "a significant asymmetry in bargaining power in circumstances where Standards Australia is the principal source of standards in Australia";⁶ or
- (c) has a "dominant position" with respect to the supply of standards in Australia.⁷

⁴ Notification, section 3.3.

⁵ Notification, sections 5 and 8. Similar assertions are repeated in sections 9.3, 10(e) and 17.1.

⁶ Notification, section 3.3.

⁷ Notification, section 9.3.

At various points,⁸ the Notification also incorrectly implies that Standards Australia's distributors benefit from a "significant asymmetry in bargaining power" because Standards Australia is the "principal source of standards".

Although Standards Australia owns or otherwise has the relevant rights to license copyright in Australian Standards and other Licensed Material, Standards Australia disagrees that it follows from this that it or its distributors have a monopoly position or substantial market power in the supply of standards in Australia. These assertions are incorrect for the following reasons:

- (a) The supply of standards occurs primarily through Standards Australia's independent distributors, who are in competition with each other (and with Standards Australia's Store).
- (b) Standards Australia has actively increased (and continues to seek to increase) its distribution network in order to enhance consumer choice and increase competition in the supply of standards.
- (c) Standards Australia requires distributors to pay royalties on the sale of Licensed Material but does not control the price or non-price terms of distributors' agreements with their customers.⁹ Its distributors are independent from it, and Standards Australia's position as peak standards development body has no influence on its or its distributors' bargaining position downstream.

3. **TAFE-SPECIFIC LICENCE**

In accordance with its public commitment in the Framework, Standards Australia is open to discussing a TAFE-specific licence. Standards Australia considers that a licence specifically designed for TAFEs is appropriate given their public interest function as higher education institutions. These institutions utilise standards as part of their educational function, an activity which can be distinguished from integrating standards into training provided by private entities for commercial gain or other commercial uses of standards.

Standards Australia considers that fitness for purpose is a major consideration in the development of this licence. However, as noted above, Standards Australia must also take into account (and considers it is appropriate for it to do so):

- (a) the need for Standards Australia to be able to fund its standards development activities and operate sustainably;
- (b) relatedly, the need to protect its intellectual property through DRM; and
- (c) the fact that Standards Australia's third party distributors are independent organisations, and are (and will continue to be) responsible for customer service and the technology platforms they use to supply customers.

⁸ For example, the penultimate paragraph of section 3.3.

⁹ Distributors have obligations to Standards Australia under their distribution agreements, including DRM requirements that are set by Standards Australia on a product-by-product basis. Distributors have full discretion in relation to the terms of their agreements (both price and non-price) but, of course, must not act in a way that is inconsistent with their distribution licence (such as by selling digital products without being able to achieve the required DRM outcomes).

[REDACTED]

There will be certain minimum requirements regarding DRM which will need to be retained in any licensing arrangement. Where Standards Australia insists on a DRM requirement, that is a reflection of the role and importance of DRM to Standards Australia's operating model, rather than any exercise of perceived bargaining power. It is not rational for Standards Australia to expose itself to an unacceptable degree of risk of unauthorised sharing of its Licensed Materials, undermining its ability to operate sustainably. That is the case irrespective of the relative bargaining power of Standards Australia or its counterparties.

While collective negotiations may generate some efficiencies in the development of any TAFE-specific licence by facilitating collective consultation, Standards Australia does not consider those efficiencies to be related to any increase in bargaining power through the Notified Conduct.

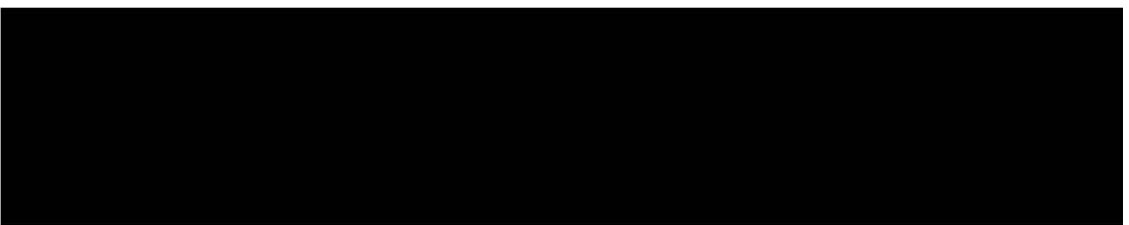
4. **PUBLIC BENEFITS**

Standards Australia agrees that there are unlikely to be significant public detriments as a result of the Notified Conduct. Standards Australia considers that collective consultation with the TAFEs will help Standards Australia gather information from the TAFEs and understand the needs of the industry on a holistic basis, which will, in turn, help inform the development of any TAFE-specific licence. Standards Australia views this information gathering as a critical aspect of any collective negotiations with the TAFEs, and therefore any public benefits from the Notified Conduct. As noted above, Standards Australia considers that a licence specifically designed for TAFEs is appropriate given their public interest function as higher education institutions. However, Standards Australia does not agree with the extent of the public benefits claimed by the Notifying Parties.

To assist the Commission's assessment, Standards Australia makes the following comments on the public benefits listed in the Notification:

- (a) The Notification suggests that collective bargaining will have the benefit of preventing students from receiving "inferior access to standards, and therefore educational experience, purely due to their geographic location". Standards Australia is not in a position to comment on whether students in particular geographic regions are receiving inferior access to standards, or the extent to which collective negotiation will address this.
- (b) When Standards Australia develops a new product (such as a new subscription model), its practice is to offer distributors equivalent distribution rights (ie including royalties and DRM requirements).¹¹ Standards Australia has already been in discussions

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¹¹ SAI Global and Techstreet LLC (**Techstreet**) distribute the full catalogue of Australian Standards and other Licensed Material. Standards Australia's other distribution partners (and its Store) distribute a subset of Licensed Material. While not all distributors supply all Licensed Material, Standards Australia's practice is to offer the equivalent (wholesale) terms for any products which they *do* distribute.

regarding the development of a licence suitable for TAFEs. With or without the Notified Conduct, Standards Australia intends to continue to engage in those discussions and to consider feedback regarding the specific needs and issues encountered by the TAFE sector. Even in the absence of the Notified Conduct, Standards Australia's intention is that any DRM required or royalty payable by distributors to Standards Australia for a TAFE-specific licence would be applied consistently across distributors, in accordance with Standards Australia's current practice. As a result, Standards Australia does not consider that uniformity of "terms that are appropriate and adapted to the TAFE education environment" is a public benefit of the Notification insofar as Standards Australia's (wholesale) terms of any TAFE-specific licence are concerned, noting of course that Standards Australia does not have control over the retail price offered by distributors or DRM software used by distributors, and that the needs of individual TAFEs may differ.

Standards Australia also observes that the rationale for the Notified Conduct includes addressing "the pricing of standards and concerns that they vary significantly among TAFEs (ie. that TAFEs may be charged different fees for the same rights / access arrangements)."¹² Standards Australia does not have control or visibility over the prices charged by its distributors and so has no knowledge of whether the Notifying Parties' concern is justified. However, Standards Australia:

- (i) aims to set royalties and other requirements consistently across distributors (and the Store);
 - (ii) considers that uneven pricing as between TAFEs (or between any other customers) may be an outcome of price competition between distributors or reflect the specific content or product the subject of the licence, the number of users and so on, and so is not necessarily undesirable; and
 - (iii) notes that the Notifying Parties have not identified why "greater uniformity" of price would be a public benefit. While any individual TAFE may prefer to avoid paying more than its competitors for the same input, uniformity of price is not (and should not be) an end in itself, or assumed to result in a public benefit.
- (c) Standards Australia disagrees with the claim that "the access arrangements imposed by Standards Australia are inconsistent with these provisions [of the Copyright Act]."¹³ Standards Australia does not agree that TAFEs are "unable" to make copies of standards. It may be that, as a purely practical matter, the removal of further DRM requirements may make it more straightforward for TAFEs to do so. The Copyright Act provides that certain actions do not constitute copyright infringement. It does not impose an obligation on holders of intellectual property rights to, in effect, "make it easier" to use the Statutory Licence. As noted above, the purpose of DRM is to address the risk of unauthorised use of the content.
- (d) As the Notification recognises, the tender processes operated by TAFEs are typically directed towards SAI Global and Techstreet rather than Standards Australia. Standards Australia is therefore not in a position to comment on those processes or whether collective bargaining would generate "significant efficiencies" by reducing the need for them.

¹² Notification, section 3.3(a).

¹³ Notification, section 3.3(c).

- (e) For the reasons explained above, Standards Australia rejects the suggestion that it is "in effect, a monopoly supplier in respect of standards in Australia". There is competition between distributors, and between Standards Australia and distributors, in relation to the supply of Licensed Material. Standards Australia welcomes input from TAFEs on the suitability and fitness of a TAFE-specific licence. Accordingly, while collective negotiation may increase the bargaining power of the Notifying Parties, Standards Australia does not consider there to be any relevant asymmetry, and so does not consider there to be any public benefit flowing from addressing this purported asymmetry.
- (f) As the Notified Conduct is voluntary, TAFEs will continue to be able to negotiate on an individual basis. However, as TAFEs are already able to do so, this is not a public benefit flowing from the Notified Conduct.

5. DURATION

The Notifying Parties request a 10 year period to be covered by the Notification, instead of the standard period of 3 years. Standards Australia does not consider that this duration is justified. It submits that a period of 3 years would be more appropriate in the circumstances.

As explained above, Standards Australia's practice is to make its products available for distribution on terms that do not discriminate between distributors or between the Store and distributors. Accordingly, Standards Australia considers 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. Following the initial rollout and uptake of the new model, future negotiations are likely to be limited to renewals, pricing and TAFE-specific variations to the general licence. It is unclear that such negotiations will need to take place collectively or benefit from doing so.

We would be pleased to provide any further information that would assist the Commission's assessment. If you have any questions about this submission, please contact Tihana Zuk, Partner, on [REDACTED] or [REDACTED].

Yours faithfully,

[REDACTED]

Ashurst Australia