



## Access to Australian Standards adopted in legislation— Correspondence

### Background

The Committee has a long-standing concern about access to legislation. It is a fundamental principle of Australian law that ignorance of the law is no excuse for a failure to comply with the law. As part of that principle, it should be clear that a person affected by a law has a right to be able to freely ascertain what the law is. This should include a right to be able to freely ascertain the *content* of any particular law. In the light of this, the Committee is firmly of the view that there should be free-of-charge access to legislation, for all users of legislation.

Something that undermines the principle of free access is the increasing practice of ACT legislation to refer to and rely on Australian Standards (AS) and Australian Standards/New Zealand Standards (AS/NZS). Such reliance on external material, by legislation, is often referred to as “incorporation by reference”. A recent example (considered by the Committee in *Scrutiny Report 42* of the 9<sup>th</sup> Assembly, 9 May 2020) is the Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Determination 2020 (DI2020-32). That instrument refers to and relies upon more than 20 different AS and AS/NZS. This means that anyone seeking to comply with the instrument must have access to those 20-odd standards, if they are to be able to fully understand their obligations under the instrument.

In the ACT, the general rule, provided for by section 47 of the *Legislation Act 2001* (Legislation Act), is that material external to legislation (including AS and AS/NZS) that is incorporated by reference becomes a “notifiable” instrument and, as a result, must be published on the ACT Legislation Register (therefore making it freely-available to users). However, ACT legislation regularly uses a power in section 47 of the ACT Legislation Act to exempt AS and AS/NZS from these requirements.

An underlying problem in the disapplication of section 47, in relation to AS/NZS, is that access to such standards generally cost a not-inconsiderable amount of money to purchase—often hundreds of dollars. In the case of the Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Determination 2020 (referred to above), this can involve hundreds of dollars *multiplied by 20*. Clearly, this is a significant cost for anyone who must comply with the relevant standards, as a result of the instrument.

Given its concerns about ensuring free access to everything involved in complying with legislation, the Committee has always closely monitored the use of the section 47 exemption, to avoid the requirement to publish on the ACT Legislation Register any standards relied on. Over many years, the Committee has adopted a policy of requiring Ministers and agencies to justify any exemption from the notification requirements and has asked Ministers to identify any alternative mechanisms for accessing the relevant material, free of charge.

In relation to the justification requirement, Ministers and agencies routinely refer to limitations involving the copyright in the relevant material. This occurs especially in the case of AS and AS/NZS, which are published on a profit-making commercial basis.

In relation to alternative access arrangements, two themes are evident in explanatory material for legislation and in Ministerial responses to the Committee's comments. One has been the proposition that "some" AS are available, for perusal, in the National Library of Australia and in State libraries. However, that access has been problematic, in the recent past, due to issues with the contractual arrangement under which this library access is provided.

The other alternative access mechanism that the Committee routinely sees is the making available of relevant material (including AS and AS/NZS), for perusal, in specified government agency premises, during office hours.

Despite the Committee's best efforts, access issues continue to arise.

It should also be noted that this is not just an issue in the ACT. It is an issue for legislative scrutiny committees in all Australian jurisdictions, as exemplified by the 2016 report of the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament (WA Committee), on *Access to Australian Standards adopted in delegated legislation* (available at [http://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/3914263a663fa6312f3c877948257fdb00358426/\\$file/4263.pdf](http://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/3914263a663fa6312f3c877948257fdb00358426/$file/4263.pdf)).

## Letter to the Chief Minister

The Committee initially raised the issue of access to standards with the Chief Minister. The Committee wrote to the Chief Minister on 27 April 2017 (a copy of which is available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0005/1609061/Letter-to-Chief-Minister,-dated-27-April-2017.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0005/1609061/Letter-to-Chief-Minister,-dated-27-April-2017.pdf)), noting its concerns about the access to standards issue and, also, noting the recommendations of the WA Committee, in the report mentioned above. In particular, the Committee noted that recommendations 1, 2 and 12 of the report raised the possibility of the Western Australian Government taking up various issues, through the Industry and Skills Council of the Council of Australian Governments. The Committee asked the Chief Minister whether the ACT Government might do likewise.

The Chief Minister responded to the Committee, in a letter dated 30 May 2017 (a copy of which is available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0007/1609063/Response-from-Chief-Minister,-dated-30-May-2017.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/1609063/Response-from-Chief-Minister,-dated-30-May-2017.pdf)). In that letter, the Chief Minister drew the Committee's attention to action (then) currently being undertaken in two respects, namely:

- ongoing discussions about community access to Australian Standards were being held between State and Territory libraries and the (then) standards license holder, SAI Global (which the Chief Minister did not think it appropriate for him to engage in); and
- consideration of the matter by the COAG Industry Skills Council, in the light of the WA Committee's report, which allowed the issue to be considered at a Ministerial level, across jurisdictions.

The Chief Minister advised that he would "keep the Committee apprised of developments as they occur". The Committee has heard nothing further from the Chief Minister on these issues.

## Letters to the Commonwealth Minister for Industry, Science and Technology

Against this background, the Committee decided to approach the Commonwealth Minister for Industry, Science and Technology, the Hon Karen Andrews MP (Minister Andrews), on the basis that the Committee was aware that various issues connected to the access to standards issue were currently being considered, within Minister Andrews' portfolio, including as a result of Minister Andrews' role in relation to the work of the Industry and Skills Council Standards Accessibility Working Group (Working Group) of the Council of Australian Governments (COAG), which had been working on issues relevant to access to standards. The Committee wrote to Minister Andrews on 2 December 2019 (a copy of which is available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0008/1609064/Letter-to-Federal-Minister-for-Industry,-Science-and-Technology,-dated-2-December-2019.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0008/1609064/Letter-to-Federal-Minister-for-Industry,-Science-and-Technology,-dated-2-December-2019.pdf)), seeking her assistance in relation to:

- the progress of the work of the Working Group and a time-line for the conclusion of that work; and
- work undertaken in relation to the distribution and licensing policy framework for AS and AS/NZS, operated by Standards Australia, which develops such standards.

Minister Andrews responded to the Committee in a letter dated 31 March 2020 (a copy of which is available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0009/1609065/Response-from-Federal-Minister-for-Industry,-Science-and-Technology,-dated-31-March-2020.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0009/1609065/Response-from-Federal-Minister-for-Industry,-Science-and-Technology,-dated-31-March-2020.pdf)). In the letter, Minister Andrews provided important information about the work of the Working Group of COAG, including about developments since November 2019.

Minister Andrews referred the Committee to Standards Australia's announcement, on 7 February 2019, that it was "moving beyond the exclusive distribution arrangements that it has had since 2013" and that a new service provider—Techstreet—had been announced. Minister Andrews also advised that Standards Australia had also recently announced a new "Distribution and Licensing Policy Framework" which, Minister Andrews advised, would see "improvements to the price relevance and reach of Australian Standards". Minister Andrews advised that these improvements would come "over time".

In relation to the issue of the suspension of access to Australian Standards, free-of-charge, through National, State and Territory libraries, Minister Andrews advised that Standards Australia was working towards restoring this access to non-commercial users. Minister Andrews went on to advise that "[i]n the meantime, Standards Australia will consider providing standards to users where there is a legitimate non-commercial need on an individual basis".

Minister Andrews advised the Committee:

It remains Government policy that the relevant regulatory authority should consider funding access to standards where referenced in legislation. This should be done on a case-by-case basis, and is often considered through regulatory impact assessment processes. The new distribution arrangements implemented by Standards Australia should also provide greater opportunities to make these standards more accessible to a range of stakeholders.

The Committee was grateful for the important information provided by Minister Andrews, which provided a significant insight into the work that was going on, in relation to access to standards. However, given the Committee's ongoing concern about the fact that the relevant issues ought to be addressed with some urgency, the Committee was interested in further information about the processes in place, and the

timelines envisaged, for resolving issues mentioned in Minister Andrews' letter. As a result, the Committee wrote a further letter to Minister Andrews, dated 4 June 2020 (a copy of which is available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0010/1609066/Letter-to-Federal-Minister-for-Industry,-Science-and-Technology,-dated-4-June-2020.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0010/1609066/Letter-to-Federal-Minister-for-Industry,-Science-and-Technology,-dated-4-June-2020.pdf)). In that letter, the Committee asked Minister Andrews for further advice about various issues, including:

- what sort of process was in place to implement the envisaged “improvements to the price relevance and reach of Australian Standards”, and what sort of timetable is envisaged, for the improvements to be implemented;
- what sort of process was in place, to restore access to Australian Standards, free of charge, through National, State and Territory libraries, and what sort of timetable is envisaged for resolution of the issue;
- what sort of process was in place for resolution of the issue of providing standards to users where there is a legitimate non-commercial need on an individual basis, and what sort of timetable is envisaged for resolution of the issue;
- what consideration had been given to providing access to relevant standards, free of charge, to potential users who might have a commercial interest in the relevant information but not a great enough interest to make it financially viable to purchase the relevant standards; and
- what sort of process was in place, to implement the new distribution and access arrangements, to be implemented by Standards Australia, and what sort of timetable is envisaged for the new arrangements to be implemented.

In asking these further questions, the Committee noted that progress towards addressing issues involved in access to standards seemed to be frustratingly slow. The Committee advised Minister Andrews that it was for that reason that the Committee sought Minister Andrews' further advice as to the processes that have been put in place and the timetables that were anticipated, in relation to the various initiatives that Minister Andrews mentioned in her response.

Minister Andrews responded to these further queries, in a letter dated 1 July 2020 (a copy of which is available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0011/1609067/Response-from-Federal-Minister-for-Industry,-Science-and-Technology,-dated-1-July-2020.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0011/1609067/Response-from-Federal-Minister-for-Industry,-Science-and-Technology,-dated-1-July-2020.pdf)). Again, Minister Andrews provided the Committee with further important information, including:

- advice that there are no Australian Government plans to negotiate with Standards Australia for free public access to all standards referenced in Commonwealth, State or Territory legislation;
- advice that the Government has partnered with Standards Australia to waive the fee for access to the bushfire construction standard, to support the recovery and rebuilding of communities after recent bushfires;
- advice that her office received a significant amount of correspondence about the cessation of access to Australian Standards through libraries, a majority of which was from “commercial users who had been inappropriately accessing Australian Standards through those channels over several years”;
- expressing a view that “[i]t is appropriate that Standards Australia has taken measures to protect their intellectual property rights and that they continue to do so”;

- advice that National and State Libraries Australia was close to an agreement to restore a level of on-site access to standards before the onset of COVID-19;
- advising that this was a matter between Standards Australia and its distributor and that she would not be intervening in those negotiations;
- advice that, in the absence of access through National and State libraries, Standards Australia has made an interim provision, under which it would consider providing access to standards for non-commercial users, where there is a need on an individual basis (and providing an e-mail address to which the request can be addressed);
- noting that the Standards Australia Distribution and Licensing Policy Framework included a commitment, by Standards Australia, to make standards available for personal, domestic or household (non-commercial) use no later than December 2023; and
- advice that the proposed access mentioned immediately above “will likely occur through an online portal managed by Standards Australia where users would register their access for non-commercial use”.

Minister Andrews also suggested to the Committee that, given its strong views in relation to the provision of free public access to standards, the Committee might reach out, directly, to Standards Australia, “to discuss possibilities for sponsored access to Australian Standards referenced in ACT legislation”. However, Minister Andrews did not directly address the Committee’s question as to what consideration had been given to providing access to relevant standards, free of charge, to potential users who might have a commercial interest in the relevant information but not a great enough interest to make it financially viable to purchase the relevant standards.

The information provided by Minister Andrews is important and useful information and the Committee is grateful to Minister Andrews for sharing it. However, the information also has a wider interest and use, beyond the Committee and the Legislative Assembly, and it is for that reason that the Committee reports on the correspondence now (and publishes the relevant letters).

Access to legislation has always been an especially important issue for the Committee. As indicated above, the reliance on standards can operate to undermine access to the *content* of legislation, unless those standards are available, free-of-charge, to users of legislation, especially those who cannot afford—or do not have a large enough commercial incentive or financial capacity—to purchase such standards. The Committee will continue to monitor this important issue.

28 July 2020