

***University of New South Wales Law Research Series***

**THE NEED FOR FREE ACCESS TO  
REGULATED STANDARDS (SUBMISSION BY  
AUSTLII TO STANDARDS AUSTRALIA IN  
RESPONSE TO ITS DISCUSSION PAPER, JULY  
2019 ‘DISTRIBUTION AND LICENSING POLICY  
FRAMEWORK’)**

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[2019] *UNSWLRS* 64

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# The need for free access to Regulated Standards

(Submission by AustLII to Standards Australia in response to its Discussion Paper, July 2019 'Distribution and Licensing Policy Framework')

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Submission dated 26 July 2019\*\*\*

The Australasian Legal Information Institute (AustLII) welcomes the opportunity to make a submission in response to the Discussion Paper issued by Standards Australia,<sup>1</sup> seeking feedback from stakeholders regarding the distribution and accessibility of its content. We congratulate Standards Australia in providing this public consultation to enable all interested stakeholders to provide input and commentary to the development of the new framework for its distribution activities.

For the interest of readers, details of AustLII's mission, history and operations are provided in Annexure A: 'Background information on AustLII and its value'.

## **AustLII and Standards Australia**

AustLII has a long standing and significant stakeholder relationship with Standards Australia (SA).

A number of years ago SA commissioned AustLII to develop an online search tool, made available via SA's website, through which members of the general public are able to search all Acts and Legislative Instruments of all Australian legal jurisdictions available on AustLII to determine whether particular Australian Standards are referenced in such Acts and Legislative Instruments. SA funded AustLII to develop this tool and continues to fund its maintenance.

Given AustLII's public policy mission and its important current relationship with SA, we are keen to provide comment on this review, focused primarily on the importance of providing the community with free access to Regulated Standards.

In accordance with the views expressed in our submission, AustLII stands ready to work with and support SA to provide Regulated Standards and other standards of high public interest to the community on a free access basis.

## **Response to questions asked in the Discussion Paper**

*A. Do you agree with Standards Australia's broad objectives?*

*B. Are there other broad objectives that should be considered by SA's Board?*

With respect to Questions A and B, AustLII submits that Standards Australia's objectives should be modified to better reflect the public interest in its role, as

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\*\*\* We acknowledge the contributions made by Richard Hunter (Development Manager, AustLII) and Chris Jones (Consultant electronics engineer) to the development of this submission.

<sup>1</sup> Available at <<https://www.standards.org.au/getmedia/aabf7d12-2a11-4700-822b-9a587e97585b/SA-Distribution-discussion-paper.pdf.aspx>>.

reflected in its Constitution and in its Memorandum of Understanding with the Commonwealth of Australia.

AustLII submits that SA should adopt these following additional objectives:

- an objective to maximise the placing of Standards in the public domain through the use of non-viral open content licensing (such as Creative Commons licences with Attribution (BY), NoDerivatives (ND) and NonCommercial (NC) conditions), thus allowing free access reproduction of the Standards while retaining SA’s control over commercialisation opportunities and the development of innovative uses;
- an objective to make available, through open licensing, Regulated Standards and other standards of very high public importance and interest;
- an objective to develop an operating model which recognises the public interest in its activities and that allows for multiple funding sources within a not for profit framework; and
- an objective to implement such open licensing when Standards are first made, or if necessary, after a defined short period of time.

AustLII submits that these principles should be accepted now as broad objectives, irrespective of the extent to which they can be achieved at the moment.

*C. Do you support a non-exclusive model for the distribution of standards content in Australia?*

Yes, AustLII would support a non-exclusive model of distribution. The model should also include an element of inclusion in the public domain via open licensing, as referred to in the comments above. Also, whether or not SA is “engaged in direct distribution of its content” is a valuable but not sufficient consideration. It is also necessary that access is provided to multiple publishers (ideally for free access as much as possible). A sub-optimal approach, not involving open content, would be for SA to license particular ‘innovation partners’ to distribute particular categories of Standards for free access.

We note, in this regard, Paragraph 8.32 of SA’s Memorandum of Understanding with the Commonwealth:

“8.32 Where it is able to do so, Standards Australia will take all reasonable action to ensure fair and equitable access to Australian Standards for all users. It will work towards providing:

8.32.1 competition in the distribution of standards, by supporting multiple channels for distribution

8.32.2 innovative digital, mobile and other channels for accessing standards to give users more choice and to better meet community needs

8.32.3 flexibility in pricing structures to facilitate economical access for all users; and

8.32.4 options for partnering with Standards Australia to facilitate forms of public access to Australian Standards, particularly where referenced in regulation, or where they relate to public interest outcomes, such as health and fire safety.”

*D. What criteria do you think should be applied to the selection of distribution partners?*

Regulated Standards should be made available for free access to the community on the widest possible distribution basis. If an open licence is used, choice of distribution partners is not relevant. For Standards which are to be made available for free access, but not under an open licence, such a choice is appropriate, and the ability to achieve the widest free access distribution should be a major factor. Where Standards are distributed on a commercial basis, AustLII submits that the 'standardised commercial terms' should not be made too burdensome, as this would create a high barrier to the entry to new and alternative publishers.

*E. How can SA encourage competition in the distribution of current standards products?*

*F. How do we encourage new innovators to engage with standards content to deliver new solutions and customer offerings?*

With respect to Questions E and F, AustLII submits that open licensing of some Standards will ensure competitive distribution of those Standards (see response to Questions A and B).

We also submit that SA should avoid entering into any long-term distribution agreements in the future. Also, SA should not enter into non-exclusive agreements that place any restriction that would prevent SA from entering into a subsequent or concurrent agreement with another distributor at a lower royalty price.

*G. How do we select innovative partners?*

Choice of innovation partners, in relation to free access distribution (as opposed to open content distribution, for which it is not relevant) should be chosen primarily on their track record for effective and sustainable free access distribution to the widest possible audience.

*H. How do we ensure third party developed innovative products are good quality and fit for purpose?*

If SA wishes to retain 'quality control' of innovative products, it can still license the mere distribution of classes of Standards under a Creative Commons licence (with Non-Commercial and No-Derivatives conditions), but can still negotiate licences that are to include the right to create derivatives of Standards or provide 'value-add' products and services. SA could then review 'innovative products' to ensure an appropriate level of quality is met and then if approved, licence the products to carry the trademarks ("Australian Standard" and the logo). This would allay fears of the SA "brand" being tarnished by 3rd party offerings.

*I. How do we ensure we strike the right balance between facilitating innovation by third parties and maintaining the financial sustainability of Standards Australia?*

*J. How can SA ensure that distribution activities do not negatively impact its public benefit role in standards development?*

With respect to Questions I and J, SA should develop an operating model that allows for a variety of complementary revenue streams to ensure financial sustainability within a not for profit framework and working towards a goal of providing as much content as possible through open licensing.

It is noted that in 2018, 70% of SA's revenue came from investments with 18% from royalties and 12% from government grants and other sources. There is

flexibility to vary these proportions and still increase revenue over time in order to maintain and improve quality assurance and service.

The development of ‘innovative products’ should be a ‘value-add’ to the core business of providing Standards to the public, and should be revenue positive over and above the cost of developing and providing the basic standard to the community (otherwise the ‘innovative products’ would be a poor business decision). Where incorporated into legislation, the existing products still need to be created in any case, and the ‘innovative product’ should be required to add (saleable) value to the user base that exceeds its development cost, or it should be cancelled at the earliest opportunity. The cart should not lead the horse!

*K. How should SA implement the required commercial confidentiality for distribution arrangements within the context of transparency in the rest of the business?*

No comment.

*L. How can Regulated Standards be made more accessible to the end user while maintaining the financial sustainability of the standards ecosystem?*

AustLII submits that when public policy determines that a Standard is of such significance or importance that it should be mandated in a legislative instrument (a Regulated Standard), this Standard should be made available for free access to the community, through multiple distribution channels. This may be implemented by either:

- (a) incorporation of the Standard by reference, in which case the Standard should become available for free access by virtue of an open licence (see response to Questions A and B) or by equivalent means, or
- (b) incorporation of the relevant text from the Standard in the legislation or regulation, thereby ensuring free access through public availability of the law.

The funding model for Regulated Standards should be different from other Standards. A proportion of the funding to ensure the maintenance and development of these Regulated Standards should be a charge on the public and funded by government. SA should negotiate with the governments of Australia to ensure that at least some of the costs associated with the development and maintenance of Regulated Standards are borne by the taxpayer, preferably as an up-front subsidy, but otherwise upon inclusion in legislation or regulation. Precedents for this model exist with regard to the development and availability of the National Construction Code of Australia and the Food Standards Code. A further proportion of the funding should acknowledge a cross-subsidisation of Regulated Standards by revenue generated by the commercialisation of other Standards. Other complementary forms of revenue should also be explored.

We note, in this regard, Paragraph 9 of SA’s Memorandum of Understanding with the Commonwealth:

“9.1 The Commonwealth may, through a grant, provide financial assistance in relation to activities contributing in net terms to the welfare and wellbeing of the Australian community as a whole that would not occur if left entirely to the private market.

9.2 The Commonwealth will encourage its agencies to consider the merit of providing financial or in-kind support on a case-by-case basis for the development of regulatory standards.”

*M. How can access beyond existing channels be made easier for user groups like TAFE and university students?*

Regulated Standards should be made available on a free access basis (see response to Question L above). For other Standards SA should provide a licence to TAFE and university library systems at the lowest cost possible - ideally at no cost.

There are other standards that AustLII is also concerned to ensure should be available for free access to the whole community (not only specific user groups), including:

- (i) Access to superseded versions of Standards (clearly so marked) is important for academic and other research purposes as well as for other purposes such as investigations where it is relevant to know what a particular Standard was at a particular point in time (eg coronial inquests).
- (ii) Some standards which are not Regulated Standards are of such high public importance that they need to be available for free access so as to make public policy debates possible, particularly if they affect civil liberties (for example, standards for surveillance in public places). Some but not all Consumer Interest Standards should be included here. Selection of these Standards should be on a case-by-case basis by SA, but on the basis of expert advice.

*N. How can useful information be better provided to the public regarding Consumer Interest Standards?*

*O. Do you have a view on what types of partners SA could work with in providing better information to the public regarding Consumer Interest Standards?*

With respect to Questions N and O, AustLII submits that Information on Consumer Interest Standards should be developed as part of the Standards Development process and that it should be informed by expertise from the Community Legal Sector in the writing of ‘plain language’. These Information on Consumer Interest Standards should be made available through multiple channels for free access.

## **Annexure A: Background information on AustLII and its value**

### **What is AustLII?**

The Australasian Legal Information Institute (AustLII) was founded in 1995. It is the largest free-access provider of online Australian legal materials, a founding member of the Free Access to Law Movement, and one of the largest providers of world-wide free-access legal content. AustLII collaborates with other free access LIIs around the world to operate three international multi-LII systems for legal information: Asian Legal Information Institute (AsianLII); Commonwealth Legal Information Institute (CommonLII); World Legal Information Institute (WorldLII); as well as developing the LawCite international citator with the same group of collaborators. In addition, AustLII jointly operates the New Zealand Legal Information Institute (NZLII) and the LII of India, in cooperation with local partners in those countries.

### **How is AustLII structured?**

The Australasian Legal Information Institute (AustLII) is comprised of two entities:

- The AustLII Foundation Limited (a public company limited by guarantee with charitable Deductible Gift Recipient tax status), which is responsible for the operation and maintenance of the infrastructure and services that delivers the online library of Australian legal information to the community.
- The AustLII Research Centre (a joint research centre of UNSW Australia and the University of Technology Sydney), which conducts leading edge international research in technologies for developing legal information systems.

These two arms of AustLII operate in a symbiotic partnership – revenue opportunities that accrue to the academic arm from research grants and contract research feeds-back into and opens opportunities for the Foundation while stakeholder engagement activity by the Foundation can often be leveraged for grant applications available to the Research Centre.

### **What is the AustLII ‘hybrid’ business model?**

AustLII does not and cannot seek user access subscriptions or advertising because they are inconsistent with its free access policies and its charitable status. Instead, AustLII asks all its users, those who publish via its services, and those who otherwise benefit from its operations, to make an annual contribution that reflects the value of AustLII to them and to the Australian community.

AustLII aims to achieve a broad and balanced diversity of contributions and other sources of funding. It avoids tying its funding to any one provider or type of provider - such as a grant body, government fund, or levy on the legal profession. The diversity of AustLII’s contributors needs to reflect the diversity of its stakeholders, so as to maintain AustLII’s independence and ability to serve all its stakeholders, and to provide a robust long-term funding model.

### **What does AustLII provide?**

AustLII offers unrivalled breadth to its coverage of current Australasian legal information, and increasingly comprehensive historical depth as well. Its content and services include the following:

- Over 800 legal databases, with at least 25 new databases added each year, one every two weeks.

- All Acts and Regulations enacted in every jurisdiction in Australia, enriched by an expanding coverage of Bills, Explanatory Memoranda, Gazettes etc.
- The decisions and case law of all significant courts, tribunals and regulatory authorities in Australia (over 120), plus the historical decisions of superseded bodies. New sets of decisions are added on request.
- A Treaties Library of all international treaties that Australia has entered into since Federation, and related documents, the largest national collection on the Internet.
- Legal History Libraries which provide near-comprehensive annual Acts since 1788, plus extensive historical series of law reports from most Australian jurisdictions.
- A Legal Scholarship Library of nearly 100,000 academic and judicial papers, theses and monographs.
- The Sino search engine, which combines simplicity of use with sophisticated features when needed, and (most of all) very fast search results.
- Interconnection of more than 2 million documents by over 80 million hypertext links.
- The LawCite citator, which automatically integrates citation data from cases and articles both on AustLII and on cooperating Legal Information Institutes from around the world. It also links or refers to other external databases. LawCite currently indexes nearly 6 million cases and articles.
- AustLII Communities, providing a wiki-based collaborative and free-access platform allows those with interest and expertise to write commentary and publish information on Australian law and legal issues, automatically linked to the primary and secondary legal resources located on AustLII (case law decisions, legislation, treaties, journals, etc.)
- DataLex rule-based legal inferencing software, operating within the AustLII Communities platform, to enable the development of knowledge-based applications to legal problems, to support free legal advice services, and other uses as appropriate.

### **Who uses AustLII?**

In 2018 the AustLII website received 229 million page accesses (over 600,000 per day) and 25 terabytes of data were downloaded. AustLII maintained its number one market share of nearly 20% of the online legal category throughout 2018 (figures provided by Hitwise). This category includes websites from legal information providers in government, publishers, courts and tribunals, law societies, legal firms and the bar. Identifiable usage came, in order of largest use, from the commercial sector, government educational and community sectors.

### **What does AustLII cost?**

The AustLII Foundation Limited is a public company limited by guarantee with charitable Deductible Gift Recipient tax status. It is responsible for the operation and maintenance of the infrastructure and services that delivers AustLII's online library of Australian legal information to the community. The Foundation requires approximately \$1.2 million per year to do this.

Expansion of AustLII's databases and infrastructure, and innovative research, is funded by competitive research grants obtained within the University sector by the AustLII Research Centre. The Research Centre receives nearly \$1 million in grant funding each year.

### **Who funds AustLII?**

The legal profession, business and industry, courts and tribunals, government agencies, educational institutions and the general community all make contributions to support AustLII. Each year more than 300 organisations and individuals contribute in amounts ranging from \$5 to \$50,000. AustLII Foundation's stakeholder-driven donation funding model has proven to be an efficient and cost-effective vehicle to maintain AustLII's services - but this requires ongoing support from all AustLII's stakeholders, particularly its users.

The AustLII Research Centre is regularly awarded competitive research grants from the Australian Research Council under its Linkage Infrastructure Equipment and Facilities and Industry Linkage programs. Grants have also been received from such grant making bodies as the Victorian Legal Services Board, the Commonwealth Secretariat, the American Bar Association and AusAID.

### **Why should AustLII be supported?**

There are four main reasons why AustLII should be supported by the legal profession, businesses generally and the wider community:

#### *1. AustLII delivers high quality and cost-efficient services*

The legal profession and many commercial and government sectors have a strong vested interest in funding AustLII so as to secure free access to the legal information that they, or those they represent, need to conduct their business.

#### *2. AustLII stimulates a competitive market*

AustLII provides a free-access product into the same legal information marketplace within which commercial and government legal information providers compete. Its quality and breadth of coverage has made it the most-used online provider in Australia. The 'AustLII alternative' impacts on the price settings of commercial providers, stimulating them to keep their prices reasonable, and to increase the value-adding of their products. AustLII also cooperates with some commercial publishers to assist them to improve the coverage of their products.

#### *3. AustLII provides public benefits to the whole community – essential legal information*

AustLII provides free access to public legal information to everyone, irrespective of their means. This supports the effective functioning of the rule of law, and provides essential legal information that benefits both community support organisations and individuals.

#### *4. AustLII supports good public policies on legal information*

AustLII supports free-access policies and opposes monopolistic practices in relation to legal information. Free access to legal information is necessary for the rule of law and democracy to function effectively. These interests need an advocate, because public and commercial bodies do not always support, or even recognise, free access and other public interests in legal information. AustLII works to expand the scope and quality of legal information available for free access, and defends it against poor public policies.