

20th December 2022

BY EMAIL: exemptions@accc.gov.au

General Manager
Competition Exemptions
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Dear Sir/Madam

CB10000484 - Collective bargaining notification: The National Copyright Unit on behalf of the Copyright Advisory Group for TAFEs

Thank you for the opportunity provide to provide additional information to the Commission in relation to collective bargaining notification CB10000484 (**Notification**), and to respond to Standards Australia's submission.

1. Request by the Commission for additional information

The Commission emailed the National Copyright Unit (**NCU**) on 13th December 2022 to obtain:

- (i) confirmation of the identities of all current TAFE Copyright Advisory Group members (**CAG TAFE**);
- (ii) further detail on how collective negotiations between the Notifying Parties and the targets will be conducted.

Our responses are as follows:

In relation to (i), the entities listed in Annexure A of the Notification, other than Victorian TAFEs, are the current CAG TAFE members.

In relation to (ii), it is intended that the NCU will represent all Notifying Parties during negotiations with Standards Australia and the Distributors, with representatives of the Notifying Parties only participating on an as needed basis. This will generate efficiencies for the Notifying Parties in terms of the time and cost that would otherwise be involved in engaging directly with Standards Australia and in negotiations with the Distributors.

While flexibility will be required, the Notifying Parties anticipate that negotiations will occur in two phases. First, this will require engagement primarily with Standards Australia regarding the key terms of licence(s) that will be made available for TAFEs, including via Standards

Australia's Distributors. Second, this may require negotiating specific commercial terms with Standards Australia and / or the Distributors.

As set out in clause 3.1 of the notification, the Notifying Parties consider that there is a need to negotiate core licence terms which reflect the common needs of TAFE providers. While there may be some need to accommodate particular requirements for individual TAFEs, the overarching objective is to negotiate a licence and commercial terms that is appropriately fit for purpose for the TAFE sector.

2. Standards Australia's submission

We have briefly addressed below several matters that are raised in the submissions of Standards Australia. However, in short, we welcome Standards Australia's position that it does not oppose the notification, its agreement that there are unlikely to be public detriments, and that collective negotiations/consultation may help Standards Australia.

For the avoidance of any doubt the Notifying Parties consider that:

- The notified collective negotiations will result in transaction cost savings and improved opportunities for institutions to meaningfully engage with the development of a TAFE specific licence that is appropriate and adapted to the TAFE education environment. The notified conduct will facilitate greater cooperation between TAFEs which is likely to improve the outcome of consultations about licence terms relevant to the TAFE sector.
- The notified conduct is unlikely to have any detrimental effect in circumstances where the collective negotiations will be voluntary. The Notifying Parties, Standards Australia and the Distributors will continue to be able to deal directly if they prefer. The Notified Conduct will also have no impact on commercial arrangements between Standards Australia and the Distributors with other acquirers of standards outside the TAFE sector.

2.1 Duration of Notification

We respectfully disagree with Standards Australia's submission that a ten-year term is not justified and that three years is sufficient to allow for completion of the design, implementation of the new licence and entry into contracts.

We reiterate the Notifying Parties' request for a ten-year term to ensure that there is adequate time to negotiate a new licence agreement and facilitate any ongoing negotiations that may be required. We submit that a ten-year term is reasonable given the complexity of the issues and the number of stakeholders involved.

We see no detriment in a ten-year term, and submit that it provides necessary flexibility given that negotiations may take some time. Standards Australia would also be protected on the basis that the ACCC could revisit its assessment at any time if circumstances were to change, or if the ACCC received further information about benefits or detriments.

If the ACCC was to consider that a period of less than 10 years was warranted, then for the reasons noted above, the Notifying Parties consider that a three-year term would be inadequate. Some TAFE institutions have entered into multi-year agreements and a three-year term would not account for the need to negotiate prior to, or upon, the expiry of those agreements. In some cases, that may not occur until beyond a three year period.

2.2 Other issues raised by Standards Australia

There are several matters raised in the submissions made by Standards Australia that we consider require a response. We have addressed these matters briefly below, in circumstances where we note Standards Australia does not oppose the notification.

First, it is pleasing that Standards Australia has acknowledged the need for a TAFE-specific licence, and that it has expressed an interest in re-engaging in discussions about the licence (pp 4, 6). We note Standards Australia's claim that its Digital Rights Management (**DRM**) requirements are necessary to 'protect its intellectual property from unauthorised sharing' (p 3). We question the appropriateness of its onerous DRM requirements in the context of the TAFE sector. We anticipate that the Notified Conduct will provide an opportunity for further consideration of this important issue.

Second, Standards Australia claims that neither it nor its Distributors have a monopoly position or substantial market power in relation to the supply of standards in Australia. Standards Australia refers to the fact that it does not itself make decisions to refer or mandate standards, that there is increased competition through Standards Australia's distribution network, and that Standards Australia does not control downstream terms.

While Standards Australia may not itself mandate the use of standards, it significantly benefits from the fact that standards are referred to in numerous regulatory regimes. An unequal bargaining position arises because TAFEs require access to standards in order to teach, and their ability to access standards is ultimately controlled by Standards Australia. TAFEs must incorporate standards in their teaching; there is no alternative.

Standards Australia suggests that its insistence on rigorous DRM requirements reflects the role and importance of DRM to Standard Australia's operating model, rather than any exercise of perceived bargaining power. However, the result of Standards Australia's operating model is that TAFEs are unable to obtain the access they need to standards, or on particular terms that are adapted to the needs of TAFEs.

We noted in the Notification that the access arrangements imposed by Standards Australia are inconsistent with provisions of the *Copyright Act 1968 (Cth)* (**the Act**). 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 do under the statutory licence set out in section 113 (**Statutory Licence**) and other exceptions set out in the Act (**Exceptions**). For

example, Standards Australia's submits that it does not agree that TAFEs are 'unable' to make copies of standards. In the experience of TAFEs, the DRM makes it very difficult, if not impossible, to do so. Again, this is a matter that we consider would be the subject of negotiations with Standards Australia as part of this process.

In addition to the onerous restrictions imposed by the DRM, our understanding is that Standards Australia and/or its Distributor(s) have previously advised TAFEs that they were not permitted to copy extracts of standards in reliance on the Statutory Licence. This is a further example of a matter that we expect would be raised in negotiations.

Third, Standards Australia has referred in various places in its submission to its financial position, the commercial terms it has struck with the Distributors, and the 'practice' of Standards Australia regarding the terms of which its products are made available on a wholesale basis. We do not have visibility of those commercial terms and, as a result, cannot comment on the substance of Standards Australia's distribution arrangements.

Fourth, we note that Standards Australia suggests (at 4(f)) that the continued ability of TAFEs to negotiate individually is not a public benefit. For the avoidance of any doubt, we confirm that there is no suggestion that this is a benefit. Rather, it is a feature of the Notified Conduct which is intended to confirm that the proposal creates no detriment.

Thank you, again, for providing the opportunity to respond. If you have any further queries please do not hesitate to contact me on [REDACTED].

Yours faithfully,

[REDACTED]