Submission to the Australian Government Productivity Commission's Review of Standards and Accreditation

by

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I. Summary

1. I welcome this Review by the government and the Productivity Commission ("PC"), as this Submission will confirm that the standard-setting system operated by Standards Australia ("SA") is particularly dysfunctional. The system must be reformed, because it represents a key site of governance in Australia's deregulating polity. SA acts as a delegated *legislator*, in setting many standards that promptly or eventually become mandatory, and even in generating "soft law" through "voluntary" standards that de facto must be followed in a particular field, or which may prevent or minimise the superimposition of mandatory rules. SA can also act as a de facto *regulatory enforcement agency*, particularly when it provides services to certify that important standards are being met by firms and other organizations. Although less frequently and obviously, SA can even act like a *court*, for example when it reconvenes and directs Committees to redraft standards after a dispute over interpretation arises. Yet, compared to such governance bodies, SA operates largely free of important constraints, such as participation, transparency, and potential for "appeal" or challenge. This vacuum also contributes to the inefficiencies of its processes, noted in some earlier studies by the PC and by many others.

2. Taking product safety as one focal point, this Submission argues that SA's current system is unlikely to generate optimal (efficient) standard levels, is ineffective in promoting other values (such as participation, transparency, accountability and good citizenship), and is cost-inefficient in both those respects (Part III). This situation calls for considerable rethinking of the government's role and relationship with SA, including its Memorandum of Understanding ("MoU") and SA funding (Part IV).

II. Background

3. I am a full-time Senior Lecturer at the University of Sydney Faculty of Law. I am also a Director of a legal consultancy firm, Japanese Law Links Pty Limited. I specialise in

Australian and comparative commercial and consumer law, and have taught and published widely in product liability and safety law, regulatory theory, and corporate governance. Specific qualifications and experience are set out in Appendix A to my first Submission to the PC's Review of the Australian Consumer Product Safety System (dated 11 July 2005).[1] I have also served on a SA Committee that completed redrafting one Standard in 2004, I am aware of how another current Committee is operating, and have reviewed the Cameron Ralph consultancy report on SA last year, as well as the "Global Standard" magazines published by SA and other literature. I make this Submission in my personal capacity.

4. The PC's interim and final reports for its Product Safety Review (2006, chs 4 and 12), and its Building Regulation Review (2004, ch 8), had already identified more systemic problems with SA, such as delays, unpaid and narrow participation in Committees, inadequate expertise, voting on Committees, and transparency more generally.

III. Efficiency and Effectiveness

5. This Review's Terms of Reference and the PC's Issues Paper asks for analysis of "the efficiency *and effectiveness* of standards setting" in Australia. This implies a broader perspective than usual for the PC, going even beyond the distinctions drawn between these two concepts in the Issues Paper (pp 9-11).

6. In my view, for example in the field of setting safety standards, assessing *efficiency* involves a narrower inquiry into (i) whether the standards set are *optimal* in generating safety outcomes maximising socio-economic benefits – set neither too high (dissuading valuable activity for little net gain) or too low (not providing sufficient incentives for firms to internalise costs of providing safe goods or services) – as well as (ii) whether these standards are generated in the most *cost-effective* manner. By contrast, a standard may still be *effective* even if not *efficient* in the former sense, if it is set too high or too low from an economic perspective, provided it contributes to other desired goals or values, such as maximising public participation and transparency expected of governance regimes in a democratic society. We can and should still ask whether such desired outcomes are being generated through *cost-effective* processes. However, effectiveness does invite us to consider goals, values and outcomes less amenable to neoclassical economic analysis. Although effectiveness often will subsume efficiency, it is a broader concept.

[1] No 42, at http://www.pc.gov.au/study/productsafety/subs/sublist.html.

7. Focusing initially on *efficiency* in the sense of whether standards set are *optimal*, it is seems increasingly likely that those generated by SA are not so. There is growing risk that its Committees will be "captured" by vested interests, particularly industry interests, engaged in rent-seeking to overall socio-economic detriment.

   > Specifically, these interests may ensure (SA) standards are set too high, to disadvantage newcomers or competing suppliers. There is a particular risk of this occurring when there are a few incumbent firms, and/or an industry association dominated by them, which generates the standard – especially the first one, since the (largely) consensus-voting in SA Committees make it difficult for newcomers to get the standard changed, even if they can get onto the relevant Committee.
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   > Alternatively, they may be set too low, not providing sufficient incentives eg to supply safe products or services; but aimed at minimising the potential for regulators to formally intervene, imposing higher (optimal) standards. There is a particular risk of this if government agencies and especially consumer groups are not represented on the relevant Committee. Unfortunately, "leaner government" means that its agencies have diminishing capacity and interest to contribute to committees, while consumer or other stakeholder groups are more afflicted by collective action problems. This leaves narrower self-interested firms or industry associations with growing incentive and ability to dominate standard-setting. This problem can become particularly acute if SA lets individual firms dominate, and does not liaise well even with industry associations (where some of the vested interests may cancel out, depending on the membership and governance of the association).[2] It is also exacerbated when Australia maintains, for example, a now comparatively weak regime of consumer product safety regulation – on the (law) books, and in practice – because this diminishes "credible threats" of regulatory intervention if (SA) standards are set too low; and when Australian courts are not involved in supervising this process.[3]

8. Turning next to efficiency in the sense of *cost-effectiveness*, my experience and literature

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[2] More generally, for example, Submission No 4 from the Australian Marine Industries Federation criticises SA for not liaising with that association.

[3] See my second Submission (No DR48) to the Product Safety Review, appending an article from the *Australian Product Liability Reporter* comparing this situation with that particularly now in the European Union ("EU"): http://www.pc.gov.au/study/productsafety/subs/sublist.html

review confirms that SA's operations are generally quite poor.[4]

> First, it is not clear – even to Committee members – why and how standards are generated and reviewed. Sometimes it seems that the government's urging now generally to keep standards updated leads to standards being redrafted more to be seen as being active, rather than to address major substantive problems with existing standards. Conversely, SA can be very slow to constitute or reconstitute Committees to draft standards. Sometimes this is because of the "capture" just mentioned. Other times SA apparently say they are "waiting for international standards", which Professor Selinger thinks translates as SA enjoying "the overseas junkets more than getting results for Australian consumers".[5]
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> Even once standard-setting is (re)initiated, Committee deliberations can take years. A further problem here is that the SA staff convening these Committees often seem to change during deliberations, and typically seem to have little specialist knowledge to guide their draft-ups. Relatedly perhaps, the re-drafting occurs in full Committee, with all having to be present, which tends to be very time-consuming. Even in universities, hardly a paragon of efficiency, we minimise this by having Committee members or sub-groups circulate drafts beforehand.
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> Excessive time taken to generate the standards also dissuades a broader array of stakeholders from contributing to the process, even if "incumbent capture" problem can be overcome, and independently of the growing resource constraints particularly afflicting government agencies and consumer groups. Even within industry, it seems more likely that salaried employees of larger firms will be motivated and able to attend.[6] (Indeed, some may welcome "time off work", especially if it involves joining an SA delegation to overseas meetings.)
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> Further disincentive arises from outcomes of SA's standard-setting process. The firms, associations or other organizations that have volunteered their

[4] Cf, unsurprisingly, Submission No 5 by SA.
[5] Submission No 2, p 2. Professor Selinger also notes how SA still has not moved despite safety problems with light globes (bulbs) being highlighted by him for example in the widely read *Burke's Backyard* magazine (April 2005). I am aware of at least one other Committee that took far too long to reconstitute, and is still dragging its feet, regarding another commonly used product that now raises safety, security and other social issues.
[6] Eg Submission No 3, by Professor Tyas regarding dentistry products, p 2.

staff to serve on Committees have to purchase the resultant Standards from SA (or more precisely, SAI Global, which it listed on the ASX in 2003 and in which it still holds 9% of shares). Even extracts are prohibited from display on these organisations' websites.[7] In the case of one Standard I drafted, SA didn't even send me (personally) a copy of the final version, and I had to chase them up three times to get it.

9. Finally, as explained above (para 6), the analysis requested of the PC by the government is not limited to efficiency; it also asks about broader *effectiveness* of SA's standard-setting system. Even if safety standards are not set optimally from the perspective of economic efficiency, for example, the system may be operating effectively by promoting other values and goals. Unfortunately, these are not being clearly articulated and pursued, in a cost-effective way.

As identified above, there are severe and seemingly growing problems in securing balanced *public participation* in Committees and SA governance more generally, which citizens should be entitled to for such an important institution.

There are also problems with *transparency*, even for Committee members trying to understand what is behind proposals to (re)draft standards, and the processes and time frames to guide deliberations.

More broadly, SA has little *accountability* beyond occasional Memoranda of Understanding (since 1988) with the government and some related pressure it can exercise on SA through funding ($2.1 million in 2005-6). It is unclear whether such links with the government and the nature of the functions exercised by SA would subject the latter to administrative or judicial review, if for example its Committee processes and decision-making did not comply with natural justice and other fundamental principles we expect nowadays when public functions are exercised.[8] As for substantive outcomes, the Standards themselves are supplied "in trade", so can be "misleading or deceptive" under fair trading legislation; but that will depend on the particular facts.

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[7] Idem, concluding "it seems inequitable that [dentistry association] members have made their intellectual property available to SA at some personal cost, and then have to buy it back".

[8] See generally eg Aronson, M et al, *Judicial Review of Administrative Action* (3rd ed 2004, Lawbook Co); but also now the *Masu (No 2)* case, [2004] NSWSC 829.

We also have little assurance that SA is contributing (cost-effectively) as a *good international citizen*, on behalf of the government and Australian taxpayers, when it uses state funding to participate in standard-setting activities overseas.

IV. Australian Government's Role, including MoU and funding for SA

10. Because of these problems of SA standard-setting that is likely to be sub-optimal (inefficient), or more broadly ineffective, and carried out in a cost-inefficient manner, the government needs to seriously reconsider its role and relationship with SA.

11. In particular, a new MoU should require SA to monitor, publicly disclose and improve broader stakeholder participation not only in Committees (including eg breakdowns of salaried, large firm, association representation) but also in SA governance structures (including consumer and NGO participation, and in its still related listed company, SAI Global). The MoU should also set, monitor and disclose standards for timely initiation and completion of standard (re)drafting. The government should ensure SA has in place a complaints process, as well as an open door at government level to appeal to. The MoU should also add a requirement that SA demonstrate its value-added contributions to standard-setting internationally. If stricter conditions are not met, the government should seriously consider promoting the establishing of a competitor organization to SA --although excessive diversification of standard-setting bodies brings its own problems, as in the US.

12. Government funding of SA meanwhile should be continued, and possibly even expanded, but subject to stricter conditions such as those just mentioned. It should not be directed to more glossy magazines, further expensive outside consultancy reports, and the like. Staff expertise and retention, and managing a more diverse array of stakeholders effectively, should be more pressing concerns for SA. In addition, too little funding is being forwarded towards travel and other costs of consumer groups and other important but less well-resourced stakeholders. The government might directly fund participation by certain stakeholder groups, as in the EU.

13. It should also rethink the way SA listed SAI Global, and the relationship between those two organisations. SAI Global makes healthy profits, yet only a small

portion goes to SA (as 9% shareholder), primarily because it has a 15-year licensing agreement for the publication and sales of SA's Standards. Yet those Standards were and are still being generated thanks to the unremunerated contributions to SA Committees by government agencies, university teachers like myself, consumer groups and others serving the public interest. Personally, I see little reason now to work for free on such Committees, if the main beneficiaries are not even SA but rather the other 91% shareholders of SAI. I would be more amenable if the licensing agreement were renegotiated so that SA gets more royalties from SAI Global, *and* SA itself becomes more cost-effective, efficient and effective in its standard-setting activities.

14. Because the problems in the latter respects seem so pervasive, the government also needs to consider its role more broadly. Particularly in some areas, such as consumer product safety, it needs to bolster its capacity for regulatory intervention and information-gathering to meet the new global (EU) standard.[9] If SA can still not produce proper product safety standards, the government needs more credible back-up powers to generate them itself, premised on better information flows from SA, firms themselves and an informed public.

V. Conclusions

15. In sum, SA's current system is unlikely to generate optimal (efficient) standard levels, it is ineffective in promoting other values (such as participation, transparency, accountability and good citizenship), and it is cost-inefficient in both those respects. This requires considerable rethinking of the government's role and relationship with SA, including its MoU and SA funding. We may not need to reinvent the wheel, as similar issues are being analysed in other countries and at the global level. The EU provides important lessons.[10]

16. Hopefully more Submissions and information will be forthcoming for the PC particularly in regard to SA and its standard-setting process. We know now the problems, and they need to be widely publicised and addressed.

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[9] See also Nottage, L., 'The Latest Round in Australia's Review of Consumer Product Safety Regulation: The Productivity Commission's Final Research Report', (2006) 17 *Australian Product Liability Reporter* 1-8; Nottage, L., 'Consumer Product Safety Regulation Reform in Australia: Ongoing Processes and Possible Outcomes', (2006) *Yearbook of Consumer Law* forthcoming.

[10] See eg eg Dawar K *Decision Making in the Global Market: Trade, Standards and the Consumer* Consumers International London 2005 at www.consumersinternational.org; and Howells G G 'The Relationship between Product Liability and Product Safety: Understanding a Necessary Element in European Product Liability through a Comparison with the US Position' (2000) 39 *Washburn Law Journal* 305-46.