

# Regulatory Impact Statement

## Application of Crown Copyright to New Zealand Standards under the new Standards Regime

### Agency Disclosure Statement

- 1 This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment.
- 2 It provides an analysis of options to deal with Crown copyright implications arising from the change in institutional arrangements for the New Zealand Standards system [Cab min () 5/4 and Cab min (13) 35/1 refer].
- 3 Without further action there may be varying levels of copyright protection in Standards and a small risk that copyright will disappear altogether. This uncertainty and the possibility of inconsistent copyright in Standards is likely to undermine vital existing relationships and practice.
- 4 There is uncertainty as to whether the contractual arrangement between MBIE and the volunteer expert contributors to Standards could be characterised as 'contracts for services'. Our analysis and conclusions are the same in either case but the magnitude of the problem we have identified increases if the volunteers are considered to be Crown contractors. Our view is that they will not be Crown contractors, but this could change depending on future contractual arrangements.
- 5 No other key gaps, key dependencies or significant constraints, caveats or uncertainties concerning the analysis were identified.

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## Status Quo

- 6 The Standards Council is the sole developer of New Zealand Standards (Standards). The Council performs its primary functions of developing and promoting Standards through its operating arm Standards New Zealand (SNZ).
- 7 SNZ maintains a catalogue of over 2500 Standards. Approximately 1200 Standards are referenced in regulations, codes of practice and industry guidelines (either as legally mandatory or as providing an acceptable solution or means of compliance).
- 8 Standards are drafted by committees comprising of industry experts who come together to pool and catalogue their knowledge and experience to create a Standard. This process is in line with the International Organisation for Standardisation (ISO) guidelines. The experts are not paid for their time or expertise by SNZ. Copyright is normally vested in SNZ.
- 9 Eighty-two per cent of the Standards are joint Australia New Zealand standards (AS/NZS) produced by committees of up to 20-30 experts, including 2-3 New Zealanders. The copyright in AS/NZS is owned by both parties with each having exclusive copyright within its own territory.
- 10 Many Standards and AS/NZS are reproduced, adopted, adapted or otherwise derived from ISO and the International Electrotechnical Commission (IEC). SNZ is a member of ISO and IEC. SNZ holds the New Zealand copyright licence and often places its own copyright notices on Standards adopted from ISO and IEC.

### *The New Regime*

- 11 The Standards Council is to be disestablished and replaced with a Statutory Board and statutory officer located within MBIE. The Board will approve, revoke and archive Standards. The Crown will hold copyright in Standards and the statutory officer will be responsible for the administration of copyright and development of Standards [Cab min (13) 5/4 refers].
- 12 Crown copyright applies to any part of a Standard or AS/NZS created by any employee or contractor of the Crown. As MBIE is part of the Crown, there will be at least three possible scenarios under the new regime in which a Crown employee or contractor may contribute to the creation of a Standard:
  - a) the Standards project manager (who will be usually be an MBIE employee) writes the first draft of a Standard
  - b) an employee of MBIE is a member of a committee drafting a Standard (for example, as a representative of the regulator for the relevant industry)
  - c) an MBIE contractor prepares the first draft of a Standard.
- 13 The use of volunteer based committees to develop Standards consistent with ISO Guidelines means that any contribution of Crown employees or contractors is unlikely to be significant. It is not anticipated that a Standard would be created exclusively by Crown employees or contractors.
- 14 Standards Australia want to enter into a formal arrangement with MBIE as the new Standards authority. This is conditional in part on a continuation of the current copyright protections, licensing and royalty arrangements that are in place for AS/NZS, and for Australian standards drawn on in developing Standards.

- 15 The existing relationship with Standards Australia provides significant benefits to New Zealand. These include access to Australian expertise and resources which assist in producing Standards that are robust and high quality, internationally aligned to facilitate trade, and cost effective to produce. Connecting to ISO, IEC other standard development organisations (SDO) offer further similar benefits.

#### *Crown copyright*

- 16 Section 26 of the Copyright Act 1994 (the Act) provides that copyright in a work made by a Crown employee or contractor is Crown copyright. The Crown is automatically the first owner of copyright and does not need to separately contract for ownership of works created by a contractor (as is the case with ordinary copyright). Joint authorship is also treated differently, with Crown copyright existing only in the contribution to the work made by the Crown employee or contractor.
- 17 Section 27(1A) provides that no Crown copyright exists in any work that is incorporated by reference into legislation. Any other copyright in the work incorporated by reference under section 27(1A) will be unaffected.
- 18 Crown copyright continues to be Crown copyright even if the copyright is assigned to another person. That is, Crown copyright can only be created by a Crown employee or contractor and it does not cease to exist because of a change of ownership. Conversely, if copyright in an existing work is assigned to the Crown, it will not become Crown copyright. The Crown will hold that copyright as an ordinary copyright holder.

### **Problem Definition**

- 19 The Standards development function is moving into MBIE. Any Crown copyright in Standards that are incorporated by reference into legislation will cease to exist by virtue of section 27(1A) of the Act. Standards or parts of Standards may therefore become freely available. This would compromise the Standard development arrangements that New Zealand currently has with Australia and other SDO's. Maintaining these relationships is vital for ensuring robust, high quality, internationally aligned Standards.

#### *Size of the problem*

- 20 The likelihood of Standards becoming freely available is small, but leaving open the risk that it could happen would have serious consequences for producing Standards.
- 21 A loss of Crown copyright in a Standard would not necessarily mean that there was no copyright in the Standard at all. Even if Crown copyright in part of a Standard ceased to exist when the Standard were incorporated by reference, copyright in the rest of the Standard would not cease to exist. More importantly, the loss of Crown copyright in the relevant part of the Standard would not affect any other copyright (i.e., non-Crown copyright) in that same part. Copyright may be vested simultaneously in the other creators, whose copyright would then be assigned to the Crown. As holder of that non-Crown copyright, the Crown would be able to use that copyright to protect the Standard.
- 22 However, it is possible that Crown copyright will arise in part of a Standard that was the only copyright in that part. In that scenario that part of the Standard could lose copyright protection altogether when incorporated by reference and become freely available.

- 23 The majority of Standards will not be subject to Crown copyright. The Crown will usually hold copyright in Standards as an ordinary copyright owner. It will not exist in any Standard or any part of a Standard that has been created without Crown employee or contractor contributions. There will therefore be no Crown copyright in any Standard developed entirely by volunteer experts, Standards Australia, ISO, IEC or any other SDO (or a combination of these). Section 27(1A) applies only to Crown copyright. If there is no Crown copyright in a Standard then the incorporation by reference of a Standard into legislation will not affect the copyright status of the Standard.
- 24 Existing Standards are to be assigned to MBIE under the new regime. Section 27(1A) will not apply to these existing Standards as any Crown copyright in the Standards would have been assigned to SNZ. Section 27(1A) only applies if the copyright has not been assigned to a third party
- 25 Leaving the risk open has serious consequences for the production of Standards. The impact of Crown copyright creates an actual or perceived risk for SDOs of losing control of copyright in their standards. This is likely to negatively impact New Zealand's relationship with other SDOs, including becoming an obstacle to negotiating a new joint standards development arrangement with Standards Australia. A reduction in the levels of cooperation and practice with SDO's and particularly Standards Australia would affect New Zealand's ability to produce cost effective, high quality, robust, internationally aligned Standards.

## **Objectives**

- 26 The objectives are to:
- Prevent any risk of Standards becoming freely available to ensure on-going cooperation between New Zealand, Australia and other SDOs
  - Ensure that copyright in Standards is clear, consistent and easy to administer
  - Maintain the integrity of New Zealand's copyright regime.

## **Regulatory Impact Analysis - Options**

- 27 There are four options in dealing with the Crown copyright in Standards created by MBIE:
- a) Status Quo – Crown copyright applies to any part of a Standard developed by an MBIE employee or contractor and that copyright ceases to exist if the Standard is incorporated by reference into legislation
  - b) Contract out of Crown Copyright – provide in the contracts with any Crown employee or contractors contributing to the creation of Standards that Crown copyright does not apply
  - c) Remove Standards from the scope of section 27(1A) of the Act – Crown copyright applies to any part of a Standard developed by a Crown employee or contractor, but legislative amendment provides that copyright does not cease to exist if the Standard is incorporated by reference into legislation (Preferred Option)
  - d) Remove Standards from the scope of Crown copyright – legislative amendment specifically excluding Standards from Crown copyright.

### **Option one: Status Quo**

- 28 MBIE would hold Crown copyright in a Standard or part of a Standard created by its employee or contractor but Crown copyright will cease to exist if that Standard is incorporated by reference into legislation by virtue of s 27(1A).
- 29 The major cost of this option is discussed above at paragraph 25.
- 30 A further cost of this option is that the nature and treatment of copyright in Standards would not be consistent. As discussed above in paragraphs [20-24], Crown copyright will not apply to most Standards, but it will often be very difficult to determine when it does apply and what (if any) copyright exists in those Standards if they are incorporated by reference into legislation. This would make the new regime more difficult to administer. It would also make the new regime more difficult for users of Standards to understand.

### **Option two: Contract out of Crown copyright**

- 31 The application of Crown copyright is subject to any agreement to the contrary<sup>1</sup>. An alternative to legislative change for the Crown is to enter an agreement with every Crown employee or contractor providing that they are the first owner of the copyright in that person's contribution to a Standard but that this copyright is assigned to the Crown.
- 32 The benefit of this option is that it provides a way to avoid Crown copyright without legislative amendment. However there is a risk that contracting out of Crown copyright may not be monitored closely enough to work consistently, and that the contracting out process is open to change over time. Further, a legislative amendment is not difficult in this case, given that there will be a need to be a Bill to implement the new Standards regime.
- 33 This option could result in the negative impact to New Zealand's relationships with SDOs as well as the inconsistent and uncertain copyright in Standards discussed at paragraphs [25 and 31] above.

### **Option three: Remove Standards from the scope of section 27(1A)**

- 34 This option would involve providing that, to the extent there is Crown copyright in a Standard, that Crown copyright does not cease to exist if the Standard is incorporated by reference into legislation. This is the preferred option.
- 35 This option may require that Crown copyright is not claimed. There is no specific requirement that Crown copyright should be asserted or notified. The copyright notice can merely set out the existence of copyright, the applicable owners of that copyright and the year and country of first publication. This practice would overcome any potential administrative difficulty in determining the copyright status and the correct copyright notice for a Standard. It would also prevent any risk that people using Standards with a Crown copyright notice might infringe copyright by assuming that they are entitled to copy any part of that Standard if incorporated by reference in legislation. This practice, in combination with the legislative change, would provide clarity to users of Standards that there is no change to the level of availability of Standards under the new regime.

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<sup>1</sup> Section 26(6) of the Act.

- 36 The benefits of this option are that it would lay the foundations for successfully negotiating a formal arrangement with Standards Australia and maintain New Zealand's existing cooperation and practice with other SDO's. This would ensure New Zealand's on-going access to Australian and other international expertise and resource, enabling the most cost effective model available for producing high quality Standards and maintaining the existing catalogue. It would also ensure that Standards continue to be internationally aligned both in content (through joint development and adaptation) and in practice (i.e. commercialisation of standards).
- 37 This option has the further benefit of creating optimum conditions for on-going production of Standards with minimal impact on the integrity of the copyright regime.

#### **Option four: Remove Standards from the scope of Crown copyright**

- 38 This option would retain essentially the same copyright regime for Standards as exists under the current regime. It provides the benefits relating to maintaining cooperation with Standards Australia and other SDOs discussed at paragraph [35] above and benefits relating to certainty and ease of administration. It also aligns to international best practice.
- 39 All copyright in Standards would be identical. This option produces the clear result that the Crown would be the copyright holder (as assignee of the copyright of others) and the copyright would not be Crown copyright. This consistent approach across all Standards would ensure that the copyright in Standards would be easy to explain to the relevant industry and regulators, and that New Zealand is aligned to international best practice.
- 40 This option allows for the smooth transition of copyright and existing arrangements with partnering SDO's from SNZ to MBIE. There will be no risk of a change in copyright status impacting on any existing arrangement and no requirement to determine whether and to what extent Crown copyright applies.
- 41 However, the cost of this option is that it involves an inconsistent legal treatment of copyright created by the Crown. It would involve treating Standards differently to any other work produced by the Crown.

42 Our analysis is summarised in the following table:

**Table 1: Summary of Regulatory Impact Analysis**

| Objective<br>Option  | Prevent any risk of Standards becoming freely available to ensure on-going cooperation between New Zealand, Australia and other SDOs   | Copyright in Standards is clear, consistent and easily administered.  | Maintain the integrity of NZs copyright regime                         |
|--|--|---|--|
| <b>Option A – Do nothing</b>   | ✗ Changes current copyright protection for Standards which creates risk that Standards (or parts of Standards) may become freely available. This would negatively impact on NZ’s international relationships   | ✗ The nature and treatment of copyright in Standards would be unclear with increased administrative complexity  | ✓ Copyright regime unaffected  |
| <b>Option B - Contract out of Crown Copyright</b>  | ✗ Would provide copyright protection similar to current Standards and go some way to maintaining international cooperation and practice. Relies on consistent administration over time. Remaining uncertainties and perceived risk that Standards (or parts of Standards) may become freely available would negatively impact on-going cooperation with Australia and other SDOs | ✗The nature of copyright in Standards would be clearer<br>Consistency of treatment could be uncertain and administratively complex  | ✓ Copyright regime unaffected  |
| <b>Option C - Remove Standards from scope of section 27(1A) and consistent copyright notices</b> | ✓ Would provide copyright protection similar to current Standards and legislative certainty to eliminate risk of Standards becoming freely available, ensuring optimum conditions for maintenance of international cooperation and practice  | ✓ The nature and treatment of copyright in Standards would be clear, consistent and easily administered through a combination of legislation and the practice of not asserting Crown copyright in copyright notices | ✓ Minimal impact on integrity of copyright regime                      |
| <b>Option D - Remove Standards from the scope of Crown copyright</b>                             | ✓ Would maintain current copyright protection for Standards and legislative certainty to eliminate risk of Standards becoming freely available, ensuring optimum conditions for maintenance of international cooperation and practice  | ✓ The nature and treatment of copyright in Standards would be consistent, clear and easily administered   | ✗ Treats Standards differently to any other work produced by the Crown |

## Consultation

43 As part of the Standards review process, the Standards Council and SNZ raised copyright in Standards as a key issue. Discussions have focused on international intellectual property and royalty arrangements and the need to honour obligations and enforcement of copyright.

- 44 Once MBIE became clear on the preferred approach to institutional arrangements for the Standards development function (i.e. to move to MBIE), we engaged further with key stakeholders, including Standards Australia. Standards Australia raised their concerns regarding the implication for copyright arrangements, and their desire for current arrangements for Standards to be maintained. MBIE is now in the process of negotiating a formal agreement with Standards Australia.
- 45 MBIE has also engaged with ISO, IEC, British Standards Institution and CEN-CENELEC. MBIE's GM visited ISO in June to discuss the Standards Review. Throughout the process MBIE have reiterated that ISO/IEC guidelines and international obligations (e.g. WTO Technical Barriers to Trade agreement) will continue to apply, and that copyright for Standards will be respected (including existing arrangements regarding licensing, royalty payment and enforcement of copyright).
- 46 Consultation was not undertaken with Standards users because, provided that MBIE ensures on-going cooperation and practice with SDOs, the transition to the new regime (and options considered) will have no practical impact on user access to Standards.

## **Conclusions and Recommendations**

- 47 As discussed at paragraphs [20-24] the risk of Crown copyright in Standards being problematic is small. However, the consequences of the risk on maintaining the confidence of Standards Australia and other SDOs are significant. In order to create optimum copyright conditions for the maintenance of New Zealand's relationship with Australia and other SDO's while ensuring the integrity of the existing copyright regime, option three is recommended. This option will ensure that we are able to continue to produce robust, high quality, internationally aligned, cost effective and readily accessible Standards in accordance with international best practice and provide a Standards regime that is clear and easy to administer and protect.

## **Implementation**

- 48 The proposed exemption of Standards from Crown copyright will require an amendment to the Copyright Act 1994 as a consequential amendment in the Standards and Conformance Bill.
- 49 The Standards and Conformance Bill should clarify that there is no Crown copyright in new or existing Standards. (Existing Standards may have Crown copyright if employees or contractors of the Crown have been involved in their drafting. It is doubtful that there is any record of this).

## **Monitoring, Evaluation and Review**

- 50 The arrangements for monitoring and review will be developed further by the oversight group, and will be finalised prior to legislation coming into force.
- 51 The Standards development function, located in MBIE, will be subject to usual agency oversight. The new regime will have a monitoring process built in and the copyright changes will be factored and considered as part of the process.