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## Chapter 4

### Public policy issues

4.01 The terms of reference require the Committee to consider, amongst other things, the social and economic objectives of government ownership of copyright material. This chapter examines a range of relevant public policy issues:

- competition policy;
- the copyright balance;
- other policy issues, including providing an incentive to create, ensuring access to government material, protecting its integrity and allowing its cost-effective management; and
- consideration of whether government needs to own copyright in commissioned works to achieve its aims.

#### **Competition policy – the Ergas Committee’s report**

4.02 As noted in Chapter 1, a key factor for this inquiry was concern about the interaction between government ownership of copyright and competition policy. As outlined in Chapter 3, there were no specific Crown copyright provisions until the 1911 UK Act. Apart from the prerogative right, the Crown held the same rights as any other copyright owner.

4.03 In 2000 the *Review of Intellectual Property Legislation under the Competition Principles Agreement* (the Ergas Committee) examined the effect of government ownership of copyright in light of principles of competitive neutrality. The Competition Principles Agreement was signed by all Australian governments in 1995 and the objective of competitive neutrality is set out in subclause 3(1):

The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net *competitive* advantage simply as a result of their public sector ownership. These

principles apply only to the business activities of publicly owned entities, not to the non-business, non-profit activities of those entities.

4.04 Clause 3 allows governments discretion to determine their respective competitive neutrality policies.<sup>1</sup> The Queensland Government stated:

In essence, how competitive neutrality is applied is up to each government and its application varies widely across jurisdictions. Competitive neutrality does not apply to all government businesses – only to those where governments elect to do so.<sup>2</sup>

4.05 The Ergas Committee in applying competitive neutrality principles to government ownership of copyright stated that section 176 (which gives the government ownership of copyright in material made under its direction or control):

...places government in a more favourable position than other contractors or employers who only become copyright owners under an assignment in writing, or subject to the terms of a contract of employment (implied or otherwise).<sup>3</sup>

4.06 Accordingly the Ergas Committee recommended that section 176 be amended to place the government in the same position as any other contracting party. The Commonwealth Government's response stated that while it accepted that government should not benefit from unjustified preferential treatment, it would first look at developing best practice policy guidelines for Crown ownership of copyright rather than change the legislation, on the basis that this measure 'could be more immediately effective and serve as a model for other jurisdictions'.<sup>4</sup> During this inquiry, this view was supported by the Bureau of Meteorology, which opposed any legislative change on the basis that policy could be adapted more quickly than legislation to suit a changing environment.<sup>5</sup>

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<sup>1</sup> National Competition Council, *Competitive Neutrality: Scope for Improvement*, June 2002, p. 5.

<sup>2</sup> Submission 71, p. 8.

<sup>3</sup> Ergas Committee, *op cit*, p. 113.

<sup>4</sup> See: [www.ipaustralia.gov.au/pdfs/general/response1.PDF](http://www.ipaustralia.gov.au/pdfs/general/response1.PDF).

<sup>5</sup> Submission 18, p. 1.

### **Evidence to the Committee on the Ergas recommendation**

4.07 Several submissions to the Committee, particularly those from State governments, argued that the Ergas Committee did not explore the issue of Crown copyright in depth and that its recommendation should not apply across the board to all government activities.

4.08 For example, the Queensland Department of Natural Resources, Mines and Energy argued that the Ergas Committee's consideration of section 176 did not go beyond the situation where government commissions the production of copyright material by an independent contractor, such as an architect or artist. The Department argued that section 176 applies in a much broader range of circumstances and that different policy considerations may arise depending on how and why materials are produced by or for government:

The competition considerations arising in the circumstances on which the [Ergas Committee] based its recommendation cannot be assumed to be of equal relevance or significance – if indeed they are relevant or significant at all – across the wide range of circumstances in which governments may be vested with first ownership of copyright by virtue of s 176.<sup>6</sup>

4.09 The NSW Attorney General's Department noted that the Competition Principles Agreement refers only to 'government businesses' and 'government business enterprises', and argued that, depending on how those terms are construed:

... the observations of the Ergas Committee may apply not to the government-as-a-whole but only to discrete portions of government.<sup>7</sup>

4.10 On a separate point, the Queensland Government argued that the effect of the first ownership provisions 'in practice ... would be negligible and would not be sufficient to warrant repeal or amendment of those sections'.<sup>8</sup> The NSW Attorney General's Department also questioned whether government benefited under section 176 from a net competitive advantage:

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<sup>6</sup> Submission 65, p. 3.

<sup>7</sup> Submission 57, p. 10.

<sup>8</sup> Submission 71, p. 9.

The government is not competing in a market with private owners of copyright. While the government's ownership of copyright in material made under its 'direction or control' is automatic under s.176, it is open to debate that s.176 thereby confers a 'net competitive advantage' on the government.<sup>9</sup>

4.11 However, the NSW Government did concede that there may be situations where the Crown copyright provisions should not apply:

One such area may be in relation to government business enterprises which are removed from the 'core' functions of government where competitive neutrality issues might come into play. Many of the businesses may not have the benefit of the Crown copyright as they no longer represent the Crown, for example, State Owned Corporations, or because copyright issues would be dealt with through commercial negotiations.<sup>10</sup>

4.12 While the Ergas Committee recommendations may provide reasons for abolishing or amending the Part VII provisions, the Committee considers there are other policy considerations that justify the same conclusion.

### **The copyright balance**

4.13 Copyright law has long been considered to be a balance of competing policy objectives. There have been various expressions of what an appropriate balance should be. The preamble to the *World Intellectual Property Organisation (WIPO) Copyright Treaty* recognises a need to balance the following interests:

... the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.<sup>11</sup>

4.14 There have been similar formulations by copyright law reform bodies in Australia. The Spicer Committee in 1959 described copyright law as a balance

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<sup>9</sup> Submission 57, p. 11.

<sup>10</sup> Submission 56, p. 5.

<sup>11</sup> Preamble, WIPO Copyright Treaty (WCT) 1996.

between providing rewards and incentives for creators, and ensuring that monopoly rights are not abused and that research and education are not restricted.<sup>12</sup> In 1976 the Copyright Law Committee on Reprographic Reproduction (the Franki Committee) acknowledged the Spicer Committee's formulation and considered that the development of reprographic reproduction had affected that balance:

A tension has therefore developed between the expectations of many copyright owners that they should benefit from the greater availability of their works, on the one hand, and the needs of the community, on the other, for ready access to information and knowledge.<sup>13</sup>

4.15 The Copyright Law Review Committee in 2002 described the copyright balance as one between encouraging competition and providing incentives to innovation and creativity on the one hand, and ensuring access to information on the other,<sup>14</sup> and this Committee agrees with that description. The Committee also acknowledges that the development of digital technology has led to debate over what the appropriate balance is, in light of new means of access which may allow unauthorised high quality reproductions but also allow access to be restricted.<sup>15</sup>

## Policy issues

4.16 As noted in the previous chapter, most submissions were in favour of government owning copyright in all works and subject matter covered by the Copyright Act. In particular, most government departments and agencies supported government ownership of copyright material produced by all three arms of government: the executive, legislature and judiciary. As the Committee noted in its Discussion Paper,<sup>16</sup> reasons advanced in support of this position include the following:

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<sup>12</sup> Spicer Committee, para 13.

<sup>13</sup> Copyright Law Committee on Reprographic Reproduction (the Franki Committee), *Report of the Copyright Law Committee on Reprographic Reproduction*, Chairman the Hon Justice Franki, AGPS, Canberra, 1976, p. 10.

<sup>14</sup> Copyright Law Review Committee *Copyright and contract*, CLRC, Canberra, 2002, p. 13.

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.*, para 11.

- government ownership of copyright is the best way of ensuring the integrity of government material;
- it also ensures public access regardless of commercial considerations;
- abolishing government ownership of copyright will increase costs;
- governments should be able to control the dissemination of material they produce;
- copyright royalties provide an additional means of funding government functions;
- Crown copyright supports industry development; and
- Crown copyright fosters a competitive market for information.

4.17 Others disagreed with some or all of those justifications. They are discussed in more detail below.

### **The range of material may affect policy considerations**

4.18 Integral to the Committee's examination of public policy considerations in government copyright is the scope of material in which copyright is owned. As noted in Chapter 2, given the extensive range of modern government functions, copyright can subsist in a broad range of government material to which different policy considerations may apply. As the Australian Information Industry Association (AIIA) stated:

The government has an obligation to make the most effective use of its copyright material. In some cases, this may require strict controls to protect the value of the material. In other cases, this may require widespread availability to the community whose taxes have paid for its creation or acquisition.<sup>17</sup>

4.19 Different categories of material can be distinguished on the basis of the public interest in their dissemination:<sup>18</sup>

- material where there is a clear public interest in providing the widest possible dissemination, including primary legal materials (the focus of

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<sup>17</sup> Submission 21, p. 12.

<sup>18</sup> See J Gilchrist, 'The role of government as proprietor and disseminator of information' *Australian Journal of Corporate Law*, 1996, vol 7, 62–79, at 63–4.

much comment in submissions). Many other government materials are produced to encourage public discussion and education, promote community standards and facilitate public access to government services;

- other material, such as historical material, where the public interest in dissemination is not as strong; and
- unpublished material, such as submissions to ministers and particular databases. Access to unpublished material is governed to some extent by freedom of information and privacy laws, as well as archives legislation.

4.20 Not all parties agreed with this breakdown. For example, during consultations with State governments, a suggested alternative analysis was to consider the type of government agency which was involved, ranging from core government departments to those which have a commercial focus, such as government trading enterprises. Others argued that all materials were created for government purposes, with commercial exploitation of materials being an offshoot of their creation rather than their purpose.

4.21 These different perspectives underline the difficulty of making policy determinations across the board without considering the implications for different types of material and different government functions. The Committee considers that they also raise questions about the desirability of maintaining a favoured position for government in all circumstances currently covered by the special Crown ownership provisions in Part VII of the Copyright Act.

4.22 Key policy issues are explored in more depth below:

- providing an incentive to create;
- ensuring access to government copyright material, including the relationship between copyright and freedom of information (FOI) and archives legislation;
- ensuring the integrity of government information;
- allowing cost-effective management of government material; and
- whether government needs to own copyright to achieve any or all of these aims.

### Providing an incentive to create

4.23 The Committee considers that the traditional balance between rewarding creators and protecting the rights of users is not necessarily relevant to all government copyright material. The Committee noted in its Issues Paper that it is difficult to see how copyright provides an incentive for government to create in many cases, given that government is bound to carry out its functions.<sup>19</sup> In 1992 the Prices Surveillance Authority recommended that Crown copyright in legislation and related materials be abolished, one of its key reasons being that:

Copyright monopoly rights are not necessary to ensure incentive for adequate development of such information. It is information produced using public money to facilitate government. Such information should be freely available.<sup>20</sup>

4.24 However, some submissions argued that this reasoning may not apply equally to all material in which the government claims copyright. The NSW Government stated that financial reward may be relevant to government:

While government material is produced using public money, without copyright protection there is a risk that some of this material will no longer be produced. In some cases government will be exposed to risk in developing certain material (required by the public) because it might be unable to recoup any costs incurred.<sup>21</sup>

4.25 The Western Australian Department of Industry and Resources argued:

... if governments generate copyright material the rights afforded as a reward for creativity can be utilised or commercialised for the benefit of the people ... [T]o remove copyright protection from government generated materials or to provide a lesser level of copyright protection ... would destroy or seriously damage a potentially valuable driver of economic development in Australia.<sup>22</sup>

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<sup>19</sup> Para 77. The Committee also noted that this argument may equally apply to non-government authors.

<sup>20</sup> Prices Surveillance Authority, *Inquiry into the publications pricing policy of the Australian Government Publishing Service*, 1992, p. 92.

<sup>21</sup> *Submission 56*, p. 10.

<sup>22</sup> *Submission 35*, p. 2.

4.26 During the Committee's consultations representatives of the Victorian Government noted that production costs can be offset by money recouped through copyright, enabling enhancements to formatting or upgrading of websites. If production costs were too high and government was unable to recover any funds, the quality of publication might be reduced, although representatives stated that it would be rare that government would decide not to publish at all.<sup>23</sup>

### **Ensuring access to government copyright material**

4.27 An essential characteristic of modern democracy is open access to government information. This has been increasingly recognised through a range of reforms such as the introduction of freedom of information (FOI) legislation throughout Australia in the past two decades.<sup>24</sup>

4.28 A generally accepted principle of copyright law is that copyright does not protect information but only the particular form in which information is expressed: that is, there is a clear division between ideas and their expression. However, this categorisation has been subject to criticism.<sup>25</sup> Ms Judith Bannister, lecturer in law at Flinders University, submitted that the idea/expression dichotomy did not always operate well in practice in relation to government copyright and that, on occasion, open access to government information requires the work itself to be reproduced.<sup>26</sup>

4.29 Other submissions, including the Administrative Review Council (ARC),<sup>27</sup> argued that governments should not use copyright to restrict access to government documents. However, it is clear that copyright has been used in this

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<sup>23</sup> CLRC Consultation, Melbourne, 24 August 2004.

<sup>24</sup> See Australian Law Reform Commission *Open government: A review of the federal Freedom of Information Act 1982*, ALRC, 1995, chapter 2. The 1982 federal legislation was the first national freedom of information legislation in a country with a Westminster style of responsible government (para 2.1).

<sup>25</sup> For example, Ricketson & Creswell *op cit*, para 4.65; Lahore & Rothnie *op cit*, para 6030. See also *Desktop Marketing Systems v Telstra* (2002) 55 IPR 1 in relation to copyright protection available for databases.

<sup>26</sup> *Submission 58* (unpublished).

<sup>27</sup> *Submission 69*, p. 2.

way. In *Commonwealth v Fairfax*,<sup>28</sup> the High Court granted an interim injunction to restrain the publication of certain documents produced by the Department of Defence and Department of Foreign Affairs on the basis that publication would be a breach of copyright.<sup>29</sup> The case has been criticised as a ‘poor exercise of government copyright’:

... because it was essentially used for an ulterior purpose, that of preserving the confidentiality of documents. In the governmental sphere this is more appropriately dealt with by specific laws dealing with disclosure ...<sup>30</sup>

4.30 Moreover, as the Australian Law Reform Commission (ALRC) noted in its recent report on protecting classified and sensitive information,<sup>31</sup> this action did not protect the information, with much of the content of the documents being subsequently published in summary form.<sup>32</sup> More recently, copyright is also reported to have been asserted in attempting to address the unauthorised release of a police video of the Port Arthur massacre.<sup>33</sup>

4.31 Submissions varied on how access to government information may be ensured where there is an identifiable public interest in making that information widely available.<sup>34</sup> Some submissions suggested retaining Crown copyright but introducing statutory exceptions or blanket licences. Others suggested abolishing copyright in certain material, particularly primary legal material

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<sup>28</sup> (1980) 147 CLR 39.

<sup>29</sup> The Commonwealth argued for an interim injunction on three grounds: that it was the owner of the copyright in most of the documents in the book; that publication should be restrained on the basis that the documents contained confidential information whose disclosure would prejudice Australia’s relations with other countries; and that disclosure would involve an offence against section 79 of the *Crimes Act 1914* (Cth). Mason J declined to grant an injunction on the last two grounds, but granted it on the basis of copyright.

<sup>30</sup> J Gilchrist, ‘The role of government as proprietor and disseminator of information’ op cit, p. 62.

<sup>31</sup> ALRC *Keeping secrets: the protection of classified and security sensitive information*, Report 98, ALRC, 2004, para 5.7.

<sup>32</sup> *ibid*, citing R Walsh & G Munster, *State secrets: a detailed assessment of the book they banned, Documents on Australian Defence and Foreign Policy 1968–75*, 1982.

<sup>33</sup> R Wade, ‘Police probe on for video truth’, *The Mercury*, 2 September 2004, p.11, where it was reported that a person was threatened with prosecution under the Copyright Act for making and distributing unauthorised copies of the tape.

<sup>34</sup> For example, during the Committee’s public forum in Sydney on 27 July 2004, representatives of CAL argued that copyright does not necessarily restrict access but rather is a means to manage access, and that the relevant question to consider is how access should be managed.

where there is a strong public interest in wide dissemination. However, some expressed concern that removing copyright protection from government material would increase private ownership of copyright in published editions of works. This in turn may hinder access to that material. Consequently it has been argued that retaining copyright protection for all government material but providing exceptions or broad licences would be a preferable way of ensuring access.<sup>35</sup>

### ***The impact of new technologies on access***

4.32 Technological advances in the electronic storage and dissemination of information have had an impact upon access to government material in Australia and elsewhere. Governments have used the Internet and electronic databases to facilitate cheaper and more efficient access to government information. For example, the Commonwealth Government has developed *Scaleplus* to provide access to Commonwealth and Territory legislation.

4.33 The former National Office of the Information Economy (NOIE) developed an ‘e-government’ strategy for Commonwealth agencies. The strategy is designed to achieve the ‘era of fully-fledged e-government – in which the application of new technologies to government services, information and administration demonstrates sustained benefits to citizens, business and government itself.’<sup>36</sup> The strategy has six key objectives:

- achieve greater efficiency and a return on investments;
- ensure convenient access to government services and information;
- deliver services that are responsive to client needs;
- integrate related services;
- build user trust and confidence; and
- enhance closer citizen engagement.

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<sup>35</sup> For example, Professor Brian Fitzgerald, *Submission 17*, p. 2; ACC, *Submission 27*, p. 6. See also J Gilchrist, ‘The role of government as proprietor and disseminator of information’ op cit, p. 78.

<sup>36</sup> National Office of the Information Economy, *Better services, better government: The Federal Government’s e-Government strategy*, Canberra, 2002. The office was replaced in April 2004 by the Australian Government Information Management Office and in October 2004 that office was incorporated into the Department of Finance and Administration.

4.34 While new means of access facilitate the free flow of information, they also provide more scope for unauthorised reproduction and use. As the ALRC and AIIA noted, a balance must be found between the two interests.<sup>37</sup>

### ***International moves to improve access to government material***

4.35 While new technology has improved the accessibility of information for many people, it has also allowed the development of new protection measures that can restrict that access. Internationally there have been increased efforts to ensure public access to government copyright material. For example, the 1998 UK review of Crown copyright stated that the review was to facilitate ‘the growth of new information services in printed and electronic formats, in line with the Government’s policy of maximising public access to official information, and subject to the continuing need to protect the taxpayers’ interest and the integrity of Crown copyright materials.’<sup>38</sup>

4.36 In December 2003 the United Nations (UN) convened a world summit on the information society in Geneva.<sup>39</sup> At the Summit it was agreed that all stakeholders should work together to improve access to information and knowledge. This commitment by the UN and participating countries (including Australia) to build an information society with greater access to a rich public domain is particularly relevant.<sup>40</sup>

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<sup>37</sup> ALRC *Submission 3*, p. 3; AIIA *Submission 21*, p. 12.

<sup>38</sup> Minister for the Cabinet Office, *Green Paper*, op cit, p. 1.

<sup>39</sup> United Nations, ‘Draft Declaration of Principles’, *World Summit on the Information Society*, Geneva 2003.

<sup>40</sup> Hon D Williams MP (Minister for Department of Communications, Information Technology and the Arts), ‘Australia endorses global ICT action plan’, *Media release*, Canberra, 15 December 2003; National Office of the Information Economy, *World Summit on the Information Society*, accessed in March 2004 at <[www.noie.gov.au/projects/access/connecting\\_communities/wsis.htm](http://www.noie.gov.au/projects/access/connecting_communities/wsis.htm)>. Australia was represented at the summit by a delegation of government and community representatives, who highlighted the Australian Government’s programs to provide greater internet access in developing countries and regional communities. However, the Australian delegation did not address the possible effect of government ownership of copyright material on the dissemination of, and access to, information. The Australian Government has endorsed the Declaration of Principles.

4.37 In May 2001 the European Council and Commission adopted a Regulation on public access to European Parliament, Council and Commission documents.<sup>41</sup> The introduction of the Regulation indicated a growing awareness of the importance of promoting transparency and improving public access to institutions' documents.<sup>42</sup> In 2003 the European Commission passed a Directive to facilitate the re-use of public sector information held by public sector bodies of Member States.<sup>43</sup> The Directive is expressed not to affect the intellectual property rights of public sector bodies.<sup>44</sup>

4.38 In the last few years, there have also been increasing calls for open access to research studies, particularly scientific studies. The number of open-access journals has risen dramatically,<sup>45</sup> with open-access publishers charging authors a printing fee and making materials available on-line for free. According to an article published in late August 2004, Nobel Prize-winning scientists have asked the US government to make all taxpayer-funded research papers freely available.<sup>46</sup> The US Federal Government is reported to fund about 59 per cent of academic research and development.<sup>47</sup> The US House Appropriations Committee has reportedly issued a directive to make National Institute of Health-funded research available for free within six months of publication, beginning in 2005.<sup>48</sup>

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<sup>41</sup> Regulation (EC) 1049/2001 of 30 May 2001.

<sup>42</sup> At the time of introduction it was also expected that the Regulation would encourage citizens to participate in the decision-making process, thus ensuring greater legitimacy and accountability. One practical effect of the Regulation has been a lifting of fees charged for documents obtained from the Eur-Lex website, a single point of access to all the European Union's legislative instruments.

<sup>43</sup> Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (the Directive). The Directive is a response to the lack of uniformity regarding re-use of public information across Europe. Some countries have a policy of making all documents freely available while others are more restrictive in their approach.

<sup>44</sup> Recital 22 of the Directive. Member States must implement the Directive by 1 July 2005.

<sup>45</sup> Said to have increased from 5 in 1992 to 1200 in 2004 (D Vergano 'Scientists want research papers freely available', *USA Today*, 29 August 2004, at [http://www.usatoday.com/news/science/2004-08-29-free-research\\_x.htm](http://www.usatoday.com/news/science/2004-08-29-free-research_x.htm), accessed on 1 September 2004).

<sup>46</sup> In a letter to Congress and the National Institute of Health, the researchers object to barriers that hinder the spread of scientific knowledge supported by federal tax dollars. See D Vergano, *op cit*.

<sup>47</sup> *ibid*, citing the National Research Council. Universities are said to fund 20 per cent and state and local government 7.1 per cent.

<sup>48</sup> *ibid*. Some publishers are said to strongly disagree with the plan.

4.39 Some submissions raised the issue of open access, including the Council of Australian State Libraries (CASL),<sup>49</sup> Queensland University of Technology law Professor Brian Fitzgerald<sup>50</sup> and the Australian Digital Alliance/Australian Libraries' Copyright Committee (ADA/ALCC).<sup>51</sup> Professor Fitzgerald argued that open access did not require the abolition of Crown copyright:

Ten years ago the question would have simply been whether the Crown should or should not have copyright? Many advocating for no Crown copyright would have been seeking open access to information.

Today ... [i]t is arguable that a broader and more robust information commons can be developed by leveraging off your copyright rather than merely “giving away” material.<sup>52</sup>

4.40 Professor Fitzgerald supported the retention of Crown copyright in order ‘to strategically manage Crown copyright either in a closed manner for maximum economic reward or in an open fashion for maximum public access’:

The copyright becomes the key tool in managing downstream usage – open or closed. A proposal that the Crown does not have any rights to copyright material would in effect reduce the ability of the Crown to structure user rights and otherwise manage information.<sup>53</sup>

4.41 Professor Fitzgerald conceded that for an open licensing system to be effective, government policy and information management systems would need to be ‘clearly articulated ... and where necessary legislatively reinforced’.<sup>54</sup>

### ***Materials which should be freely accessible***

4.42 A substantial number of submissions argued that copyright in legislation and other primary legal materials should be abolished, with some suggesting

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<sup>49</sup> *Submission 30.*

<sup>50</sup> *Submission 17.*

<sup>51</sup> *Submission 19.*

<sup>52</sup> *Submission 17*, p. 1.

<sup>53</sup> *Submission 17*, p. 2.

<sup>54</sup> *ibid.*

that certain executive materials should be treated in the same way. There has been a growth in availability of legal information through a network of legal information institutes that provide free online access.<sup>55</sup> The legal information institutes argue that maximising public access to this information promotes justice and the rule of law, and that public legal information is digital common property which should be accessible to all on a non-profit basis and free of charge.<sup>56</sup>

4.43 Submissions that supported the placement of certain material in the public domain referred in particular to legal material. For example, the Australasian Legal Information Institute, AustLII, identified a class of ‘public legal material’ (legislation, judicial decisions, law reform and Royal Commission reports) that it considered should be in the public domain.<sup>57</sup> The Law Council of Australia submitted that copyright should not subsist in materials created by the judicial, legislative and at least certain parts of the executive arms of government.<sup>58</sup> Similarly, the ABC submitted that ‘[m]aterial directly relevant to the Government’s public functions, such as parliamentary documents and court judgments’ should not be subject to copyright.<sup>59</sup> The Flexible Learning Advisory Group (FLAG) also argued that the principle that legal materials should be freely available was ‘most fully reflected in a regime which treats such documents as copyright free’, while noting its view that the effect of such a change would be more symbolic than practical.<sup>60</sup>

4.44 Former Chief Justice of the Supreme Court of New South Wales Sir Laurence Street expressed concern in 1982 about the implications of having copyright in judgments:

On the technical question of whether judgments are the subject of copyright I offer no opinion. They may be; they may not be. But I am clear that they *ought*

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<sup>55</sup> Such as the Australasian Legal Information Institute, AustLII, a joint facility of the University of Technology Sydney and University of New South Wales Faculties of Law with private and public funding.

<sup>56</sup> ‘Declaration on free access to law’, Law via the Internet Conference, Montreal, October 2002, as amended in November 2003, available at <http://www.worldlii.org/worldlii/declaration>.

<sup>57</sup> Submission 25, p. 1.

<sup>58</sup> Submission 33, p. 1–2.

<sup>59</sup> Submission 54, p. 1.

<sup>60</sup> Submission 46, p. 4.

*to be regarded as *publici juris* - available to all without restraint to be read, criticised, studied and understood. ... To my mind it is unthinkable that a judge who delivers a judgment should have power to order that it be not reproduced in the press or elsewhere. It is equally unthinkable that the Crown should have the power to suppress or forbid reproduction or quotation of a judgment in the press, in universities and elsewhere. The spectre of political censorship lurks not far behind assertions of copyright in judgments.*<sup>61</sup>

4.45 The Law Council of Australia and AustLII favoured amendment of the Copyright Act along the lines of the New Zealand legislation. As noted in Chapter 3, copyright does not subsist in New Zealand in bills, legislation, regulations, by-laws, parliamentary debates, reports of select committees, judgments, and reports of commissions or inquiries.<sup>62</sup> Other submissions such as the ACC<sup>63</sup> and the University of Melbourne<sup>64</sup> supported the principle that such materials should be freely available but argued that copyright in them did not necessarily need to be abolished.

4.46 However, AustLII argued that providing general licences for reproduction were not enough to promote greater access to legal information:

Without effective access to electronic data streams, no publisher today has any effective right to publish, as the cost and delay of conversion from paper copies precludes this alternative. Even if governments provide free access to law through government-run websites, we argue that this is not sufficient to protect the public interest – unless this also provides effective free access to the data for republication by other publishers.<sup>65</sup>

4.47 The Committee received submissions from some members of the judiciary about copyright in judgments. Chief Justice Black of the Federal Court of Australia submitted that copyright should not subsist in judgments,

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<sup>61</sup> Sir Laurence Street, Speech at the Opening of the Law Term Dinner, Sydney, 2 February 1982, quoted in Australian Law Journal, 'The Crown and copyright in publicly delivered judgments', editorial, Australian Law Journal, vol. 56, 1982, 327–8.

<sup>62</sup> Section 27 of the *Copyright Act 1994* (NZ).

<sup>63</sup> *Submission 27*, p. 6.

<sup>64</sup> *Submission 5*, p. 1.

<sup>65</sup> *Submission 25*, p. 6.

court rules, practice notes and notices to practitioners.<sup>66</sup> His Honour considered that because in a common law system part of the law is in judgments, they should be freely available, and stated that there is little chance of inaccurate reproduction in this electronic age. Alternatively, His Honour submitted that the Copyright Act should be amended to make it clear that copyright vests in the judges as authors of judgments, and to introduce a statutory licence for the reproduction of judgments without charge. In His Honour's view, a unilateral waiver by government would be unsatisfactory 'first, because it leaves untouched the possibility that the judges, and not the government, own the copyright in judgments, and, secondly, because some governments might not waive copyright'.<sup>67</sup>

4.48 During the Committee's public forum in Sydney, the President of the Copyright Tribunal and judge of the Federal Court, Justice Lindgren, reinforced Chief Justice Black's view. His Honour noted that he did not consider that integrity of material was a reason to retain copyright in judgments, since Federal Court judgments were posted onto the Internet soon after delivery, and also because judgments were 'misused and misinterpreted every day'.<sup>68</sup> His Honour also queried the appropriateness of the Commonwealth Government having copyright in court publications, given the relationship between the judicial and the executive arms of government. Chief Justice Black's views were also supported by the President of the Australian Industrial Relations Commission<sup>69</sup> and the Hon Paul Seaman QC.<sup>70</sup>

4.49 However, these views were not universally shared by members of the judiciary. Chief Justice Doyle of the Supreme Court of South Australia thought it appropriate that copyright in materials produced by the judiciary be vested in the Crown. However, His Honour considered that the right should not be used to place inappropriate restrictions on the publication and dissemination of judgments. They should be able to be reproduced relatively freely, but it was

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<sup>66</sup> *Submission 61*, p. 2.

<sup>67</sup> *ibid.*

<sup>68</sup> CLRC Public forum, Sydney, 27 July 2004.

<sup>69</sup> Department of Employment and Workplace Relations (DEWR), *Submission 74*, p. 3.

<sup>70</sup> CLRC consultations, Perth, 20 August 2004. The Hon Paul Seaman QC is a retired judge of the Supreme Court of Western Australia.

not unreasonable to seek a return from those who publish for commercial gain.<sup>71</sup>

4.50 His Honour Judge McGill from the District Court of Queensland argued that there was ‘no obvious practical advantage’ in abolishing copyright in judicial materials, since judgments were currently widely disseminated. However, there could be unforeseen disadvantages:

Having ownership of judicial materials ... does not have to be inconsistent with having them readily available, but would be useful in discouraging inappropriate use of them.<sup>72</sup>

4.51 In addition to proposing that copyright in primary legal materials should be abolished, the Law Council of Australia submitted that copyright should not subsist in ‘at least certain parts of the executive arms of government’.<sup>73</sup> The Law Council of Australia proposed that copyright should be abolished in:

- parliamentary debates and reports of parliamentary committees;
- reports of commissions of inquiries, including royal commissions and ministerial and statutory inquiries;
- government and parliamentary press notices and promotional materials;
- judicial, legislative and administrative forms;
- material on official websites of the executive, legislative or judicial arms of government; and
- texts of ministerial and parliamentary speeches, articles and papers.<sup>74</sup>

4.52 While the Department of Veterans’ Affairs stated that there were good public policy reasons for all executive material to be freely accessible to members of the Australian community, it noted that it had used copyright in relation to ‘some unfortunate experiences with the overseas use of material’. International agreements had allowed the Department to rely on copyright ownership to resolve the dispute.<sup>75</sup>

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<sup>71</sup> *Submission 39*, p. 1.

<sup>72</sup> *Submission 70*, p. 2.

<sup>73</sup> *Submission 33*, p. 1.

<sup>74</sup> *Ibid*, p. 3.

<sup>75</sup> *Submission 55*, p. 9.

### ***Relationship between copyright and FOI, privacy and archives legislation***

4.53 During its inquiry, the Committee sought views on the relationship between copyright law and other legislation that deals with access to information held by government, namely, FOI, archives and privacy legislation.

4.54 The ALRC noted that while FOI and privacy laws provide a means of regulating access to information held by government, ‘in practice this relates only to material not already in the public domain’. Consequently those laws have very limited impact on the use of material that is published or otherwise released to the public.<sup>76</sup> For unpublished government material in which there is an identifiable public interest in access, FOI law is more appropriate to regulate access.<sup>77</sup>

4.55 The Committee considers that the nexus between privacy law and copyright law is very limited, given that the purpose of the *Privacy Act 1988* (Cth) is to protect personal information about an individual against misuse.<sup>78</sup> Very few comments on privacy laws were received during this inquiry.

4.56 However, copyright law interacts to a limited extent with FOI and archives legislation in relation to the form of access to certain material in the possession of government. The extent of that interaction is discussed briefly below.

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<sup>76</sup> Submission 3, p. 3.

<sup>77</sup> Ms Judith Bannister, Submission 58 (unpublished).

<sup>78</sup> For example, Information Privacy Principles provide that government agencies shall not disclose a record containing personal information unless certain circumstances exist (such as the individual’s consent), and that personal information should not be used or disclosed for a purpose which is secondary to the primary purpose of collection unless certain circumstances exist: see section 14 of the *Privacy Act 1988* (Cth).

### ***Freedom of information***

4.57 The object of the *Freedom of Information Act 1982* (Cth) (the FOI Act) is to extend as far as possible the right of the Australian community to have access to information in the possession of the Commonwealth.<sup>79</sup> It does so by requiring Commonwealth agencies:

- to publish information about their operations, their powers affecting members of the public and their decision-making processes; and
- to provide access to documents in their possession unless the documents are within a specified exception or exemption. Exemptions are provided where necessary to protect essential public interests or the private or business affairs of others, including documents affecting national security, defence or international relations,<sup>80</sup> those containing material obtained in confidence<sup>81</sup> and those affecting personal privacy.<sup>82</sup>

4.58 Copyright law interacts with FOI law in a limited way, in that the *form* of access to material in the government's possession may be restricted if another party owns copyright.<sup>83</sup> The practical effect of this provision is, for example, that a document in which another party owns copyright may be made available by government for viewing, but not for copying.<sup>84</sup> Where access is provided by making a copy of the document, the requester may not deal with the work in a manner that would infringe the owner's copyright, whether the owner is government or another person.<sup>85</sup>

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<sup>79</sup> Freedom of Information Act 1982 (Cth), section 3.

<sup>80</sup> Freedom of Information Act 1982 (Cth), section 33.

<sup>81</sup> Freedom of Information Act 1982 (Cth), section 45.

<sup>82</sup> Freedom of Information Act 1982 (Cth), section 41.

<sup>83</sup> That party may object to disclosure under some of the exemption provisions, but a decision may still be made to release the material. See *Freedom of Information Act 1982* (Cth) s. 20(3); *Freedom of Information Act 1989* (NSW) s. 27(3); *Freedom of Information Act 1992* (Qld) s. 30(3); *Freedom of Information Act 1989* (ACT) s. 19(3); *Freedom of Information Act 1991* (SA) s. 22(2); *Freedom of Information Act 1982* (Vic) s. 23(3); *Freedom of Information Act 1992* (WA) s. 27(2). The Commonwealth Act, unlike those of the States, provides that this exception does not apply to matter that relates to the affairs of an agency or department.

<sup>84</sup> P J Bayne, *Freedom of information : an analysis of the Freedom of Information Act 1982 (Cth) and a synopsis of the Freedom of Information Act 1982 (Vic)*, Law Book Company, Sydney, 1984, p. 238.

<sup>85</sup> *ibid*, p. 239.

4.59 The FOI Act contains various review mechanisms where government refuses access to any material in its possession, consistent with the object of facilitating the widest possible access to government information.<sup>86</sup> The Committee notes that there are no such rights of review where government refuses access to material under the Copyright Act.

### ***Archives legislation***

4.60 A basic principle of the *Archives Act 1983* (Cth) is that all Commonwealth records should be made publicly available once they are 30 years old, unless they contain exempt information. However, copyright may still be used to restrict the use that may be made of the material.

4.61 The National Archives of Australia noted that access to Commonwealth records more than 30 years of age is regulated only by the access provisions of the *Archives Act 1983* rather than the FOI Act, since the FOI Act applies only to works created after 1977. Where material is released under the *Archives Act 1983*, its use is regulated only through the government's exercise of its rights in copyright. The National Archives could not recall any situation where government had refused permission to use material on the grounds that the use was inappropriate. Consequently:

The Archives considers it unnecessary to retain copyright ownership of records in order to control their use when this power is little used and records are in any case examined before public release to ensure they contain no information of ongoing sensitivity.<sup>87</sup>

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<sup>86</sup> *Freedom of Information Act 1982* (Cth), Part VI.

<sup>87</sup> *Submission 37*, p. 9.

4.62 The National Archives also noted that:

...privately authored material is also part of the records of the Commonwealth and is released under the Archives Act, but the Commonwealth has no power to control the use of that material through copyright ownership.<sup>88</sup>

4.63 Accordingly the National Archives stated:

An argument could therefore be mounted for the Commonwealth to waive its copyright in respect of records over thirty years of age or at least to streamline the avenue of obtaining permissions. The economic argument for retaining copyright in materials over thirty years of age has little force.<sup>89</sup>

4.64 In particular, most works produced by government ‘are not commercially exploitable’ and the National Archives argued that a distinction should be made between material that is commercially valuable and material that is not:

... in the way that government exercises its rights of copyright, so that a regime intended to protect legitimate economic interests is not applied to material of no economic value and in so doing merely act as a hindrance to legitimate public use.<sup>90</sup>

4.65 The Australian Society of Archivists expressed similar views.<sup>91</sup>

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<sup>88</sup> *Submission 37*, p. 9.

<sup>89</sup> *ibid*, p. 9. The National Archives went further in suggesting (at p. 6) that it would be appropriate if copyright in Commonwealth records, both published and unpublished, expired at the same time that they became available for public access under the *Archives Act 1983*, namely, when they were thirty years old.

<sup>90</sup> *ibid*, p. 8.

<sup>91</sup> *Submission 53*, pp. 5–6.

## Protecting the integrity of information

4.66 As discussed in Chapter 6 in relation to prerogative rights, part of the original rationale for government ownership of copyright material was a need to ensure the integrity and authenticity of official government publications. Since that time this rationale has been developed<sup>92</sup> and was restated in many of the submissions received.<sup>93</sup> Reviews in other common law countries have also referred to this rationale in relation to their government materials.<sup>94</sup>

4.67 DCITA argued that government ownership of copyright enables the Commonwealth to impose conditions on the use of material (such as by requiring the inclusion of standard acknowledgments and disclaimers). DCITA submitted that this can help ensure appropriate use of sensitive published materials that are critical to the community, especially where use could imply Government endorsement of a particular political party or a commercial product or service, or where sensitive materials such as immigration forms are used.<sup>95</sup>

4.68 The Victorian Government similarly argued:

In some circumstances it is important for a State body to continue to exercise control over State copyright, to ensure confidentiality or quality or consistency with other Government publications or outputs. The State must ensure the continued integrity and authenticity of official government publications so that

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<sup>92</sup> See for example, Gilchrist, 'The role of government as proprietor and disseminator of information', *op cit*, p. 79: where he argued that integrity and authenticity were ensured by the imposition of appropriate licensing conditions under copyright, so that action can be taken under copyright law for misuse or misrepresentation of material.

<sup>93</sup> For example, Ms Judith Bannister, *Submission 58* (unpublished); ARC *Submission 69*; South Australian Attorney-General, *Submission 52*; Department of Family and Community Services (FACS), *Submission 36*; Victorian Government, *Submission 64*; and Bureau of Meteorology, *Submission 18*.

<sup>94</sup> See Minister for the Cabinet Office, *White Paper: The future management of Crown copyright*, Cmnd 4300, HMSO, 1999, para 5.1; C Tullo 'Crown copyright: the way forward – access to public sector information' *The Law Librarian*, vol 29 no 4, 1998, 200–3, at 200. A Canadian review also stated that government ownership of copyright 'is useful to prevent distortion and misuse', but did not elaborate on its reasons: see A A Keyes and C Brunet, *Copyright in Canada: Proposals for a Revision of the Law*, Department of Consumer and Corporate Affairs, Ottawa, 1977, p. 225.

<sup>95</sup> *Submission 60*, p. 2.

the public can be aware of the status of each publication. Continuing to maintain Crown copyright is essential to achieving these outcomes.<sup>96</sup>

4.69 However, in relation to protecting the integrity of legal materials, Justice Lindgren, President of the Copyright Tribunal and judge of the Federal Court, contended that the issue did not arise in relation to judgments,<sup>97</sup> as discussed earlier in this chapter.

4.70 The Committee considers it unlikely that re-publishers of primary legal source materials would either deliberately or negligently disseminate inaccurate copies, as a lack of integrity, authority and accuracy in the materials would considerably affect the publisher's reputation.

4.71 However, His Honour Judge McGill from the District Court of Queensland argued that abolishing copyright in judgments 'may well be a huge incentive to plagiarism'. On this point, His Honour noted:

Any judge would be pleased to see his exposition of any particular legal point or principle cited by others, but would I think be less pleased to see it claimed by others as their own.<sup>98</sup>

4.72 An important question is whether Crown copyright is the most appropriate means to protect the integrity of government material, with several submissions referring to alternative mechanisms. The National Archives, arguing that copyright did not prevent the distortion of government material, stated:

The way to ensure the accuracy and authenticity of government material is through recordkeeping and custodial regimes which preserve the authenticity and integrity of government material over time and ensure the availability of such material as a check against deliberate distortion.<sup>99</sup>

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<sup>96</sup> *Submission 64*, p. 1.

<sup>97</sup> CLRC public consultation, Sydney, 27 July 2004.

<sup>98</sup> *Submission 70*, p. 2.

<sup>99</sup> *Submission 37*, p. 10.

4.73 The National Archives also stated that in instances where government material has been used, for example, on a website advocating racial violence, or implies government support for an issue, action may be taken under the *Racial Vilification Act 1996* (Cth) to restrict its use.<sup>100</sup>

4.74 AustLII also argued that government may rely on the *Trade Practices Act 1974* (Cth) to control the use of material.<sup>101</sup> Section 52 of that Act allows action against a corporation in trade or commerce for misleading or deceptive conduct or conduct likely to mislead or deceive. While this provision operates in limited circumstances, particularly only in relation to conduct by corporations, AustLII argued:

Given that this issue has not, to our knowledge, proven to be a major problem in the past in Australia, and that jurisdictions such as New Zealand and the USA (at the Federal level) have eschewed Crown copyright, we consider that s52 is likely to provide sufficient protection to the public interest in ‘integrity’.<sup>102</sup>

4.75 The Law Institute of Victoria submitted that government should use technological protection measures to protect material online.<sup>103</sup> The Copyright Agency Limited (CAL) as a Digital Object Identifier (DOI) registration agency submitted:

It is CAL’s view that the use of Digital Object Identifier (DOI) by government would be beneficial to government in a number of ways. These include monitoring the use of government material, ensuring that government material was always accessible to the public, and providing a reliable method of tracking authenticity of government material.<sup>104</sup>

4.76 AIIA noted that it was unlikely that governments would ever be able to fully safeguard against inappropriate use of their material made available through new technologies. While technology could be used to control access

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<sup>100</sup> *Submission 37*, p. 10.

<sup>101</sup> *Submission 25*, p. 3.

<sup>102</sup> *Submission 25*, p. 4.

<sup>103</sup> *Submission 42*, para 3.13.

<sup>104</sup> *Submission 48*, p. 9.

and ensure integrity to some extent, governments needed to weigh the benefits of making material available against the risk of distortion.<sup>105</sup>

4.77 The ARC, while opposing the use of copyright to restrict access to information held by government, stated without elaboration that there may be ‘good arguments’ for the retention of government ownership of copyright ‘based on the need to ensure the integrity and authenticity of government information in the public domain’. The ARC noted, however, the importance of asserting Crown copyright ‘in a manner consistent with the goal of open and accountable government, rather than discouraging citizen involvement in government’.<sup>106</sup>

### **Allowing cost-effective administration of government**

4.78 Another justification for government ownership of copyright relates to the cost-effective administration of government, particularly by providing the capacity to recoup costs. It has been argued that a principal rationale for government copyright is that it minimises the printing and publishing costs borne by the government and the taxpayer.<sup>107</sup> Another argument is that government material that is not protected by copyright may be exploited free of charge by other countries. Government ownership of copyright may also be seen as easing the administrative burden on agencies by reducing the need to make express arrangements for the use of material prepared by third parties.

4.79 DCITA submitted that Crown copyright allows the Commonwealth to charge fees for the commercial use of materials that have been produced and published with public monies. DCITA noted that the Commonwealth Copyright Administration (CCA) generally does not charge a fee for reproduction of published Commonwealth copyright material where the material will be used in a non-commercial context (for example, by educational institutions). Fees are also waived where the proposed use is deemed to be of particular public interest.

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<sup>105</sup> *Submission 21*.

<sup>106</sup> *Submission 69*, p. 2.

<sup>107</sup> Gilchrist, ‘The role of government as proprietor and disseminator of information’, *op cit*, p. 79.

4.80 DCITA further submitted that Crown copyright allows the Commonwealth to protect its commercial interests in materials it creates or publishes if, for example, the Commonwealth divests itself of ownership in agencies that deliver particular assets or services. The purchaser of the rights to the services may reasonably expect to obtain rights to some, if not all, of the essential intellectual property, such as internal records and promotional materials.<sup>108</sup>

4.81 An important influence on policy objectives, as outlined above, is the changing function and role of government and the scope of material that is now produced. In response to this development, copyright is increasingly being viewed as a means of generating revenue from the commercialisation of government material and thus as having important economic benefits.<sup>109</sup> For example, the Western Australian Department of Industry and Resources stated:

Governments across Australia are beginning to appreciate the importance of managing and, where appropriate, commercialising intellectual property assets generated with public funds. The Western Australian Government Intellectual Property Policy approach is to identify that IP assets have the potential to generate economic, social or environmental benefits to Western Australians through the use and commercialisation of those assets.<sup>110</sup>

4.82 Similarly, the Bureau of Meteorology argued:

... as a research and scientific organization, [the Bureau] needs to be able to compete and collaborate with other such organizations in producing innovative meteorological software and other products. Being able to own its copyright enables the Bureau to perform effectively within this environment. Certain copyright material can also be manufactured to the Bureau's specifications at a lower cost than would otherwise be the case and this has a public benefit. Secondly copyright is essential to meet cost recovery requirements.<sup>111</sup>

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<sup>108</sup> *Submission 60*.

<sup>109</sup> Minister for the Cabinet Office, *White Paper*, op cit.

<sup>110</sup> *Submission 35*, p. 1.

<sup>111</sup> *Submission 18*, p. 1.

4.83 The Royal Australian Mint stressed in relation to coins, medallions and other works it produces that copyright is used ‘to protect public investment in copyright materials having commercial value’.<sup>112</sup>

Although the *Crimes (Currency) Act 1981* would operate so as to prevent counterfeits, entry of coin designs and other artistic works into the public domain would allow other businesses to appropriate freely and exploit commercially the government’s investment in intellectual property. It would allow commercial enterprises to produce a range of articles using this intellectual property without authorisation, the payment of royalties, or control by the Mint. It would place the Mint at a disadvantage compared to its domestic and international competitors.<sup>113</sup>

4.84 One issue on which opinions differed markedly during this inquiry is whether governments should be able to generate revenue from the reproduction and sale of legal materials. The Western Australian Department of the Premier and Cabinet noted:

Changes to the current scheme of Crown copyright ownership would have budget and funding implications in those states including Western Australia where charges are made for the sale or licensing of legislative materials in particular situations.<sup>114</sup>

4.85 Government ownership of copyright in official information may also prevent official texts being exploited by commercial interests, on the basis that the production of official texts is funded by taxpayers and should not be exploited for profit. However, it has also been argued that the existence of copyright reinforces the tendency for official information to be treated as a scarce and expensive commodity.<sup>115</sup>

4.86 Not all States share the Western Australian Government’s view in relation to exploitation of legal information. For example, the NSW Government and

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<sup>112</sup> *Submission 2*, p. 1.

<sup>113</sup> *Submission 2*, Attachment A.

<sup>114</sup> *Submission 29*, p. 3.

<sup>115</sup> S Picciotto, ‘Towards Open Access to British Official Documents’, 2 *Journal of Information Law and Technology*, 1996, p. 3.

the Northern Territory Government have issued express waivers over copyright in legislative materials and judicial decisions, acknowledging the public benefit in encouraging access to government information.<sup>116</sup>

### **Other public policy reasons for government ownership**

4.87 The Australian Library and Information Association (ALIA)<sup>117</sup> and the Law Institute of Victoria<sup>118</sup> argued that governments must have the ability to acquire copyright to ensure that they have control over the reproduction, modification, adaptation and publication of works.

4.88 The Royal Australian Mint also argued that copyright can be used ‘to ensure that the use of material is consistent with government policy’:

Removing this ownership would remove the ability of the government to ensure that the designs are used in good taste and that any use is compatible with the public expectations.<sup>119</sup>

4.89 DCITA also referred to circumstances where permission to reproduce copyright material may be denied on the grounds that it may allow a commercial/supply relationship with the Commonwealth to be wrongly implied or inferred.<sup>120</sup> While acknowledging that trade practices legislation and the tort of passing off may possibly apply in such circumstances, DCITA saw copyright as a ‘more immediate and effective tool’, although it did not elaborate on its reasons.

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<sup>116</sup> *Submission 56, Submission 72.*

<sup>117</sup> *Submission 32.*

<sup>118</sup> *Submission 64.*

<sup>119</sup> *Submission 2.*

<sup>120</sup> *Submission 60*, p. 3, referring to the Department of Defence’s position on the use of photographs from the Defence image gallery.

### **Is copyright ownership of commissioned material necessary?**

4.90 As outlined above, there is clearly debate over the justifications for Crown copyright ownership, particularly in relation to categories of material where there is a strong public interest in wide dissemination. Whether or not those reasons are accepted in relation to works produced by government or its employees, there is disagreement as to whether governments need to have ownership of copyright in material commissioned from third parties, or whether a licence to use material would be sufficient to achieve their aims. This issue relates in particular to cost-effective management, but also has implications for the capacity to restrict access and to ensure integrity of material.

#### ***The Commonwealth position***

4.91 In relation to commissioning or procuring works from other parties, DCITA argued that Commonwealth government agencies are encouraged to gain the best value for money from their investment (by considering, for example, that a licence to use material may cost less than full copyright ownership). Hence DCITA claimed it is ‘fairly common’ for copyright in some of the content of Commonwealth publications not to belong to the Commonwealth. An ‘ongoing review’ of the CCA indicated that when acquiring rights to third party copyright materials, Australian Government departments usually only acquire the rights they need to achieve their objective (such as a conditional licence to use photographs or extracts in their reports).<sup>121</sup>

4.92 DCITA also stated that the Commonwealth sometimes invests in the development of products or services either fully owned by the Commonwealth or in partnership with third parties.<sup>122</sup> DCITA acknowledged there may be some public benefit in terms of value for public expenditure if the Commonwealth was able to commercialise the product, or the developer or another third party was allowed to own copyright for further development.

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<sup>121</sup> *Submission 60*, p. 3.

<sup>122</sup> *Submission 60*.

4.93 DCITA gave as an example Commonwealth investment in developing information technology (IT) products. DCITA stated that the *Commonwealth IT IP Guidelines*<sup>123</sup> encourage a flexible approach to ownership options for IT products that may have commercial application, and aim to obtain value for money in Government purchasing and to encourage industry development. The Commonwealth may invest in the development of products or services either fully owned by the Commonwealth or in partnership with third parties.

4.94 However, a 2004 report by the Australian National Audit Office (ANAO) on Commonwealth intellectual property practices<sup>124</sup> presented a more critical view of agency practice. After surveying 74 Commonwealth agencies, the ANAO found that just over half (55 per cent) reported that they had mechanisms in place to decide on the appropriate level of ownership of intellectual property.<sup>125</sup> Only 30 per cent of agencies had developed specific policies or procedures for managing intellectual property.<sup>126</sup> The ANAO found that, although the *Commonwealth IT IP Guidelines* provide useful guidance to agencies on managing intellectual property in IT (including consideration of ownership options), there was a need for more general guidance and support.<sup>127</sup>

### ***The States' position***

4.95 The ANAO report noted that in recent years several States had developed guidelines for dealing with intellectual property, particularly in relation to information technology, and that other States were in the process of doing so.<sup>128</sup>

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<sup>123</sup> *Commonwealth IT IP Guidelines: Management and commercialisation of intellectual property in the field of information technology*, DCITA, Canberra, 2000.

<sup>124</sup> ANAO, *Intellectual property policies and practices in Commonwealth agencies*, Audit Report No. 25 2003–04, ANAO, 2004.

<sup>125</sup> *ibid.*, p. 21. The ANAO found that the most common means of agencies obtaining intellectual property were in-house development (24 per cent), consultancy (22 per cent) and licence (18 per cent) (p. 20). It should be noted that the study incorporated other forms of intellectual property besides copyright, namely, trade marks, designs and patents.

<sup>126</sup> *ibid.*, para 26, p. 22.

<sup>127</sup> *ibid.*, para 28, p. 22. Accordingly, the ANAO recommended the development of such an approach and guidance (Recommendation 2). The ANAO noted that the Commonwealth does not have a whole-of-government policy approach, unlike all but one of the States.

<sup>128</sup> *ibid.*, paras 1.53–63, pp. 42–4.

4.96 Most of the State and Territory intellectual property policies have not addressed the issue of whether government needs to own copyright in all situations, as discussed in more detail in Chapter 10. However, Tasmania has produced policy principles for agencies dealing with intellectual property in information technology. The principles recommend agencies only acquire copyright in instances where it is required.<sup>129</sup>

4.97 Other parties argued that it was unnecessary for government to own copyright in certain circumstances. The Royal Australian Institute of Architects (RAIA) argued that there should be no presumption in favour of government ownership of copyright in relation to architects' work:

There is simply no need for ownership of copyright by an architect's client in the vast majority of cases due to the operation of either an express licence in the commissioning agreement, or the implied licence arising from common law, either of which enable a client to have built and to maintain what has been designed by the architect ... To a creative author, the ability to re-use physical expressions of ideas or to further develop them in subsequent works is a valuable aspect of the author's intellectual property.<sup>130</sup>

4.98 The RAIA argued that while it could not point to specific examples, the presumption of government ownership of copyright had the potential to operate 'against full application of effort by a creative author' and thus reduce the value for money that government gets.<sup>131</sup>

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<sup>129</sup> [http://www.go.tas.gov.au/standards/itip\\_policyv1.0sept2001.htm](http://www.go.tas.gov.au/standards/itip_policyv1.0sept2001.htm).

<sup>130</sup> *Submission 75*, p. 7.

<sup>131</sup> *ibid.*