
Chapter 5

Special Crown ownership provisions of the Act

5.01 Government may own copyright under the general ownership provisions in Parts III and IV of the Copyright Act and through the prerogative right in the nature of copyright. In addition, government may own copyright under special provisions in Part VII, Division 1 of the Copyright Act.

5.02 Many submissions to the Committee advocated the abolition or restriction of the Part VII provisions. This chapter discusses:

- the scope of the Part VII provisions;
- evidence the Committee received on whether any change should be made; and
- the position in other common law countries.

The scope of the Part VII provisions: ownership of material made under the direction of the Crown

5.03 Sections 176 and 178 provide as follows:

176 Crown copyright in original works made under direction of Crown

- (1) Where, apart from this section, copyright would not subsist in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the work by virtue of this subsection.
- (2) The Commonwealth or a State is, subject to this Part and to Part X, the owner of the copyright in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or the State, as the case may be.

178 Crown copyright in recordings and films made under direction of Crown

- (1) Where, apart from this section, copyright would not subsist in a sound recording or cinematograph film made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the recording or film by virtue of this subsection.
- (2) The Commonwealth or a State is, subject to this Part and to Part X, the owner of the copyright in a sound recording or cinematograph film made by, or under the direction or control of, the Commonwealth or the State, as the case may be.

5.04 Sections 176 and 178 provide that the government is the owner of copyright in any work, film or sound recording made by, or under the direction or control of, government. Subsections 176(1) and 178(1) deal with the subsistence of copyright, providing that where copyright does not subsist by virtue of the other provisions of the Copyright Act, copyright will subsist under these subsections. Subsections 176(2) and 178(2) deal with government ownership of copyright where the material is created ‘under the direction or control of’ government.

Possible interpretations of sections 176 and 178

5.05 The way in which subsections 176(1) and 178(1) relate to subsections 176(2) and 178(2) is not entirely clear. One interpretation is that the opening words of subsections 176(1) and 178(1), ‘Where, apart from this section, copyright would not subsist ...’, reads down the operation of the following subsections, so that subsections 176(2) and 178(2) only apply where copyright does not subsist under the general provisions of the Copyright Act.

5.06 An alternative interpretation, and one that has been more widely accepted,¹ is that subsection 176(2) and 178(2) operate independently of the

¹ See for example, *RAIA Submission 75*, p. 5, arguing that on the basis of their experience, subsection 176(2) is commonly applied ‘in isolation, such that government asserts the presumption of ownership repeatedly, and that this is the reality in the community’.

preceding subsections. Thus subsections 176(1) and 178(1) exist only to ensure that copyright subsists in all material produced under the direction or control of the government irrespective of other requirements in the Copyright Act; they do not read down the operation of subsections 176(2) and 178(2) respectively.

5.07 This second interpretation was accepted in *Commonwealth of Australia v Oceantalk Australia Pty Ltd*,² where Burchett J stated:

If the Commonwealth proves that ‘an original...artistic work’ was ‘made by, or under the direction or control of, the Commonwealth’, it proves ownership of the copyright in that work, subject to the provisions to which s 176 is subject, which include s 180(2). The Commonwealth does not have to negative subsistence of copyright under s 32, or under the prerogative, in order to rely on s 176(2) because, if it proves the ingredients of that provision, it proves facts which must necessarily result in the subsistence of copyright.³

Similar provisions in the *Copyright Act 1956 (UK)*

5.08 In considering how these provisions should be interpreted, it is useful to consider their genesis. As outlined in Chapter 3, the Spicer Committee in 1959 recommended the enactment of a similar provision to section 39 of the 1956 UK Act, noting:

Section 39 of the 1956 Act in effect provides that copyright in works, cinematograph films or sound recordings made by or under the direction of the Crown shall, subject to agreement to the contrary, subsist in the Crown. The Crown is entitled to copyright in those circumstances even though, apart from that section, copyright would not subsist in the work. The effect of this provision is that the Crown has copyright in works and articles made under its direction or control without regards to the nationality or residence of the ‘author’ or the place of first publication.⁴

² (1998) 39 IPR 520.

³ *ibid*, p. 524.

⁴ Spicer Committee, *op cit*, at 402.

5.09 The Spicer Committee’s recommendations were adopted in the current Act.

5.10 Subsection 39(1) of the 1956 UK Act provided as follows:

In the case of every original literary, dramatic, musical, or artistic work made by or under the direction or control of Her Majesty or a Government department -

(a) if apart from this section copyright would not subsist to the work, copyright shall subsist therein by virtue of this subsection, and

(b) **in any case**, Her Majesty shall, subject to the provisions of this Part of this Act, be entitled to the copyright in the work.

5.11 The words ‘in any case’ made it clear that copyright would vest in the Crown regardless of whether copyright otherwise subsisted.⁵ While the Australian provisions are very similar, the words ‘in any case’ in the former UK Act were not included in sections 176 and 178.

Arguments for repeal of subsections 176(1) and 178(1)

5.12 Irrespective of how subsections 176(1) and 178(1) are interpreted, submissions to the Committee argued that these subsections should be repealed on the basis that situations where they would be relied upon today were difficult to envisage. For example, the ACC stated:

Given the various connecting factors for copyright subsistence, and the large number of countries whose nationals are now entitled to national treatment under the Copyright (International Protection) Regulations, and in which first publication is a connecting factor for subsistence, we were unable to find examples of material which would not be protected by copyright but for ss176 to 178.⁶

⁵ An identical provision to the UK’s section 39 existed in the former New Zealand legislation (section 52 of the *Copyright Act 1962* (NZ)) and was considered by the New Zealand Court of Appeal. In *Land Transport Safety Authority of New Zealand v Glogau* [1999] 1 NZLR 261, the court referred to the argument that the Crown would own copyright under paragraph (b) only if copyright came into being under paragraph (a). The court held ‘That interpretation limits ownership by the Crown to a very limited and arcane category indeed, most obviously works outside the Berne Convention. There is no obvious or sensible need for such an ownership restriction’ (at 272 per Gault, Blanchard and McGechan JJ).

⁶ *Submission 27*, p. 4.

5.13 The Law Council of Australia made similar comments, noting that while the provisions may have been appropriate at a time when the USA and other significant countries were not members of the Berne Convention, the rationale for their existence has since been ‘substantially superseded’.⁷

5.14 The Committee is unaware of any situations where subsections 176(1) and 178(1) would be relied upon to establish copyright subsistence in any particular work, and notes that no examples were given in submissions or during consultations.

The ‘direction or control’ test

5.15 The term ‘under the direction or control of’ is not defined in the Copyright Act, and as far as the Committee is aware there has been very limited judicial interpretation in the context of copyright. While the term clearly includes works created by government employees in the course of their duties, its exact scope is uncertain. It may include commissioned works and the works of volunteers supervised by government. In one reported case, *Linter Group Ltd (in liq) v Price Waterhouse*,⁸ the Supreme Court of Victoria held that the transcript of judicial proceedings produced pursuant to the judge’s direction under the *Evidence Act 1958 (Vic)* had been produced under the direction of the State for the purposes of section 176.

5.16 According to the ACC, the words ‘direction’ and ‘control’ in these provisions should be read separately and will include different situations.⁹ Whether work has been produced under the ‘control’ of another has been subject to much scrutiny by the courts in the context of employment law. Control over the manner of doing the work is the most commonly applied criterion in finding that a contract of employment exists, as distinct from a contract for services by an independent contractor. Factors that may be considered include whether government can oblige the employee to comply with the government’s instructions, and the ability of the government to dismiss the employee.¹⁰ However, courts have acknowledged that the control test is

⁷ *Submission 33*, p. 5.

⁸ (2000) VSC 90, Harper J, para 7.

⁹ ACC, *Government and Copyright*, Sydney, 2002, p. 35.

¹⁰ See for example *Performing Right Society v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762.

imprecise and sometimes does not reflect commercial reality, for example, where there are highly skilled technical workers.¹¹ ‘Direction’ has a broader meaning and may encompass a wide range of situations: it will require government to prove it guided, managed, instructed or ordered the making of the work.¹²

5.17 Several submissions raised concern over the lack of certainty arising from the use of this term in Part VII. Thomson Legal & Regulatory Ltd (Thomson),¹³ the Council of Australian University Librarians (CAUL)¹⁴ and the Victorian Government¹⁵ supported restriction of the provision to works made by government officers and employees, citing the UK provisions as a model. As CAUL noted:

[This change] would not preclude government seeking ownership of copyright when negotiating contracts for the creation of material.¹⁶

5.18 CAL expressed a similar view, arguing that government should be on the same footing as other employers.¹⁷

5.19 The Queensland Government, on the other hand, argued that the expression ‘direction or control’ should be re-stated to ensure that the meaning was clear, but pressed for a broader scope. In particular, the Queensland Government considered the Copyright Act should expressly state that the Part VII provisions cover material produced:

- by employees, volunteers, students and other unpaid workers, such as those on work experience;
- by independent contractors and consultants; and
- pursuant to a legislative, regulatory or administrative requirement where it is needed for a ‘governmental function’.¹⁸

¹¹ See for example *Queensland Stations Pty Ltd v FCT* (1945) 70 CLR 539; *FCT v Barrett* (1973) 129 CLR 395; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 36–7 per Wilson and Dawson JJ. Where the control test is not appropriate, the courts must consider the totality of the relationship.

¹² ACC, op cit, p. 35.

¹³ *Submission 13*, p. 3.

¹⁴ *Submission 7*, p. 2.

¹⁵ *Submission 64*, p. 6.

¹⁶ *ibid.*

¹⁷ *Submission 48*, p. 4.

¹⁸ *Submission 71*, p. 10. The last point is discussed further below in relation to surveyors’ plans.

5.20 Three situations where more clarity appears especially desirable are discussed in more detail below: the judiciary; commissioned works; and surveyors' plans.

The judiciary

5.21 Of particular concern with the term 'under the direction or control' is its application to the judiciary. There has been debate as to whether judges may be considered to be under the 'direction' of the Commonwealth or a State.

5.22 The Commonwealth Constitution under section 72 provides that the judiciary is independent and separate from the executive. However, it has been argued that factors such as the method of appointment and dismissal of judges (including the judicial oath) and the payment of judicial salaries by the government may mean that the judiciary is under the direction of the Crown.¹⁹

5.23 This view is not accepted by some writers,²⁰ or by members of the judiciary. Chief Justice Doyle of the Supreme Court of South Australia noted that vesting copyright in materials produced by the judiciary in the Crown may challenge the independence of the judiciary.²¹ The Federal Court submitted that:

...the judiciary does not operate under the direction or control of the Crown (cf ss176–8 of the Act); judgments are not made pursuant to the terms of any 'employment' by the Crown (cf s 35(6) of the Act); and judges are, and will remain, entitled to use judgments in connection with all matters incidental to their exercise of judicial power, including the right to nominate which version of their judgments is the authorised version of the judgment of the court.²²

5.24 Monotti argues that the term 'direction' should be defined to include the relationship between the Crown and its judges, so government may own

¹⁹ Monotti, *op cit*, 313.

²⁰ For example, M Taggart 'Copyright in written reasons for judgment' *Sydney Law Review* vol 10, 1984, pp. 319–29, at 326; C J Bannon 'Copyright in reasons for judgment and law reporting', 56 *Australian Law Journal* 59–60, where he argues that while judges are not employees of the Crown within the meaning of the Copyright Act, the Crown has a prerogative right in judgments because 'the judges sit in the Royal courts, pronouncing judgments in the name of the Monarch' (p. 60).

²¹ *Submission 39*.

²² *Submission 61*, p. 3.

copyright in judgments.²³ Monotti considers that it is undesirable for copyright to vest in a judge as author because the exclusive publishing and reproduction rights will vest in the judge. However, she states a wide interpretation of ‘direction’ to include judges may as a consequence allow government to own copyright in all works requested.²⁴

5.25 As discussed in Chapter 6 there is a stronger argument that the prerogative right in the nature of copyright protects judgments. The issue of whether judgments should be protected by copyright and in whom that copyright should vest is discussed in more detail in that chapter.

Commissioned works

5.26 There is uncertainty over whether works commissioned by government are or should be considered to be created under the ‘direction or control’ of the government. This issue is particularly important where the agreement commissioning the work does not stipulate copyright ownership.

5.27 Some submissions argued that in the absence of any clear intention on copyright ownership, government should not own copyright in a commissioned work by relying on the ‘direction or control’ test. During the public forum in Sydney, a representative of the National Association of the Visual Arts (NAVA) stated that there had been difficulty in maintaining artists’ copyright, particularly where artists answer a government tender to take part in a public art commission.²⁵

5.28 However, the NSW Government argued that government should own the copyright in commissioned work where there is no contractual stipulation because of the benefit to the public:

While the Crown copyright protections are of limited relevance in a commercial context, the Crown copyright provisions play an important role in respect of ‘core’ government functions. For example, where a government appoints a person to prepare a report for public discussion, this may not necessarily be

²³ Monotti, *op cit*, p. 313.

²⁴ *ibid*, p. 314.

²⁵ CLRC public forum, Sydney, 27 July 2004.

commissioned through a formal contract. Without the protection provided by Crown copyright, there is a risk that the author of the report may retain ownership of the material and government could lose the right to deal with that report for the benefit of the public.²⁶

5.29 As noted above, the Queensland Government also considered that government should own copyright in commissioned works unless otherwise agreed.²⁷

Surveyors' reports

5.30 Ownership of copyright in surveyors' reports prepared by independent parties and lodged with government pursuant to legislation or regulation has been an issue of contention between State governments and relevant parties in recent years.

5.31 A 2004 decision²⁸ by the Copyright Tribunal outlines the background to such disagreements. The case dealt with an application by Australian Spatial Copyright Collections Ltd for a declaration that it was a collecting society²⁹ in relation to survey plans, design plans, digital cadastral databases, survey reports and similar materials. Lindgren P, rejecting the application, outlined the history of disagreement between CAL and the States and Territories in relevant negotiations.³⁰

5.32 During this inquiry, the Western Australian Department of Premier and Cabinet argued that the ownership of survey maps and plans required to be lodged with government agencies should be clarified, noting that copyright

²⁶ *Submission 56*, p. 5.

²⁷ *Submission 71*, p. 10.

²⁸ *Reference by Australian Spatial Copyright Collections Ltd* [2004] ACopyT 1 (5 May 2004), Lindgren P. The issue of who owns copyright in survey plans was not decided in that case.

²⁹ Under section 153F of the *Copyright Act 1968* for the purposes of Division 2 of Part VII (use of copyright material for the Crown).

³⁰ Australian Spatial Copyright Collections Ltd had submitted that CAL had been 'perfunctory' in enforcing the statutory right of surveyors to equitable remuneration, relying on evidence about negotiations between CAL and the States and Territories in 2002 and 2003 for a new agreement, including discussions as to whether survey maps and plans were covered, and in particular negotiations between CAL and NSW. The judgment referred to a draft agreement prepared by CAL in September 2003 that recognised 'differing views' in relation to the State's use of survey plans and included a specific reference to the absence of any admissions by the State as to subsistence or ownership of copyright in such plans.

claims by other parties should not interfere with the public interest in ensuring that information is publicly available.³¹

5.33 The Queensland Government went further. The Queensland Department of Natural Resources, Mines and Energy expressed similar concerns in relation to mining and petroleum exploration reports lodged pursuant to legislation. The Department suggested that the phrase ‘under the direction or control’ in the Part VII provisions be re-stated to expressly apply to material produced in response to a requirement in legislation or regulations, where those materials are ‘essential for the performance of a key governmental function’.³² A subsequent submission from the Queensland Government supported that view.³³

5.34 Other parties expressed strongly opposing views. Mr Ken Michael, a town planner and licensed surveyor, argued:

... any amendment to the Copyright Act that would either remove the personal copyright of reports, plans and similar works held in State archives or transfer those rights to the State, would only encourage the State to use copyright laws

- To restrict the circulation of information and material held in archives, and/or
- Establish State monopolies, and/or
- Encourage the State to use public access to archival material as a source of revenue raising and taxation.³⁴

5.35 CAL also objected strongly to the suggestion of the States, arguing that such an interpretation of the Part VII provisions was ‘unfounded and unreasonably broad’.³⁵ CAL submitted that the use of surveyors’ works by the Crown ‘should be equitably remunerated’ in accordance with the Copyright Act.³⁶

³¹ *Submission 29*, p. 2. The WA Department of Land Information expressed a similar view (*Submission 16*).

³² *Submission 65*, p. 11.

³³ *Submission 71*, p. 10.

³⁴ *Submission 73 (2)*, p. 4.

³⁵ *Submission 48(3)*, p. 2.

³⁶ *ibid.*

5.36 The Committee is aware that proceedings in relation to survey plans are currently under way before the Copyright Tribunal.³⁷ That process may provide some guidance as to the ambit of the Part VII provisions on these issues.³⁸

Works first published under the direction of the Crown

5.37 Under section 177, subject to any agreement to the contrary, the Crown is the owner of copyright in any work first published in Australia by, or under the direction or control of, the Commonwealth or State.

5.38 Section 177 provides:

177 Crown copyright in original works first published in Australia under direction of Crown

Subject to this Part and to Part X, the Commonwealth or a State is the owner of the copyright in an original literary, dramatic, musical or artistic work first published in Australia if first published by, or under the direction or control of, the Commonwealth or the State, as the case may be.

5.39 There is no equivalent of subsections 176(1) and 178(1) relating to subsistence in section 177, as paragraph 32(2)(c) provides that copyright will subsist in the work if it is first published in Australia. Hence it is not a requirement that the author be a qualified person for copyright to subsist.

5.40 The Whitford Committee in considering a similar UK ‘first publication’ provision noted that it was said to be ‘necessary in order to safeguard the right of the Crown to publish, for example, evidence given to committees and

³⁷ As at 21 January 2005.

³⁸ The Committee also notes the 1999 decision of the New Zealand Court of Appeal on the former New Zealand Crown copyright provision that contained the ‘direction or control’ test (*Land Transport Safety Authority of New Zealand v Glogau* (1999) 1 NZLR 261). The respondent had developed taxi log books that were required to be approved by the Secretary of Transport. The court, dismissing an appeal against a finding of breach of his copyright by the government, discussed the origins of the provision and stated its view that the ‘direction or control’ test ‘does not extend much if at all past commission, employment and analogous situations and merely concentrates ownership in the Crown to avoid the need to identify particular authors, employees or contracting parties. We are satisfied it was not intended to capture “approval” situations such as the present ...’ (at 273 per Gault, Blanchard & McGechan JJ).

commissions and the findings of such bodies’.³⁹ However, the Whitford Committee did not agree with this argument and recommended the provision be abolished:

It is understandable that it may indeed be desirable to safeguard this right, but we do not see that a right arising because of its publication safeguards a right to publish. Further it seems indefensible to provide such a safeguard by a provision enabling the Crown to override an independent copyright in works independently produced.⁴⁰

5.41 The ambit of section 177 is potentially very broad, although there is little case law on its meaning. However, in relation to the former UK provision, it was held that copyright in a patent specification (a description of an invention for which a patent is sought) prepared by the inventor or his patent agent vested in the Patent Office which published it.⁴¹ Similarly, designs for decimal coinage were Crown copyright, having been first published under the direction and control of a government department.⁴²

5.42 Section 177 has also been the subject of debate as to whether it should be read subject to subsection 29(6). Such an interpretation would greatly reduce its operation. This issue is discussed later in this chapter.

Who is the ‘Commonwealth’ in Part VII?

5.43 Another concern about the way in which sections 176–8 operate relates to uncertainty as to who is the ‘Commonwealth’ and in whom copyright will vest. One interpretation is that copyright under sections 176–8 vests in the Commonwealth as a legal person, irrespective of whether an emanation of the Commonwealth created or first published the work. This is the interpretation under which the Commonwealth operates, as evidenced by CCA being responsible for granting permission to reproduce published Commonwealth material. The Committee is aware that this interpretation has been queried on the basis that it requires interpreting the ‘Commonwealth’ where it is first used in subsections 176(2), 178(2) and section 177 as the Commonwealth as a legal

³⁹ Whitford Committee, *op cit*, para 599.

⁴⁰ *ibid*, para 599.

⁴¹ *Catnic Components Lt v Hill & Smith Ltd* [1978] FSR 405.

⁴² *Ironside v H.M Attorney-General* [1988] RPC 197.

person. Where ‘Commonwealth’ is used in the second instance in those same provisions, it includes any agent or emanation of the Commonwealth.

5.44 The second interpretation is that an entity that is included as the Commonwealth under the ‘shield of the Crown’ test will own copyright itself under sections 176–8. A third interpretation is that copyright vests in the Commonwealth as a legal person but is exercisable by the relevant entity.

5.45 These interpretations have not been considered by the courts, but the three possible interpretations illustrate the potential difficulty with sections 176–8. These issues are discussed more fully in Chapter 8.

Relationship between Part VII and the rest of the Act

5.46 A further concern about the Part VII provisions is that the relationship between those provisions and the rest of the Copyright Act is not entirely clear. Provisions in various Parts of the Copyright Act make certain provisions ‘subject to Part VII’.⁴³ Section 182 in Part VII also provides that Parts III and IV (other than the provisions relating to subsistence, duration or ownership of copyright) apply in relation to copyright subsisting by virtue of Part VII in the same way as they apply to copyright subsisting by virtue of those Parts. Various provisions of Part VII also express them to be subject to Part X, which contains miscellaneous provisions, some of which may apply to government. For example, subsection 196(3) requires assignments to be in writing.

5.47 The WA Attorney-General submitted that:

‘...clarification should occur of the relationship between Parts III and IV and Part VII of the *Copyright Act*, and between Parts III, IV, VII and Part X. Do the numerous references to ‘subject to...Part X’ really only mean that agreements altering copyright ownership must all be in writing?’

5.48 The WA Attorney-General also noted that the relevant provisions dealing with ownership of copyright in television broadcasts, sound broadcasts and published editions (sections 99 and 100 respectively in Part IV) make those provisions ‘subject to Part VII’, but that the Crown ownership provisions in Part VII do not deal with such subject matter. Submissions from FACS and the

⁴³ For example, sections 7, 35, 99 and 100.

Western Australian Department of Premier and Cabinet supported the WA Attorney-General's view that there should be specific provisions in Part VII dealing with Crown ownership of copyright in television and sound broadcasts and published editions of works.

Section 177 and subsection 29(6)

5.49 A key issue on which there has been some disagreement is whether the operation of section 177 should be read down by subsection 29(6). Subsection 29(6) states that, in determining 'for the purposes of any provision of this Act' whether a work has been published or whether a publication was the first publication, any 'unauthorised publication' should be disregarded. Subsection 29(7) defines unauthorised publication as publication without the owner's licence where copyright subsisted in the work, or where copyright did not subsist, without the licence of the author. Following this reasoning, it can be argued that section 177 should only operate to vest copyright in the Crown where the author of the unpublished work has agreed.

5.50 Monotti⁴⁴ argues that section 177 should be read subject to subsection 29(6) for various reasons: first, that the subsection 'does not appear to be subject' to Part VII and subsection 29(8) specifically excludes Part IX; second, that the two provisions are not inconsistent if first publication arises only after the author's permission has been granted; third, that other sections specifically provide that they are to be subject to Part VII; and fourth, that section 177 would need to be read down to avoid the constitutional limitation of acquisition on just terms (discussed below). She notes, however, that section 7 provides generally that the Copyright Act binds the Crown 'subject to Part VII'.⁴⁵

5.51 In support of her argument, Monotti also cites a comment by the Whitford Committee that 'it is indefensible to enable 'the Crown to override an independent copyright in works independently produced''.⁴⁶ However, the Committee notes that this remark was the Whitford Committee's comment on

⁴⁴ Monotti, *op cit*.

⁴⁵ See also Gilchrist, 'Crown copyright: An analysis of rights vesting in the Crown under statute and common law and their interrelationship', *op cit*, p. 111. He argues that for this reason, section 177 should not be read subject to subsection 29(6).

⁴⁶ Monotti, *op cit*, p. 314, citing the Whitford Committee, *op cit*, p. 599.

the provision, rather than an interpretation of how it operated, and led to its conclusion that the special Crown copyright provisions should be abolished.

5.52 The Committee heard conflicting views in submissions on this issue. The WA Attorney-General supported Monotti's view that section 177 operated subject to subsection 29(6), and referred also to subsection 183(8) in support of this view.⁴⁷

5.53 The ALRC had a different view, noting its concerns about the breadth of operation of section 177:

[Section 177] clearly erodes the rights of the author of the work where the creator is not under the direction or control of the government. While it is possible to make an agreement with the author to alter this arrangement (s 179), this is not always possible nor practicable. Without clear agreements with each contributing author, the copyright in all articles published in the ALRC journal *Reform* vests in the Commonwealth. The [ALRC's] Issues Paper highlights another area that may be of future concern to the ALRC: the publication of submissions to an inquiry on the ALRC's website. While it would not be the intention of the ALRC to usurp copyright from the author, unless agreements were made with each submission-maker prior to the time of publication, copyright would vest in the Commonwealth.⁴⁸

5.54 The ACC appeared to take a similar broad view of the application of section 177, as noted above. The Department of Employment and Workplace Relations (DEWR) also supported the broader interpretation, stating that it relied on section 177 to claim copyright in certified agreements.⁴⁹ DEWR publishes those agreements on the WageNet website and allows users to download, display, print and reproduce material in unaltered form for non-commercial use. DEWR contended that owning copyright in certified agreements allows the department to make these materials widely and freely available, in accordance with the objects of the *Workplace Relations Act 1996* (Cth):

⁴⁷ *Submission 34*, p. 3. Subsection 183(8) provides that use of copyright material by government does not constitute publication.

⁴⁸ *Submission 3*, p. 4.

⁴⁹ *Submission 74*.

Without s. 177, or some other mechanism giving the Commonwealth the power to deal with agreements in this way ... the Commonwealth would need to negotiate with authors before it could publish agreements. Because of the way in which agreements are created, identifying and locating authors would be extremely difficult. Dozens of people may be in a position to assert ownership in any individual certified agreement ... [T]here are thousands of agreements.⁵⁰

5.55 DEWR stated that if government did not have copyright:

...consultants who draft some or all of an agreement for a client, or draft a template[s] for use in agreement making, may assert rights which would deny the public the ability to use agreements...⁵¹

5.56 However, the ALRC suggested that it may be more appropriate to give government 'limited rights to control dissemination of the particular publication, rather than to usurp copyright in the work as a whole'.⁵²

5.57 There are also constitutional considerations insofar as the Commonwealth is concerned. It has been argued that because section 177 may effect an involuntary transfer of copyright from the owner to government (if it is not read subject to subsection 29(6)), it would be invalid under section 51 (xxxii) of the Constitution which requires payment of just terms for the Commonwealth's acquisition of property from an individual or State.⁵³

Criticism of the Part VII provisions

5.58 While the Part VII ownership provisions may be overridden by agreement between the parties, the Committee received evidence suggesting that the effect of the provisions is not widely known. Copyright owner interests generally argued that governments should not have a privileged position in relation to copyright ownership compared with other parties. The Australasian Performing Right Association/Australasian Mechanical Copyright Owners Society

⁵⁰ *ibid.*

⁵¹ *Submission 74*, p. 4.

⁵² *Submission 3*, p. 4.

⁵³ Monotti, *op cit* p. 314; Gilchrist, 'Crown copyright: An analysis of rights vesting in the Crown under statute and common law and their interrelationship', *op cit*, p. 111; and Ricketson & Creswell, *op cit*, para 14.185.

(APRA/AMCOS), CAL, Screenrights, the Law Society of Western Australia, ALCC, ADA/ALCC, NAVA, Vi\$copy, AIIA, Thomson, RAIA and the ABC considered that sections 176–8 should be abolished.

5.59 The ACC also argued that these provisions should be repealed for a range of reasons, including the following:

- the range of materials covered by the provisions is vastly broader than originally envisaged;
- the entities covered by the provisions now include a large range of statutory bodies and agencies in addition to the government departments originally envisaged;
- the unreasonable lack of certainty about the application of the first ownership provisions results in expense to the parties involved; and
- a lack of awareness of the provisions can result in unintended consequences: for example, it [is] not widely known that a licence to a government entity to first publish results in a transfer of copyright to that government.⁵⁴

5.60 Vi\$copy argued in relation to artistic works:

For instance, if the Crown commissions a portrait of the Prime Minister, the artist does not have to be paid reproduction royalties, although the collection often will sell reproductions of the work on cards, in books catalogues etc.

If a private commercial gallery were to commission the same work, those reproduction royalties would have to be paid. Many of our members have works impacted in this way.⁵⁵

5.61 AIIA argued in relation to information communications technology (ICT) that, although such issues are usually dealt with in contracts, the removal of section 176 ‘would support a more flexible and informed approach to copyright ownership’:

... the benefits to government, industry and the Australian community generally could be significant –

- lower tendering and negotiation costs to government and industry;

⁵⁴ *Submission 27*, p. 3.

⁵⁵ *Submission 24*, p. 4.

- increased choice and competition of ICT solutions for government;
- government benefits from ongoing innovations made;
- software related investment in Australia;
- potentially lower acquisition costs for government;
- commercialization opportunity for industry; and
- community benefits from lower government spending, increased productivity and ICT industry development.⁵⁶

5.62 In addition to these arguments, it was suggested that governments may use sections 176–8 as ‘fallback provisions’ to influence negotiations. During consultations, a representative of the Communications Law Centre stated that the Centre has provided broad advice on the first ownership provisions, since many people could not afford to obtain legal advice when contracting with the government. The Centre noted that government had demanded copyright ownership ‘a surprising number of times’ from creators, and that it was very difficult for creators to negotiate from that position. A consequence of creators not being able to afford legal advice was that they risked entering into a situation where government would own copyright in their work, without being aware that they had done so.⁵⁷

5.63 The RAIA raised similar concerns to those of the Communications Law Centre in relation to the weaker bargaining position of architects who contract with government.⁵⁸ The RAIA claimed there was no incentive for government to agree to reverse the presumption of government ownership of copyright from a stronger bargaining position.

5.64 However, during consultations, representatives of the Victorian Government stated that they had never known sections 176–8 to be used as fallback provisions in negotiations and that there was no suggestion that they were used as any means of ‘undue influence’ over other parties in that process.⁵⁹

⁵⁶ *Submission 21*, pp. 13–14.

⁵⁷ CLRC consultation, Melbourne, 24 August 2004.

⁵⁸ *Submission 75*, p. 6.

⁵⁹ CLRC consultation, Melbourne, 24 August 2004.

Support for the Part VII provisions

5.65 Government agencies generally expressed satisfaction with the current legislative scheme under Part VII. Some government submissions indicated that they generally relied on contract rather than sections 176–8 when dealing with third parties. DCITA stated:

Of 43 agencies surveyed by the CCA in late 2002, most stated that they did not rely on the default provisions under section 176 of the Copyright Act, but rather generally relied on the inclusion of specific intellectual property clauses in procurement contracts.⁶⁰

5.66 Some government submissions were concerned that any alteration to sections 176–9 would have a detrimental economic impact on government. The Department of Finance and Administration (DOFA) expressed concern that government might pay for the production of intellectual property more than once if the default position were changed. The NSW Attorney General's Department stated that the absence of Crown copyright could lead to the public paying for the production of information by government and then its secondary sale by private vendors. The WA Department of Industry and Resources argued that changes would impede economic development.

5.67 The Department of Family and Community Services (FACS) argued that while large contracts tend to address copyright ownership, smaller contracts or agreements covering temporary staff may not. FACS argued that uncertainty over ownership of copyright in such circumstances could lead to a failure to exploit material fully and thus be a waste of taxpayers' funds. The National Archives opposed amendment of the existing scheme, claiming it was a matter for government policy to determine whether to claim copyright in material created under its direction or control. The Department of Foreign Affairs and Trade (DFAT) submitted that the provisions were appropriate and adequate, and should not be amended.

5.68 While sympathetic to the Ergas Committee's views on the government's privileged position under Part VII, the ALRC expressed concerns about the

⁶⁰ *Submission 60*, p. 3.

implications of abolishing section 176 in terms of requiring detailed intellectual property provisions in contracts:

As a small government agency without extensive infrastructure, the cost of making agreements with service providers would increase greatly if s 176 were to be altered. If such changes were to be introduced, the ALRC – and no doubt a host of similarly placed agencies – would benefit from whole-of-government best practice guidelines for incorporating appropriate copyright provisions in service contracts.⁶¹

The position in other common law countries

5.69 By way of comparison, specific Crown ownership provisions in the United Kingdom, Ireland, New Zealand and Canada are outlined below.

United Kingdom

5.70 As noted in Chapter 3, legislation enacted in 1988 significantly altered the Crown ownership provisions by removing the phrase ‘by or under the direction or control’ and abolishing rights based on first publication.

5.71 Section 163 of the *Copyright, Designs and Patents Act 1988* (UK) provides that ‘Her Majesty’ owns copyright in a work made by ‘Her Majesty or by an officer or servant of the Crown in the course of his duties’. Copyright in these works subsists for 125 years from the end of the calendar year in which it was made or, where the work is published commercially within 75 years, for a term of 50 years from the end of the year of publication.⁶² In parliamentary debates on the bill, the UK Government gave two reasons for the term of 125 years. First, it was considered that a term of life of the author plus 50 years was impractical since ‘it would require a large bureaucracy to keep records of the date of death of all the authors of Crown copyright works’.⁶³ Second, as official documents in the UK are not in the public domain for 30 years (100 years in the

⁶¹ *Submission 3*, p. 4.

⁶² The term of protection for Crown copyright and Parliamentary copyright was not affected by the *Duration of copyright and rights in performances regulations* (UK) 1995/3927, which extended the term of copyright protection generally. This means that the term of protection for Crown copyright and Parliamentary copyright is generally shorter than that for other copyright.

⁶³ Skone James et al, *op cit*, 14th edition, p. 577, para 10–13, citing *Hansard*, HL, vol 491, col 559.

case of Royal documents), the term would provide ‘a reasonable period of protection’ once they were in the public domain.⁶⁴

5.72 Section 164 entitles Her Majesty to copyright in every Act of Parliament or Measure of the General Synod of the Church of England for 50 years from the end of the calendar year in which Royal Assent was given. Prerogative rights are specifically excluded from subsisting in Acts of Parliament or Measures.⁶⁵

5.73 The ‘direction or control’ test has been retained in relation to the separate system of parliamentary copyright established under the Act.⁶⁶ Works made by or under the direction or control of the House of Commons or the House of Lords include any work made by an officer or employee of that House in the course of his duties or any sound recording, film, live broadcast or live cable programme of proceedings. Works commissioned by or on behalf of a House of Parliament are not included by reason only of that commission.⁶⁷ Parliamentary copyright vests in the relevant House or both Houses jointly, and subsists for a period of 50 years from the end of the calendar year in which the work was made.

5.74 Parliament also has copyright in bills.⁶⁸ Copyright can vest in either House or both Houses jointly, depending on where it was introduced and by whom. Copyright ceases on Royal Assent or on the withdrawal or rejection of the Bill (unless, after rejection, it remains possible for the bill to be re-presented in that session). Any other copyright or right in the nature of copyright is specifically excluded from subsisting in bills.⁶⁹

5.75 Before abolishing the ‘first publication’ provision on the grounds that it was unfair to extinguish the rights of authors of unpublished work, the UK Government was concerned to ensure that the Crown could continue, where

⁶⁴ *ibid.*

⁶⁵ Subsection 164(4)

⁶⁶ Section 165. Subsection 165(7) provides that section 165 applies equally to any other legislative body of a country to which the Part extends (subject to an Order in Council providing otherwise). The Scottish Parliament and the Northern Ireland Assembly also have copyright in their bills (sections 166A and 166B respectively).

⁶⁷ Subsection 165(4).

⁶⁸ Section 166.

⁶⁹ Subsection 166(7).

appropriate, to publish and reproduce material ‘lawfully acquired in the course of Crown business’.⁷⁰ Such material included evidence given to committees and commissions, and statistical or industrial information provided to government departments. The UK Government decided accordingly to replace the ‘first publication’ provision with a provision allowing the Crown to publish such material without infringing copyright, subject to any express agreement to the contrary.⁷¹ Section 48 of the UK Act allows the Crown, for the purpose for which a work was communicated to it in the course of public business by or with the licence of the copyright owner, or any related purpose which the owner could reasonably have anticipated, to copy the work and issue copies to the public without infringing copyright.

Ireland

5.76 Like the United Kingdom, Ireland has more restrictive provisions relating to government copyright than Australia and has provided for separate parliamentary copyright. In the *Copyright and Related Rights Act 2000* (Ire), government copyright is restricted to work made by an officer or employee of the Government or the State in the course of his or her duties, and expires 50 years from the end of the year in which it was made.⁷²

5.77 The Irish legislation also provides for parliamentary (Oireachtas) copyright in any bill or enactment for a term of 50 years from the first time the work is lawfully made available to the public.⁷³ The Act provides for the first ownership by either or both of the Houses of works made by or under the direction or control of either or both Houses, specifically including sound recordings, films and live broadcasts, and works made by officers or employees in the course of their duties.⁷⁴

New Zealand

5.78 Section 26 of the *Copyright Act 1994* (NZ) provides that the Crown owns copyright in a work ‘made by a person employed or engaged by the Crown

⁷⁰ Department of Trade and Industry *Intellectual property and innovation*, Cmnd 9712, London, 1986, para 16.8.

⁷¹ *ibid.*

⁷² Section 191.

⁷³ Section 192.

⁷⁴ Section 193.

under a contract of service, a contract of apprenticeship, or a contract for services' (subject to any contrary agreement). Copyright under this section subsists for a period of 25 years in the case of typographical arrangements of a published edition, and 100 years for all other works.

5.79 As noted in Chapter 3, copyright does not subsist in Bills, legislation, regulations, bylaws, parliamentary debates, reports of select committees, judgments of any court or tribunal, and reports of commissions or inquiries.⁷⁵

Canada

5.80 As noted in Chapter 3, the current Canadian legislation is very similar to the former UK provisions, whereby 'Her Majesty' owns copyright in any work prepared or published by or under the direction or control of 'Her Majesty' or any government department (subject to contrary agreement with the author), for a term of 50 years from first publication.⁷⁶ However, a review of the Crown copyright provisions is expected within the next few years as part of a broad review of copyright law.⁷⁷

⁷⁵ Section 27.

⁷⁶ *Copyright Act 1985* C-42 (Can), section 12. Section 12 is expressed to be 'without prejudice to any rights or privileges of the Crown'.

⁷⁷ Crown copyright was listed as a medium term issue for review within 2 to 4 years, but as at September 2004 was not considered a priority (correspondence from M. Jean-Paul Boulay, Copyright Policy Branch, Canadian Heritage, dated 29 September 2004).

