

Chapter 8

Which government entities should be considered the ‘Commonwealth’ and ‘State’?

8.01 Quite apart from the issue of whether the ‘Commonwealth’ and ‘State’ include not only the executive but also the judicial and legislative arms of government, as discussed in Chapter 2, there is some uncertainty over which entities within the executive government are included within the definition of ‘Commonwealth’ and ‘State’ for the purposes of ownership of copyright.

8.02 For bodies controlled by the government, funded by the government and existing for government purposes, the application of the Crown copyright provisions is reasonably straightforward. However, the extent to which the Copyright Act applies to statutory agencies, government-owned corporations and independent contractors is less clear. This uncertainty is compounded by the increasing tendency of governments to carry out their functions through a range of entities whose status is not defined in legislation.¹

8.03 A key example examined in more detail below concerns the National Museum of Australia and the National Gallery of Australia. While they are similar bodies performing similar functions, it is likely that one would be considered to be part of the Commonwealth under the Copyright Act, while the other would not.

Terms used in the Act

8.04 As discussed in Chapter 5, the heading to Part VII of the Copyright Act refers to ‘the Crown’ while the sections in that Part use the terms ‘Commonwealth’ and ‘State’. Even if it is accepted that those terms refer only to executive government, they do not necessarily extend to all statutory and public bodies.

¹ ALRC, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, op cit, para 29.2.

8.05 The Copyright Act and the *Acts Interpretation Act 1901* (Cth) offer little assistance in ascertaining what entities should be included as part of the ‘Commonwealth and or a State’. The Copyright Act does not define ‘the Commonwealth’ apart from noting that it includes ‘the Administration of a Territory’. Similarly the terms ‘State’ or ‘Crown’ are not defined.² Thus the meaning of the terms must be inferred from the context in which they are used.

Types of government entities

8.06 The uncertainty has been compounded by the proliferation of entities established by governments to carry out many government activities. As the ALRC noted,³ the types of entities that may attract Commonwealth immunity include:

- employees,
- commissions,
- statutory authorities,
- statutory corporations,
- government business entities,
- government owned corporations, and
- private corporations under contract to the government.

8.07 The ALRC noted that in the first three categories, the status of the entity is often defined in the enacting legislation. Where the status is not specified, it is still often reasonably easy to ascertain in light of the entity’s functions and the degree of control that government exercises.

8.08 However, the ALRC noted that in the last three categories (government business enterprises, government owned corporations and private corporations under contract to the government), the nexus with government is often less clear. It may be difficult to establish the degree and existence of ministerial control, and the entity’s activities are more likely to fluctuate between those that are considered governmental and those that are private in nature.⁴ In recent years, for example, there has been an increasing tendency to privatise major

² Subsection 10(1).

³ ALRC, Review of the Judiciary Act 1903, op cit, para 5.353.

⁴ *ibid*, para 5.354.

public utilities and to contract out what were previously considered governmental activities.

8.09 The ALRC concluded that the issue of whether an entity should be included as part of the ‘Commonwealth and or a State’ need not be complicated, and emphasised the value of defining the status in legislation, particularly given the ambiguity of common law tests.⁵ During the Committee’s consultations, several State governments indicated that in recent years they have tended to define in enacting legislation whether or not an entity is part of the Crown, at least in relation to government business enterprises.⁶

8.10 However, the Victorian Government, while acknowledging the uncertainties arising in ‘an environment of corporatisation and outsourcing’, opposed legislative measures to resolve the difficulties, giving examples of the different types of classification of public entities under various Victorian Acts.⁷ For example, 245 agencies are listed as employing public servants under the *Public Service Management and Employment Act 1998* (Vic). The list does not include central government agencies such as the Victorian Police, the Privacy Commissioner and the Victorian Electoral Commissioner, which employ staff under their own legislation. The Victorian Department of Treasury and Finance, on the other hand, lists approximately 560 bodies in its database of public sector entities. If groups such as schools, municipal councils and land management councils were included, the number would rise to about 3000. Under the *Public Records Act 1973* (Vic), the list of ‘public statutory bodies’ (that is, bodies created by or under statute for a public purpose) includes various charitable organisations of a private nature.

8.11 Thus three different tests give three different results.

Common law

8.12 There have been few cases that have dealt directly with the issue of which entities should be included as part of the ‘Commonwealth and or a State’ for the purposes of copyright. However, this issue has been considered in other areas of law, particularly in relation to section 75(iii) of the Constitution. That provision gives the High Court original jurisdiction in all matters in which the

⁵ *ibid.*

⁶ CLRC consultations 20 August 2004, Perth and 24 August 2004, Melbourne.

⁷ Submission 64, p. 7.

Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party.⁸

8.13 Two tests have been applied in deciding whether a body is ‘the Commonwealth’ in constitutional cases: ‘the shield of the Crown’ test and the ‘federal’ test. These two tests are distinct tests based on different principles. However, they require an examination of similar factors, and in particular consider the degree of the government’s control over the entity’s operations. The application of the two tests, however, can lead to different results. In the only case which dealt substantially with this issue in relation to the Copyright Act, no distinction was made between the two tests and neither test was applied.⁹

‘Shield of the Crown’ test

8.14 This test is applied to determine whether a body whose identity is distinct from the Crown is entitled to share the privileges and immunities of the Crown. In *Deputy Commissioner of Taxation v State Bank of NSW*¹⁰ the ‘shield of the Crown’ test was described as:

...a means of ascertaining whether an agency or instrumentality “represents” the Crown for the purpose of determining whether that agency or instrumentality is bound by a statute enacted by the legislature. The doctrine is in essence an aid to the process of statutory interpretation whereby the courts seek to ascertain the legislative intent of Parliament. Hence it has been said that an agency or instrumentality may be endowed with the attributes of the Crown for one purpose but not for others. Indeed, the legislature could explicitly endow a private corporation carrying on business for private purposes with the privileges and immunities of the Crown, yet that private corporation would not answer the description of “a State” for constitutional purposes.¹¹

⁸ See: *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1; *State Bank of NSW v Commonwealth Bank of Australia* (1986) 161 CLR 639.

⁹ *Re Australasian Performing Right Association and Australian Broadcasting Commission* (1982) 65 FLR 437 per Bowen CJ and Franki J at 441–2, Sheppard J at 452–6.

¹⁰ (1992) 174 CLR 219.

¹¹ *ibid*, per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, at 233.

8.15 This test depends on the nature and degree of control the Crown exercises over the entity. The courts have generally required a high degree of control to find that an entity is covered by the shield of the Crown.¹² The courts have defined control as the degree of control that the Crown is legally entitled to exercise, not the degree of control that is actually exercised.¹³

‘Federal’ test

8.16 The ‘federal’ test considers whether there is a manifest intention that the Commonwealth should operate in a particular field through an entity created for that purpose or, conversely, that the Commonwealth intends to put an entity into the field to perform its functions independently of the Commonwealth.¹⁴

8.17 The High Court has adopted the federal test in deciding whether an entity is the ‘Commonwealth and or a State’ for the purposes of the provisions of the Commonwealth Constitution relating to federal jurisdiction.¹⁵ If an entity is the Commonwealth for such purposes, it will not necessarily be the Crown in the right of the ‘Commonwealth and or a State’ for all purposes, including copyright.¹⁶ However, the factors applied in these cases provide a useful starting point.

8.18 The following factors have been considered in applying the ‘federal’ test:

- the extent of the power of the executive government to give directions to the body in relation to the exercise of its powers and the performance of its functions;
- whether the incorporated entity has corporators (that is, members);
- the extent to which the power to appoint or remove directors is vested in the executive government;
- the public character of the functions of the body (including any regulatory role); and
- the financial relationship between the body and the Commonwealth.

¹² *Townsville Hospitals Board v Council of the City of Townsville* (1982) 149 CLR 282 per Gibbs CJ, at 291.

¹³ *Bank Voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584; *Re Hawthorn Pty Ltd & ors v State Bank of South Australia and anor*, (1993) 112 ALR 691.

¹⁴ *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334, per Kitto J, at 338.

¹⁵ Sections 75(iii), 75(iv) and 78 of the Commonwealth of Australia Constitution and related provisions of the Judiciary Act 1903 (Cth).

¹⁶ *Maguire v Simpson* (1977) 139 CLR 362, per Jacobs J, at 406.

8.19 The overriding consideration is the degree to which the body concerned is subject to the Crown's control, similar to the 'shield of the Crown' test. However, courts have been reluctant to apply the test strictly. For example, in *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*¹⁷ Stephen J stated:

I have not expressed these various considerations (the considerations to be taken into account in determining whether a body is the Crown) in terms of specific 'tests' although the precedent authorities provide fertile ground for the development of the concept of such 'tests'. I have, of course, had regard to those authorities, while recognising that the primary task is that of statutory interpretation rather than any mechanical application of supposed tests.¹⁸

8.20 The difficulty in having such tests is that each case is dependent on its own circumstances.¹⁹ This has resulted in courts placing varying importance on different factors. In determining the status of an entity for the purpose of use of copyright material for the services of the Commonwealth or State under section 183 of the Copyright Act, Sheppard J in *Re Australasian Performing Right Association; Re Australian Broadcasting Commission*²⁰ cited the reasons given by the Copyright Tribunal:

Matters to be considered include the question whether the corporation fulfils a governmental or non-governmental function; the capacity of the government to control its activities; financial autonomy; the right of appointment and dismissal of the members of the body of its staff by the government; whether it has duties to furnish information or accounts to the government; and its power over assets in its ownership or control.²¹

8.21 Sheppard J considered that the list was exhaustive subject to the addition of one factor, namely whether the entity's property was held for the Commonwealth.²²

¹⁷ (1979) 26 ALR 99.

¹⁸ *ibid*, at 110–11.

¹⁹ *Re Australasian Performing Right Association Ltd; Re Australian Broadcasting Commission* (1982) 45 ALR 153, per Sheppard J, at 167.

²⁰ *ibid*.

²¹ *ibid* at 167, quoting *Ex parte Australasian Performing Right Association Ltd; Re Australian Broadcasting Commission* (1982) 42 ALR 58, per Lockhart J at 64.

²² *ibid*.

8.22 The following example illustrates how difficult it may be for the public to know whether an entity is the ‘Commonwealth or State’ under the Copyright Act, since all those factors may not be apparent.

Case study: the National Gallery and the National Museum

The National Gallery of Australia (the Gallery) and the National Museum of Australia (the Museum) are established by legislation as bodies corporate to perform broadly similar functions.

The Gallery is established as a body corporate under the *National Gallery Act 1975* to develop, maintain and exhibit a national collection of works of art. The affairs of the Gallery are conducted by the Council of the National Gallery of Australia. The Council consists of members, including the Director, who are appointed by the Governor-General and may be removed for cause.

The Gallery receives budget appropriations, but there is also a fund to receive gifts and bequests. The Gallery requires the Minister’s approval to enter into major contracts or dispose of or acquire certain art works. The Act does not give the Minister any general power to give directions to the Council or the Gallery, nor does it contain any declaration as to whether or not the Gallery is entitled to the privileges and immunities of the Commonwealth generally.

The Museum is established as a body corporate under the *National Museum of Australia Act 1980*. Its principal functions are to develop, maintain and exhibit a national collection of historical material, and associated activities.

The Museum is governed by a Council, the members of which are appointed by the Governor-General and may be removed for cause. The Council is required to perform its functions and exercise its powers in accordance with such written directions (if any) as are given to it from time to time by the Minister.

Both bodies may acquire, hold and dispose of property and sue or be sued in their corporate names. The Committee understands that it is likely that the Gallery would not be regarded as the ‘Commonwealth’ for the purposes of the Copyright Act, as it is not subject to a general power of direction by the executive government and does not perform any regulatory functions. However, the Museum, while also not performing any regulatory functions, would probably be regarded as part of the ‘Commonwealth’ because of the degree of government control exercisable through the Minister’s power of direction. These factors would not be apparent to the public.

A non-exhaustive list of factors to be applied by the courts

8.23 During this inquiry, the Committee sought views as to what entities should be included in the definition of ‘Commonwealth’ and ‘State’ for the purposes of Crown copyright ownership and how this should be determined.²³ Some submissions, such as the Law Institute of Victoria,²⁴ recommended the inclusion in the Copyright Act of a list of non-exhaustive factors for courts to consider.

8.24 However, the Victorian Government stated that the matter should not be the subject of legislation ‘given that the courts, over a considerable period of time, have evolved a series of tests which define what or what is not part of the State’.²⁵ The Victorian Government further argued that attempting to provide an exhaustive list ‘may lead to the loss of statutory protection and prerogative rights in instances where an agency is not properly identified’.²⁶

The ‘fair dealing’ model

8.25 Subsection 40(2) of the Copyright Act contains a non-exhaustive list of factors which should be considered in determining whether a dealing is fair for the purpose of research or study. These subsections were based on recommendations of the Franki Committee²⁷ and were similar to types of factors that had been developed in case law. It has been argued that the factors listed in subsections 40(2) and 40(3) provide insufficient guidance.²⁸ However, the Franki Committee in making its recommendation viewed this as unavoidable:

... there are so many factors which may have to be considered in deciding whether a particular instance of copying is ‘fair dealing’, that we think it is quite

²³ Issues Paper (paras 23–27) and Discussion Paper (paras 41–43).

²⁴ Submission 42.

²⁵ Submission 64, p. 7, referring in particular to *Townsville Hospital Board v City of Townsville* (1982) 149 CLR 282.

²⁶ *ibid.*

²⁷ Copyright Law Committee on Reprographic Reproduction, *op cit*, p. 29–31.

²⁸ Ricketson & Creswell, *op cit*, para 11.35.

impracticable to attempt to remove entirely from the Court the duty of deciding the question whether or not a particular instance constitutes ‘fair dealing’.²⁹

Possible factors to include

8.26 The positive impact of introducing a list of matters to be considered may be minimal, as any determination on the status of an entity would depend on the particular circumstances. However, the Committee considered possible factors for inclusion, some of which have been considered by the courts:

- Parliament’s intent in establishing or incorporating the entity;
- the government’s capacity to control the entity’s operations;
- the entity’s financial autonomy and reporting responsibilities;
- the entity’s capacity to own and dispose of property; and
- the entity’s functions.

8.27 Each of these is discussed in turn below.

Parliament’s intent

8.28 The instrument establishing the entity may provide a clear indication of the legislature’s intention. Kitto J stated in *Inglis v Commonwealth Trading Bank of Australia*³⁰:

The decisive question is not whether the activities and functions with which the respondent is endowed are traditionally governmental in character, though their possession of a traditional or generally accepted governmental character may well help in the ascertainment of the legislative intention. The question is rather what intention appears from the provisions relating to the respondent in the relevant statute: is it, on the one hand, an intention that the Commonwealth shall operate in a particular field through a corporation created for the purpose; or is it, on the other hand, an intention to put into the field a corporation to perform its functions independently of the Commonwealth, that is to say otherwise than as a Commonwealth instrument, so that the concept of a Commonwealth activity cannot realistically be applied to that which the corporation does?

²⁹ Copyright Law Committee on Reprographic Reproduction, op cit, p. 29.

³⁰ (1969) 119 CLR 334, at 337–8.

8.29 The legislature's intention was also considered in *State Electricity Commission of Victoria v City of South Melbourne*³¹ where it was stated that:

...no statutory body should be accorded special privileges and immunities unless it clearly appears it was the intention of the legislature to confer them.³²

The government's capacity to control the entity's operations

8.30 An important factor, as noted above, is whether government directly or indirectly has power to remove, otherwise than for misconduct or incapacity, those in control of the entity's operations.³³

8.31 If the entity performs its functions in accordance with directions from the relevant Minister, this will mean that it is under the direction of the Minister and would therefore be included as part of the 'Commonwealth and or a State'.

The entity's financial autonomy and reporting responsibilities

8.32 The degree of financial autonomy may also be relevant in determining whether an entity is controlled by government.

8.33 The AIC recommended that all entities that are accountable to government under the *Financial Management and Accountability Act 1997* (Cth) (FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (Cth) (CAC Act) be included as part of the 'Commonwealth and or State'.³⁴ The Department of Veterans' Affairs also submitted that the FMA Act is useful as a starting point, and that if a wider definition were favoured, any entity receiving substantial funding from the Consolidated Revenue Fund should be included.³⁵ The Committee notes that the entities listed in the FMA Regulations include some courts.

8.34 Being subject to the full application of the CAC Act may indicate that the entity should be included as part of the 'Commonwealth'. However, some CAC

³¹ (1968) 118 CLR 504.

³² *ibid*, per Barwick CJ, McTiernan, Taylor and Menzies JJ, at 510.

³³ *Re Australasian Performing Right Association and Australian Broadcasting Commission* (1982) 62 FLR 20.

³⁴ Submission 4, p. 2.

³⁵ Submission 55.

Act entities are excluded from certain provisions of the CAC Act, such as section 28 which limits the direction or control that can be exerted.

8.35 The Committee notes that the CAC and FMA Acts deal only with Commonwealth entities. In the time available, the Committee has not been able to consider the relevant legislation that applies in each State and Territory, but considers the Commonwealth model is a useful starting point.

The entity’s capacity to own and dispose of property

8.36 In *Re Australasian Performing Right Association and Australian Broadcasting Commission*,³⁶ Sheppard J held that if an entity holds property or surplus revenue for the Commonwealth and or a State, that may indicate that it is part of the Crown.

8.37 However, the Flexible Learning Advisory Group (FLAG) argued that no distinction should be made between entities that have capacity to acquire, hold and dispose of real or personal property, and those which do not, on the basis that the policy reasons applying to government copyright apply equally to those bodies that act on behalf of government.³⁷

The entity’s functions

8.38 Whether or not the government is able to control an entity’s functions may not always be a determining factor. Instead, emphasis may be placed on whether the entity is an instrument of the Crown, in the sense that it carries out regulatory public functions.

8.39 It has been noted that this factor may become increasingly less helpful as more functions formerly regarded as matters of private concern are carried out by government instrumentalities. Thus the question of whether the functions are traditionally or peculiarly governmental is becoming less relevant.³⁸

8.40 Some submissions supported the inclusion of this factor in determining whether an entity is part of the Commonwealth or State for the purposes of

³⁶ (1982) 62 FLR 20.

³⁷ Submission 46, p. 4.

³⁸ *Re Australasian Performing Right Association and Australian Broadcasting Commission* (1982) 62 FLR 20.

copyright. The AVCC³⁹ and CAUL⁴⁰ submitted that entities whose functioning is integral to public administration should be included.

Other options for reform

8.41 Apart from a list of factors to be considered by courts, other options may provide some degree of certainty as to which bodies are the Commonwealth or State. Two options are discussed below:

- allowing the Attorney-General to declare the status of an entity; and
- introducing as an administrative measure an inclusive list of entities that are part of the ‘Commonwealth and or a State’.

Declaration of entities by the Attorney-General

8.42 In its Discussion Paper the Committee referred to the option of introducing a system similar to that used to declare collecting societies under Parts VA and VB of the Copyright Act.⁴¹ The Attorney-General upon application could make a determination on whether an entity should be included as part of the ‘Commonwealth and or a State’. The advantage of this proposal is that it allows the status of an entity to be declared without recourse to the courts.

8.43 The Committee received little feedback on this option during its consultations. A representative of the ACC stated that this option in combination with an administrative list of entities would be preferable.⁴² However, representatives of the Victorian Government did not favour giving the Commonwealth Attorney-General power to declare State government entities.⁴³ The length of time that the Commonwealth Attorney-General may take to make a declaration was considered to be a concern.

³⁹ Submission 49, p. 3.

⁴⁰ Submission 7, p. 3.

⁴¹ Sections 135P and 135ZZB.

⁴² CLRC Public forum, Sydney, 27 July 2004.

⁴³ CLRC consultations, 24 August 2004, Melbourne.

Non-exhaustive list of entities

8.44 The Committee also considered the option of creating a non-exhaustive list of entities that are included as part of the ‘Commonwealth and or a State’ for the purpose of copyright.⁴⁴ Many submissions supported the idea of a list similar to the Crown bodies list used in the United Kingdom.⁴⁵ However, some submissions opposed such a list, particularly on the basis that it would create an additional administrative burden on government to maintain the list.⁴⁶ The Australian Electoral Commission expressed concern that there may be difficulty in removing an entity from a list once it is included.⁴⁷

The UK experience

8.45 The HMSO, which administers the Crown bodies list in the UK, provided information to the Committee on its experience in creating and maintaining the Crown bodies list. Its list was created and is maintained by the HMSO Licensing team. If the HMSO Licensing team becomes aware that an organisation is changing its status (for instance, if the organisation is privatised), the list is amended. Similarly, if the HMSO receives an application or query about an organisation that is not on the list, its status is checked and the details amended accordingly. The status is checked in a variety of ways:

- by asking the organisation itself: if the organisation has an in-house lawyer this is considered to be usually the best way of obtaining a definitive response;
- by examining the legislation that established the organisation; and
- by checking with legal advisers in the Treasury and the Scottish Executive.

8.46 The HMSO discounted concerns that introducing a list of entities included as part of the ‘Commonwealth and or a State’ would be unduly burdensome on government. The HMSO indicated that while significant effort was required to create the list, there had been little difficulty in maintaining it.

⁴⁴ Issues Paper, para 27.

⁴⁵ For example, ACC, Screenrights, CAL, ALRC, Department of Family and Community Services, Thomson, Australian Libraries’ Copyright Committee, Australian Digital Alliance, and CCH.

⁴⁶ For example, CASL, Submission 30 and Law Institute of Victoria, Submission 42.

⁴⁷ CLRC Public forum, Sydney, 27 July 2004.

8.47 In the HMSO's experience, the Crown bodies list has been helpful to users in providing certainty as to the range of material available under their Click-Use Licences (discussed further in Chapter 11). This has lessened the HMSO's administrative burden by decreasing the need to answer inquiries about the status of a particular entity. The Crown bodies list is also considered to be useful to public bodies in clarifying the status of bodies with which they deal.