
Chapter 11

Management of Crown copyright

Intellectual property management should be regarded as a normal part of executive management. It should be seen as analogous to other corporate and management tasks. ... Intellectual property management allows an agency to fulfil its accountability obligations with respect to intellectual property it holds, and to ensure that agency resources are put to productive and efficient use.¹

11.01 During this inquiry the Committee sought views on whether governments throughout Australia should be encouraged to adopt uniform management of government copyright material. Management practices are not uniform between, and often within, Australian jurisdictions. At the Commonwealth level alone, the Auditor-General recently found ‘diverse approaches’ in intellectual property management.²

11.02 Most submissions supported uniformity in government practice as a desirable goal, particularly in relation to legal materials, although some States expressed reservations. Poor management of Crown copyright results in unnecessary restrictions to access to government copyright material, as some submissions noted in the examples they provided.³

11.03 This chapter considers:

- Crown copyright management by the Commonwealth government;
- Crown copyright management by State and Territory governments;
- the specific example of primary legal materials; and
- international developments in management of Crown copyright.

11.04 It then sets out the Committee’s conclusions and recommendations.

¹ ANAO op cit, p. 102.

² *ibid*, p. 97.

³ LexisNexis, *Submission 11*; Thomson, *Submission 13*; AustLII, *Submission 25*.

Commonwealth Crown copyright management

11.05 At the Commonwealth level, the CCA, formerly within the Department of Communications, Information Technology and the Arts (DCITA) and now with the Attorney-General's Department, is responsible for managing copyright in published material, including legislation but excluding judgments. The CCA is the primary point of contact for permission to reproduce material published by government, and provides advice to Commonwealth agencies on the administration of copyright.

11.06 The CCA will grant a licence to use material under general conditions, including that all permissions are subject to acknowledgement of Commonwealth copyright.⁴ No fees are charged where the use of Commonwealth material is not for profit.

11.07 There are certain materials in respect of which the CCA does not manage copyright. They include unpublished material, for which permission must be sought from the relevant agency that owns copyright, and audiovisual material, which is also managed by the agency that owns copyright. In addition, some individual Commonwealth agencies have negotiated with the Commonwealth to manage their own copyright.

11.08 Where unpublished material has been made available for public use under the *Archives Act 1983* (Cth), the National Archives of Australia has a general responsibility for managing government copyright material. The National Archives noted that it often fields requests to reproduce unpublished material in its collection. Where the Commonwealth Government owns the copyright, the National Archives refer the request to the relevant agency. However, where appropriate the National Archives will grant permission on behalf of an agency that refers the decision back to the National Archives.⁵

11.09 While CCA and the National Archives have some responsibility for granting licences to reproduce government copyright material, the Commonwealth does not have a whole-of-government approach to the

⁴ CCA, 'When do you need permission to use Commonwealth copyright materials?', DCITA, Canberra, 2004.

⁵ *Submission 37*, p. 7.

management of intellectual property.⁶ At present, it is the responsibility of the relevant agency to develop plans to manage intellectual property.

11.10 Particular attention has been paid to information technology, given that advances in information technology have greatly increased the usefulness and value of information generated by governments.⁷ In response to an increasing demand for access to Commonwealth copyright material, DCITA has issued guidelines for the management of Commonwealth intellectual property in the field of information technology.⁸ The guidelines provide practical assistance for decision-makers in Commonwealth bodies to allow them to maximise the benefits from such property. Agencies are encouraged to acquire only the intellectual property necessary to fulfil their corporate mission. Given the information technology landscape is in a constant state of change, DCITA has recently undertaken a review of the guidelines, which had not been published at the time of writing this report.

11.11 The Government prior to the October 2004 election indicated in its policy on ‘Strengthening Australian Arts’ that government copyright material should be made available to businesses that have the capacity to use the intellectual property to create employment and commercial opportunities for Australians.⁹

The Australian National Audit Office’s report

11.12 As noted in Chapter 4, the ANAO reviewed intellectual property management in Commonwealth agencies in 2003. The ANAO report noted that its case studies and surveys had revealed a ‘diverse approach to intellectual property management across the Commonwealth.’¹⁰ A survey of 74 Commonwealth agencies found that only 30 per cent had developed specific policies or procedures for managing intellectual property.¹¹ The ANAO stated:

⁶ ANAO, *op cit*, p. 42.

⁷ *ibid*, p. 35.

⁸ DCITA, *The Commonwealth IT IP guidelines: Management and commercialisation of Commonwealth intellectual property in the field of information technology*, DCITA, Canberra, 2000.

⁹ See Liberal Party of Australia & The Nationals, *The Howard Government Election 2004 Policy: Strengthening Australia’s Arts*, 4 October 2004, p. 24, accessed on 12 November 2004 at http://www.liberal.org.au/default.cfm?action=2004_policy. There was no elaboration on this policy.

¹⁰ ANAO, *op cit*, p. 97.

¹¹ *ibid*, p. 22.

This would suggest that a significant proportion of agencies do not have systems in place to know what assets they own, use or control. This has consequences for the effective, efficient and ethical management of intellectual property assets by those agencies.¹²

11.13 The ANAO report provided examples of situations that require a greater awareness of intellectual property:

... depending on the source of intellectual property, there will often be a different focus on the sorts of management issues to be addressed. For example, for intellectual property developed in-house, questions of ownership and rights to intellectual property developed by agency staff will be different to the sorts of questions and issues that arise where intellectual property is developed by third parties under consultancy arrangements. One issue to consider is that of ownership of the intellectual property. An agency must decide whether to retain ownership, enter a joint ownership arrangement, license-out or opt not to own. In this latter case, where rights are passed to another party, the agency may decide to retain rights to access, use and sub-license the existing and new intellectual property through a royalty-free, irrevocable licence.¹³

11.14 Only just over half the agencies reported that they had mechanisms in place to decide on the appropriate level of ownership of intellectual property.¹⁴

11.15 The ANAO found that, although the *Commonwealth IT IP Guidelines* provide useful guidance to agencies on managing intellectual property in information technology (including consideration of ownership options), more general guidance and support were needed.¹⁵

11.16 The ANAO recommended the development of a whole-of-government approach to protect the Commonwealth's interests in intellectual property.¹⁶ The ANAO proposed a framework for intellectual property management that

¹² *ibid*, p. 68.

¹³ *ibid*, p. 69.

¹⁴ *ibid*, p. 21.

¹⁵ *ibid*, 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.

¹⁶ *ibid*, pp. 42, 59.

highlights key principles to be considered by agencies.¹⁷ Central to this framework were leadership and corporate support, early identification of intellectual property, the agency's approach to commercialisation of intellectual property, deciding the appropriate level of ownership and control, ongoing monitoring and protection of intellectual property, and evaluating and reporting on the agency's performance of intellectual property management.¹⁸

Evidence to the Committee

11.17 Some submissions specifically supported the ANAO's findings. AIIA submitted that the ANAO framework would address many of its concerns about Commonwealth intellectual property management.¹⁹ AIIA argued that policies such as the DCITA Guidelines were 'poorly implemented in practice' for a range of reasons:

- Many procurement officials are simply unaware of their existence;
- IP is generally regarded as complex and is poorly understood by most procurement officials;
- Procurement officials are reluctant to spend additional time or resources in understanding the issue or obtaining government or external advice and prefer to adopt the 'path of least resistance', even if the parties would ultimately derive significant benefit from an alternate position;
- There is generally a lack of support for IP issues and effective IP management in the more senior bureaucratic levels of some agencies;
- The government's current fixation with accountability is driving procurement officials not to accept any risk, to 'stick to the book' and prove that they obtained something for the cost expended, even where the parties would clearly benefit from an alternative flexible approach;
- The 'we pay, we own' attitude in government is reinforced by the current legislative position, key standard contractual frameworks, such as the Government Information Technology Conditions (GITC) and even certain agency specific guidelines, such as the *Defence Intellectual Property Policy 2003*, which states that 'ownership of the Foreground IP should vest on its creation with Defence ...' (p.28).²⁰

¹⁷ *ibid*, p. 97.

¹⁸ *ibid*, pp. 198–201.

¹⁹ *Submission 21*, p. 9.

²⁰ *Submission 21*, p. 9.

11.18 Screenrights supported the ANAO's recommendation that the Commonwealth Attorney-General's Department and DCITA should take 'a more active role in co-ordinating the management of Government copyright material.'²¹ The Committee understands that the Commonwealth Government is currently examining ways of implementing the ANAO's recommendations.

11.19 Several government agencies questioned the current framework for management of copyright through the CCA, although they differed in their preferred solutions.

11.20 DOFA argued that each agency should administer its own copyright and that CCA should only provide an advisory role, arguing that DOFA was 'best placed to respond to requests for licences to use copyright material produced for [DOFA]'.²²

11.21 The ALRC did not have a concluded view, but noted that if a more devolved system were implemented 'the ALRC would prefer to be supported by whole-of-government best practice approaches, particularly in relation to the negotiation of licence agreements'.²³ The ALRC also noted that revenue collected by CAL on behalf of Commonwealth agencies was paid to DCITA, and queried whether separate entities should receive the revenue generated by the use of their works, consistent with the Government's cost recovery policy.²⁴

11.22 The National Archives favoured the establishment of two central agencies for the administration of Commonwealth copyright material: one for older material and another for more recent material. The National Archives considered that dividing responsibility for managing copyright on the basis of whether or not a work has been published was no longer relevant, particularly as governments often publish their own material.²⁵ The National Archives also commented that in relation to the Commonwealth records it holds:

...the arrangement for referring requests to authoring agencies is often unworkable in the experience of Archives and introduces unnecessary delays, complexities and inconsistencies for users of Commonwealth copyrighted

²¹ *Submission 31*, p. 4.

²² *Submission 38*, p. 2.

²³ *Submission 3*, p. 5.

²⁴ *ibid*, p. 5.

²⁵ *Submission 37*, p. 6.

material ... In many cases the authoring agencies no longer exist or if they exist in name their functions may have changed so much they have no knowledge of the documents referred to them for copyright permission.²⁶

11.23 The Australian Film Commission (AFC) noted that CCA only administered copyright in published print material and that specific agencies such as the Film Finance Corporation, the ABC, SBS and Film Australia manage the copyright they control. (However, the Committee notes that not all these organisations, such as the ABC and SBS, are necessarily ‘the Crown’ for the purposes of copyright.) The AFC argued that there should be a central point for administering government copyright in films and sound recordings.²⁷ The AFC argued that separate management by each agency of the material that it holds:

... can result in some confusion, particularly where the agency concerned no longer holds the material because it has been lodged with the [National Screen and Sound] Archive and is uncertain as to whether it actually controls the copyright.²⁸

11.24 The AFC pointed to a recent example of difficulties with current arrangements. In the absence of a central point of copyright administration for audiovisual material, the ScreenSound - National Screen and Sound Archive’s database of copyright holders refers requests to the commissioning departments, which have traditionally either granted or denied access. However:

... in July 2003 ScreenSound referred a client wanting access to a sound recording of a Prime Ministerial speech from the 1940s to the commissioning department ... The [d]epartment referred him to the Attorney General’s Department, who referred him to the Department of Prime Minister and Cabinet, who referred him back to DCITA, who referred him back to ScreenSound.²⁹

²⁶ *ibid*, p. 7.

²⁷ *Submission 41*, p. 5.

²⁸ *ibid*.

²⁹ *ibid*.

Crown copyright management in the States and Territories

11.25 Each State and Territory is responsible for managing government copyright in its own jurisdiction and their practices vary. Copyright may be administered by a central body, by each individual agency, or a combination of both.

11.26 All State and Territories license government copyright material. Most States have introduced intellectual property policies and guidelines which aim to provide information and guidance on the identification, management and use of copyright.³⁰ With the exception of the ACT, States that have not yet implemented any policies are in the process of doing so. Their management practices in relation to executive material are briefly outlined below.

11.27 In New South Wales the use of executive material is subject to the permission of the NSW Government and permission must be sought from the NSW Attorney General's Department. The agency which created and controls the copyright together with the applicant then settles the terms on which a licence or agreement is made for the use of copyright material.³¹

11.28 In Victoria, the Office of Chief Parliamentary Counsel administers copyright in legislation and judgments and each individual body administers copyright in other material. The Victorian Government has issued guidelines for the administration of Crown copyright.³² The Guidelines provide that a fee or royalty should be charged for the right to reproduce government owned material. However, this may be waived or reduced where reproduction is for 'professional, technical or scientific purposes where profit is not a primary purpose of reproduction' and for educational purposes or where dissemination of official material is paramount and commercial considerations are relatively unimportant.

³⁰ For example, see Queensland Government, *Queensland Public Sector Intellectual Property Principles*, August 2003, accessed at: http://www.iie.qld.gov.au/publications/ip/ip_principles.pdf; Western Australian Government, *Government Intellectual Property Policy and Best Practice Guidelines*, 2003, accessed at [http://www.doir.wa.gov.au/documents/businessandindustry/IPpolicy_may2003\(1\).pdf](http://www.doir.wa.gov.au/documents/businessandindustry/IPpolicy_may2003(1).pdf).

³¹ See <http://www.lawlink.nsw.gov.au/crd.nsf/pages/crown-copyright>.

³² Hon Jan Wade MP, Attorney-General (Vic) *Guidelines relating to Victorian Crown copyright* (August 1991, endorsed by the Attorney-General in December 1992).

11.29 Like Victoria, in South Australia the Attorney-General's Department administers copyright in legislation and judgments only and each individual agency administers copyright in other material. Permission to reproduce, if given, will be subject to conditions, including a requirement that the copyright owner's name and interest in the material be acknowledged when the material is reproduced or quoted.

11.30 In Tasmania, management of copyright is the responsibility of the agency that owns the copyright, under the direction of the Administrator of Crown Copyright in the Department of Justice and Industrial Relations. Guidelines for the administration of Crown copyright encourage agencies to consider the Tasmanian Government's broader social and economic goals when considering whether to commercialise intellectual property, noting that the public interest may override any benefit of commercialisation.³³ Agencies are instructed to ensure their staff are aware of the procedures to identify and protect materials in which Crown copyright may subsist. The guidelines also recommend that agencies establish a database of all licences, sales and other dealings with copyright material.

11.31 In two States, Queensland and Western Australia, a central government department is responsible for general copyright administration but some responsibilities are devolved to key departments.

11.32 In Western Australia copyright in executive material is administered by the WA Solicitor-General's Department. However, government departments and statutory corporations do administer copyright in material that is the subject of major commercial transactions, without reference to the Attorney-General's Department. The WA Solicitor-General's Department is currently reviewing its responsibility for the administration of copyright permission: it has been proposed that responsibility be devolved to the relevant departments and statutory corporations, with administration to be managed under standardised guidelines.³⁴

³³ Tasmanian Government, 'Guidelines for the administration of Crown copyright', R4.1.3, 2002, p. 3, available at http://www.go.tas.gov.au/standards/standards_guidelines_menu.htm.

³⁴ Information provided by Mr Jeff Saville, Senior Assistant State Solicitor, WA, November 2004.

11.33 In Queensland, Crown copyright administration and policy development are the responsibility of the Department of State Development and Innovation.³⁵ However, most agencies have a ‘beneficial use’ delegation from the Department of State Development and Innovation, under which they may licence the reproduction of material in which they acquire the copyright in or produce. Those few agencies that do not have this delegation refer requests to the Department of State Development and Innovation.³⁶

11.34 Permission to reproduce executive material of the Northern Territory Government must be obtained from the Attorney-General’s Department. Undertakings to reproduce the material accurately and to acknowledge that reproduction is by permission of the government are required.³⁷

11.35 In the ACT, the Department of Urban Services manages copyright in executive material. The department’s website states that any material may be downloaded, displayed, printed and copied, ‘in unaltered form only, for your personal use or for non-commercial use within your organisation’.³⁸ There appears to be no requirement that the copyright be acknowledged. Outside these circumstances, the ACT Government’s permission is required.

Policies and guidelines

11.36 At State and Territory level, there is an increasing awareness of the importance of proper management of intellectual property and how it impacts on the aims and functions of the relevant agency.

11.37 The Western Australian Government has led the way in developing guidelines and policies for its agencies, first implementing an intellectual property management policy in 1997.³⁹ Key principles of its revised ‘Government Intellectual Property Policy and Best Practice Guidelines’ include:

³⁵ See: <http://www.sd.qld.gov.au/dsdweb/htdocs/global/content.cfm?id=201>

³⁶ Information provided by Ms Natalie Camphorst, Department of State Development and Innovation, November 2004.

³⁷ See: [http://notes.nt.gov.au/dcm/legislat/legislat.nsf/\\$help?OpenHelp](http://notes.nt.gov.au/dcm/legislat/legislat.nsf/$help?OpenHelp)

³⁸ See: <http://www.urbanservices.act.gov.au/copyright.html>

³⁹ ANAO, *op cit*, p. 42.

- enhancement of service delivery through better management of intellectual property, and
- cooperation with the business community in the development and commercialisation of intellectual property.⁴⁰

11.38 To assist agencies with the implementation of these policy objectives, the WA Government has also developed ‘Intellectual Property Guidelines’.⁴¹ These Guidelines offer practical information on intellectual property and how to best manage and approach its commercialisation. The WA Government also established a Government Intellectual Property Policy Council in combination with a support program. The Council, which is responsible for reviewing intellectual property policy, is constituted by members from the Departments of Premier and Cabinet, Treasury, Industry and Resources, the State Solicitor’s Office and a range of ‘intellectual property rich’ agencies.⁴² The Committee understands that the Council is not currently active.⁴³

11.39 South Australia has also been active in policy development since 1999, when the Government published an ‘Intellectual Property Policy’ applicable to all agencies.⁴⁴ The policy includes principles to aid agencies in managing intellectual property, with each agency responsible for managing its own copyright. Generally permission to reproduce government copyright material is granted, provided that the copyright owner's name and interest in the material are acknowledged when the material is reproduced or quoted.

11.40 Queensland has put significant effort into developing policy on the management and commercialisation of intellectual property in recent years. The ‘Intellectual Property Principles’ have been developed to assist government agencies to manage and commercialise their intellectual property.⁴⁵ Guidelines which provide public sector agencies with practical information on how to best manage and commercialise intellectual property have also been published.⁴⁶ The policy principles and guidelines generally provide that agencies are

⁴⁰ Western Australian Government, ‘Government Intellectual Property Policy and Best Practice Guidelines’, 2003.

⁴¹ Western Australian Government, ‘Intellectual Property Guidelines’, 2002.

⁴² ANAO, *op.cit.*, p. 42.

⁴³ Information from the WA Department of Industry and Resources, - 9 November 2004.

⁴⁴ South Australian Government, ‘Intellectual Property Policy’, December 1999.

⁴⁵ Queensland Government, ‘Queensland Public Sector Intellectual Property Principles’, April 2003.

⁴⁶ Queensland Government, ‘Queensland Public Sector Intellectual Property Guidelines’, September 2003.

responsible for intellectual property management, and that commercialisation of intellectual property should be ancillary to the agency's core business.

11.41 The NSW Premier's Department has established an inter-agency working group to develop a whole-of-government framework for the management of intellectual property in NSW. As a result, a draft 'IP Management Framework' is being finalised and is expected to be released in December 2004.⁴⁷

11.42 The Victorian Government is committed to implementing new intellectual property policy guidelines to ensure that the knowledge generated by government is utilised for the benefit of the public. In late 2003 the Victorian Government was finalising a copyright policy to replace the 1991 Guidelines on Victorian Crown copyright,⁴⁸ and the Committee understands that as of November 2004 this policy had not been finalised. However, the Victorian Government told the Committee that it permits usage of copyright material for non-commercial purposes free of charge, subject to appropriate conditions such as the need for accuracy and attribution of source. Use for commercial purposes is subject to charge 'usually on a nominal cost-recovery basis' and subject to the same conditions of accuracy and attribution.

11.43 As well as guidelines for the administration of Crown copyright, Tasmania has produced policy principles for agencies dealing with intellectual property in information technology. The principles state that intellectual property produced through government outsourcing activities 'properly belongs to the Crown'. However, the principles recommend that agencies only acquire intellectual property they really require, and that they should allow commercialisation of their intellectual property if appropriate.⁴⁹ The Northern Territory is also currently preparing an intellectual property policy with a particular focus on computer software.⁵⁰

11.44 In 2001 the ACT Government commenced work on a policy on the management of intellectual property, with a particular focus on information

⁴⁷ ANAO, op cit, p. 43; information from NSW Premier's Department 9 November 2004.

⁴⁸ *ibid*, p. 43.

⁴⁹ http://www.go.tas.gov.au/standards/itip_policyv1.0sept2001.htm.

⁵⁰ ANAO, op cit, p. 44.

technology issues. The Committee understands that this work has been terminated⁵¹ and the draft policy has not been implemented given various unresolved issues.

A case study: primary legal materials

11.45 Many of the submissions that raised concerns about government copyright management practices referred specifically to access to legislation and other primary legal materials.

The Commonwealth

11.46 The Commonwealth's management practices ensure that legislation and judgments are available as widely as possible. In 1983 the Commonwealth commenced issuing licences to publishers and educational users allowing multiple reproductions of legislative material. It is likely that these licences have been replaced by the current licensing regime administered by the CCA.

11.47 The CCA may grant permission with a standard form licence or by a letter where the reproduction of legislative material is for a specific purpose. The CCA will grant permission for the reproduction of Commonwealth legislative material including Acts and regulations under the following conditions:

- the licence is revocable, non-exclusive, and non-transferable;
- all material published under the agreement may be reproduced without charge;
- separate permission must be sought for reproductions including Commonwealth formatting;
- all material reproduced must be accurate, in context and of a good standard; and
- all legislative material published under the agreement must include the acknowledgment/disclaimer provided by the CCA.⁵²

11.48 A recent development which the Attorney-General stated will improve the democratic principle of federal government by allowing free and easy

⁵¹ *ibid*, p. 44.

⁵² *Submission 60*, pp. 1–2.

access to clear legislation⁵³ is the *Legislative Instruments Act 2003* (Cth). The object of the legislation, which commenced on 1 January 2005, is to provide a comprehensive regime for the management of Commonwealth legislative instruments by, amongst other things, establishing the Federal Register of Legislative Instruments as a repository of Commonwealth legislative instruments, explanatory statements and compilations, and improving public access to such instruments.⁵⁴

11.49 The Secretary of the Attorney-General's Department is responsible for maintaining the Register and ensuring public access.⁵⁵ The Register will be a database of all legislative instruments, and compilations in relation to legislative instruments.⁵⁶ The development of the legislation, in combination with the blanket licences granted to publishers and educational institutions, supports the policy of providing access to legislative material. At present only Commonwealth legislative material must be registered, although States can choose to register their legislative material.

11.50 The Commonwealth has also developed SCALEplus, a legal information retrieval system owned by the Attorney-General's Department and available free on-line. SCALEplus only contains legislation of the Commonwealth and non self-governing Territories.

The States and Territories

11.51 As is the case with executive material, legislative and judicial material are managed differently in each State and Territory. As outlined in Chapter 7, two jurisdictions, NSW and the Northern Territory, have issued express waivers for copyright in legislative and judicial material.

11.52 The NSW Government's waivers are subject to the following conditions:

- that copyright continues to reside in the State of NSW,

⁵³ The Hon Daryl Williams MP, Attorney General, 'Legislative Instruments Bill 2003: Second reading speech', *House of Representatives Hansard*, 26 June 2003, pp. 17625–27.

⁵⁴ *Legislative Instruments Act 2003*, section 3.

⁵⁵ Subsections 20(1) and 20(1A).

⁵⁶ Subsection 20(2).

- that the waiver may be revoked, varied or withdrawn if the conditions are breached, or otherwise on reasonable notice,
- that publication of material must not purport to be an official version,
- that, in the case of judicial decisions, the material must not reproduce any headnotes or editorial material prepared by the Council of Law Reporting or other agency without their further authority,
- that the arms of the State must not be used in connection with publication of material without authority, and
- that material must be accurately reproduced in proper context and be of an appropriate standard.⁵⁷

11.53 In the Northern Territory, the Attorney-General claims copyright in legislative material, including bills, Acts, regulations, rules, by-laws, codes of practice, instruments of a legislative or administrative character, and explanatory material connected to legislation. Copyright in legislation is waived if certain conditions are met, including:

- the reproduction is accurate;
- the reproduction does not claim to be an official version; and
- the arms of the Northern Territory are not used in connection with the reproduction.

11.54 The waiver may also be revoked, varied or withdrawn on reasonable notice.⁵⁸

11.55 A similar waiver applies in relation to written judgments, orders and awards of Northern Territory courts.⁵⁹

11.56 Other jurisdictions have varying policies. In Victoria the guidelines for the administration of Crown copyright state that there should be ‘relatively

⁵⁷ The Hon John Hannaford MLC, Attorney General, ‘Notice: Copyright in Legislation’ *NSW Government Gazette* No.94 (27 August 1993) p. 5115; The Hon John Hannaford MLC, Attorney General, ‘Notice: Copyright in Judicial Decisions’ *NSW Government Gazette* No.23 (3 March 1995) p. 1087; The Hon JW Shaw QC, MLC, Attorney General, ‘Notice: Copyright in legislation and other material’ *NSW Government Gazette* No. 110 (27 September 1996) p. 6611 (extending the 1993 waiver to a broader range of legislative materials).

⁵⁸ Northern Territory Government ‘Copyright policy concerning legislation’, 8 October 1996.

⁵⁹ Northern Territory Government ‘Copyright policy in judgements of the courts of the Northern Territory’, as published in the *Northern Territory Government Gazette*, G48, 9 December 1998.

wide access to State legislative materials by means of licences to publishers and educational institutions'.⁶⁰

11.57 The Tasmanian Government states that it encourages public access to government and is providing online access to some government services. The Office of Parliamentary Counsel has created EnAct, a website which provides free public access to Tasmanian legislation with cross-references and amendment history.⁶¹ The Tasmanian Government expects that the website will improve the effectiveness and standing of the law and the Parliament, improve access to Tasmanian legislation and reduce the related input costs of business and government.

11.58 In South Australia the Attorney-General is responsible for granting permission to reproduce legislation. Permission may be subject to conditions (for example, the name of the copyright owner must be clearly stated.)⁶²

11.59 In Western Australia, applications for permission to reproduce legislative material are required for hardcopy and electronic reproductions. The Attorney General's Department is responsible for administering permission for hardcopy reproduction, with the WA State Law Publisher responsible for electronic reproduction requests.⁶³ The WA State Law Publisher website until recently only allowed limited general access to legislative material.⁶⁴

11.60 In Queensland, copyright in legislation is managed by the Office of the Queensland Parliamentary Counsel (OQPC). OQPC provides access to legislation on its website and allows users to download, store in cache, display, print and copy the material in unaltered form only. Users may not transmit, distribute or commercialise the material without the permission of the State of Queensland. Official versions of legislation may be purchased from the Queensland Government Printer.⁶⁵

⁶⁰ Hon Jan Wade MP, *op cit*.

⁶¹ See: <http://www.dpac.tas.gov.au/divisions/opc/about.html>.

⁶² See: http://www.parliament.sa.gov.au/info/13_copyright.shtm.

⁶³ The WA State Law Publisher operates as a branch of the Ministry of Premier and Cabinet and is responsible for raising some revenue to augment its funding.

⁶⁴ While previously users could only access individual sections of an Act and needed to pay to have access to an entire Act, as of 1 July 2004, greater access for non-commercial purposes is granted free of charge, according to information provided by the Senior Assistant State Solicitor for WA on 9 November 2004.

⁶⁵ See: <http://www.goprint.qld.gov.au/web/web/index.asp>

11.61 In the ACT legislation has been made available on-line for many years. The Office of Parliamentary Counsel is responsible for managing copyright in legislation and providing access online.⁶⁶ Its website allows users to access authorised printed legislation by downloading authorised files from the website and allowing the user to print a copy. Thus, a document printed from an authorised file is legally presumed to be an accurate copy of the piece of legislation. Permission must be sought if the user intends to copy, adapt, publish, distribute or commercialise any material on this site.

11.62 Most Australian States have also established Councils of Law Reporting to assist in publishing, printing and managing copyright in judgments. Each Council is constituted by State legislation which varies between jurisdictions.⁶⁷ Generally, the role of the Councils is to prepare, publish and sell reports of judicial decisions, or arrange for their preparation, publication and sale.

11.63 The NSW Council of Law Reporting, established under the *Council of Law Reporting Act 1969* (NSW), has the power to prepare, publish and sell, or arrange for the preparation, publication and sale of judicial decisions. Material prepared and published by the Council remains the official version and the Council's role is not affected by the NSW waiver of copyright in judgments. Similar legislative models apply in Victoria⁶⁸ and Tasmania.⁶⁹ The *Law Reporting Act 1981* (WA) does not refer to copyright, but gives the Attorney-General power to authorise publishing of judicial reports⁷⁰ and establishes a Law Reporting Advisory Board to advise the Attorney-General.⁷¹

11.64 Two jurisdictions, the Northern Territory and Queensland, have Councils of Law Reporting which began as voluntary organisations and were

⁶⁶ See further: www.legislation.act.gov.au.

⁶⁷ See: *Council of Law Reporting Act 1969* (NSW); *Council of Law Reporting Act 1990* (Tas); *Council of Law Reporting in Victoria Act 1967* (Vic); *Law Reporting Act 1981* (WA). Queensland and the Northern Territory have established Councils of Law Reporting which began as voluntary associations and were incorporated in 1907 and 1991 respectively.

⁶⁸ *Council of Law Reporting in Victoria Act 1967* (Vic).

⁶⁹ *Council of Law Reporting Act 1990* (Tas).

⁷⁰ Section 3 of the *Law Reporting Act 1981* (WA)

⁷¹ Section 7 of the *Law Reporting Act 1981* (WA)

later incorporated.⁷² As in NSW, the waiver of copyright in Northern Territory judgments does not affect the Council's role.

11.65 While some Councils of Law Reporting publish law reports themselves, others enter into exclusive agreements with commercial publishers to publish reports on their behalf. LexisNexis expressed concern that some agreements between Councils and commercial publishers were not open to tender and argued that any contract for an authorised series should be put out to tender in the interest of fair competition.⁷³

Electronic dissemination

11.66 Technological advances have impacted on how government material is stored and disseminated. Two models have developed that utilise technological advances to provide legislative and judicial information online: Australasian Legal Information Institute (AustLII); and the Commonwealth's SCALEplus, discussed above.

11.67 AustLII is a joint initiative by the University of Technology Sydney and the University of New South Wales. AustLII's stated aim is to improve access to justice by publishing primary legal materials and secondary legal materials created by public bodies for purposes of public access. This model has been viewed favourably internationally⁷⁴ and similar institutes have developed in other countries.

11.68 The development of SCALEplus and AustLII is consistent with the increased expectations of the public to have free and convenient access to legal information. AustLII is reliant on government for the information it publishes on its website. The Committee was told during this inquiry that the WA Government had ceased to supply legislation to AustLII but that AustLII was able to link to WA legislation on the State Law Publisher's website.⁷⁵

⁷² The Northern Territory Council of Law Reporting was incorporated in 1991 and the Queensland Council of Law Reporting was incorporated in 1907.

⁷³ *Submission 11*, p. 10.

⁷⁴ See for example: T McMahon, 'Public policy issues in electronic access to the Law in Canada', *University of Technology Sydney Law Review*, 2000, p. 11; D Harvey, 'A judicial perspective on public access to case law on the internet', *University of Technology Sydney Law Review*, 2000, p. 7.

⁷⁵ Mr Jeff Saville, WA State Solicitor's Office, 9 November 2004.

The views of legal publishers

11.69 AustLII said it had encountered difficulties because of varying practices in copyright management:

- Three jurisdictions in effect say to AustLII ‘we will not assist you to obtain our legislation but we will not stop you from trying to extract it from our website’. This is often extremely difficult and contributes considerably to delays in updating of these databases on AustLII due to the staff time that must be expended.
- Some jurisdictions will only supply legislative data in a proprietary format (such as Framemaker or Lotus Notes) rather than an open exchange format (such as RTF). The necessity to convert these formats into a consistent format also contributes to considerable delays in updating of some legislative databases.
- For those jurisdictions that do supply data, timeliness of supply varies somewhat but has not been a major ongoing problem except in the case of Western Australia. However, there have been situations where supply has periodically stopped for months at a time.
- The Western Australian government (via the State Law Publisher) has never been willing to provide AustLII with updates to its legislation more regularly than six-monthly. It is now proposing to terminate any supply of legislation to AustLII from mid-2004 because it says it will now provide legislation for free access on its own website. This website will not have the same value-adding to the legislation that AustLII provides (though it will no doubt have its own virtues). The effect of this will be to destroy the only national search facility for Australian legislation.⁷⁶

In its submission, AustLII referred to other difficulties in obtaining access to legal materials from State and Territory governments:

- The New South Wales government provides free access to the reports of the NSW Law Reform Commission on its own website, but has not in the past been willing to allow AustLII to republish NSWLRC reports. AustLII already publishes the complete set of ALRC reports, and would like to develop a national searchable collection of law reform reports, but the unavailability of the NSWLRC reports, the next largest set in Australia, is

⁷⁶ *Submission 25*, pp. 7–8. The Committee notes that the WA Government has since taken this action.

a significant impediment to our doing so. We should note that these policies do change over time and might now be different.

- A draft contract from a State government concerning AustLII's publication of legislation and judgments from that jurisdiction states that AustLII must, on termination of the agreement, immediately destroy any cases or legislation it is publishing. This would involve the destruction of considerable work paid for by public monies not provided by the State concerned. It appears to be an over-exercise of Crown copyright when public interests could be quite sufficiently protected by notices stating that the data was no longer being updated. The problem will probably be resolved via negotiations, as has been the case when other government agencies have proposed such conditions of supply, but it is a problem that should not arise.⁷⁷

11.70 Thomson stated it had 'experienced a great deal of uncertainty' in some jurisdictions in obtaining rights to reproduce government material and the conditions that are attached.⁷⁸

Each government body has its own set of terms on which they will grant access to their material (eg. some prefer a royalty payment on each sale whilst others prefer payment of an annual fee). Each involves separate negotiation. Sometimes this can become drawn out because they do not understand the publishing process or the way in which the publisher will use the material to produce a product.

11.71 Thomson further stated:

...we suspect, that inequities have emerged where some publishers are granted a more favourable position under a contract to be the official publisher than other publishers who wish to use the same material.⁷⁹

11.72 In Thomson's view, there should be a uniform approach to the management of copyright, including the granting of permission and the terms

⁷⁷ *ibid*, pp. 7–8.

⁷⁸ *Submission 13*, p. 7.

⁷⁹ *ibid*, p. 7.

imposed on the use of the material. Thomson stated ‘[t]he approach should be open and transparent and should be applied consistently by all governments, their departments and agencies.’⁸⁰

11.73 LexisNexis expressed similar views:

The current situation sees a different approach taken to Crown copyright in every jurisdiction in Australia. Even within a single jurisdiction there are differences depending upon the type of material to be reproduced or the manner of reproduction.

Differences include:

- Varying approaches taken to the same types of materials *between* jurisdictions – for example, in relation to legislation there are blanket licensing agreements, waivers, value-add policies, silence, letters granting permissions etc.
- Where licensing agreements are in place, the scale of fees charged for supply vary and conditions can differ markedly between jurisdictions. There are currently no standard guidelines as to an appropriate scale of fees to be charged for supply of materials under licensing agreements.
- Varying approaches taken *within* jurisdictions for various materials.⁸¹

11.74 LexisNexis claimed that the lack of uniformity has had an adverse impact on its operations:

Given the number of differences in approach both between and within jurisdictions, compliance with policies becomes a very difficult undertaking. It is difficult to know what policy is in place depending upon the type of material. It is also difficult to know when a policy in a particular jurisdiction might change. In addition, in some jurisdictions the policy is not clearly and transparently defined. These factors combine to make general compliance for publishers a very challenging and difficult task.⁸²

11.75 It is clear that these organisations have encountered difficulties in attempting to provide national coverage of primary legal materials. In relation

⁸⁰ *ibid*, p. 8.

⁸¹ *Submission 11*, p. 10.

⁸² *ibid*, p. 13.

to legislation, LexisNexis outlined its current licensing arrangements with the Commonwealth, States and Territories. While the Committee notes that the information is not necessarily representative of all agreements between publishers and the various jurisdictions, there may be some common provisions. LexisNexis has entered into individual agreements with a number of Commonwealth, State and Territory governments for the reproduction of legislative materials which have included the following terms and conditions:

- a single licence will cover hardcopy and digital reproduction – except WA where separate permission is required for electronic and hardcopy reproduction;
- in most jurisdictions a small flat fee is payable for the supply of information in electronic format and is not related to the granting of permission (fees vary between jurisdictions); and
- in WA the fee payable is per update and is comparable to the fees paid in other jurisdictions.

11.76 AustLII also claimed that it had encountered difficulties in getting access to legislative material. AustLII's submission noted its intention to link NSW legislative and judicial material to blanket waivers issued by the NSW Government, but noted it had been difficult to do the same for other States, as in most instances there are no definitive intellectual policies on State Government websites to link to.⁸³ Thomson commented that different licensing practices in combination with a lack of knowledge about copyright are leading to protracted licence negotiations.⁸⁴

International developments in Crown copyright management

11.77 Copyright management and practices in the following jurisdictions are briefly outlined below:

- the UK;
- the EU, under its directive on the re-use of public information;
- New Zealand;
- Canada; and
- the USA.

⁸³ *Submission 25*, p. 5.

⁸⁴ *Submission 13*, p. 8.

The UK

11.78 Crown copyright in the UK is managed by the HMSO. Its publishing arm was privatised in 1996 and now trades as The Stationery Office Limited.

11.79 The UK Government considered it important that certain responsibilities undertaken by the former HMSO be retained within government, including the administration of Crown copyright and the regulation of contracts dealing with printing and publishing legislation and other official materials. These responsibilities are still handled by HMSO which is now part of the Cabinet Office. As discussed in Chapter 3, in 1999 the management of Crown copyright was considered in a White Paper,⁸⁵ which established a framework for effectively managing Crown copyright based upon eight guiding principles:

- coherent application for the re-use and licensing of government materials and information;
- transparent licensing and charging terms;
- consistency of approach across central government, extending the principles as appropriate, to all public sector information;
- establishing routes and finding guides enabling users to locate material;
- increasing use of waiver of copyright liberalising broad categories of information with the lightest of management;
- a streamlined administrative process, where licensing control is required, making maximum use of new technology;
- accountability will be strengthened by the Controller of HMSO with close supervision and regulation of the delegated exercise of her authority as Queen's Printer regulating standards across government; and
- clear co-ordination and control by HMSO providing a central one-stop shop approach to combat fragmentation and loss of coherence in exercising these principles.

11.80 Categories of material in which Crown copyright should be waived were listed, including legislation, press notices, forms, consultative documents, unpublished public records and other material. Guidance Notes which outline the nature and conditions of such waivers have been issued.⁸⁶ It has always

⁸⁵ Minister for the Cabinet Office, *White Paper*, op cit.

⁸⁶ See, for example, Guidance Note 6: *Reproduction of United Kingdom, England, Wales and Northern Ireland Primary and Secondary Legislation* at: http://www.hmso.gov.uk/copyright/guidance/gn_06.htm, revised 7 Oct 2002.

been part of the UK management of Crown copyright to make such information available without undue restriction.⁸⁷

11.81 The White Paper's framework included the establishment of an Information Asset Register (IAR) to enhance the accessibility and availability of official information. IAR aims to cover information held by all government departments and agencies, including databases, old files, recent electronic files, collections of statistics, and research. The IAR concentrates on information resources that have not yet been or will not be formally published.⁸⁸

11.82 In late 2003 HMSO conducted a survey on the IAR and found that promotion and education of departments on the resource requirements of the emerging information obligations under the European Directive on the re-use of public sector information was needed. The survey highlighted government organisations' inclination to a departmental focus to the detriment of the customer or end-user.⁸⁹ HMSO has overall responsibility for IAR formats and standards with departments responsible implementing their own IARs.

11.83 HMSO has created various guidance notes designed to guide, alert and advise on a range of publishing, copyright and access issues.⁹⁰ HMSO has also developed and maintains a list of public bodies with Crown status, as outlined in Chapter 8. The list was introduced to coincide with the launch of the click-use licence. Under the click-use licence, re-users such as publishers can take out one licence to use material from a variety of Crown sources. The list was introduced to minimise the likelihood of re-using material under click-use that was not Crown copyright. The list groups the organisations under their parent department and includes as subcategories departments in Scotland, Northern Ireland and Wales. HMSO aims to update the list regularly to reflect changes in the status or name of the organisations and add new bodies, but does not guarantee that the list is comprehensive.

⁸⁷ Historically this was done through Treasury circulars.

⁸⁸ For further information on the IAR see: http://www.inforoute.hmso.gov.uk/inforoute/about_iar.htm.

⁸⁹ For further information on the IAR progress report see:
http://www.inforoute.hmso.gov.uk/inforoute/redev_project03.htm.

⁹⁰ A current list of guidance notes is available from the HMSO website at: http://www.hmso.gov.uk/copyright/guidance/guidance_notes.htm. Topics include copyright in public records; reproduction of Crown copyright scientific, technical and medical articles; copyright and publishing notices; notices on government websites (publishing); copyright in works commissioned by the Crown; and reproduction of primary and secondary legislation.

11.84 An Advisory Panel on Crown Copyright was established on 14 April 2003 to advise the UK government on issues relating to Crown copyright. Its role is, amongst other things, to advise ministers on how to encourage re-use of government information. The panel also advises the Controller of HMSO about changes and opportunities in the information industry, so that the licensing of Crown copyright information is aligned with current and emerging developments.⁹¹ One clear impact of these changes has been the introduction of online licence agreements.

Directive on the re-use of public information in the EU

11.85 In 2003 the EU passed a Directive dealing with the re-use of public sector information.⁹² The Directive which must be implemented by 1 July 2005 establishes a minimum set of rules governing the re-use and the practical means of facilitating re-use of existing documents held by public sector bodies of member States.⁹³ ‘Public sector bodies’ include State, regional and local authorities, bodies governed by public law, and associations of such bodies.⁹⁴

11.86 The Directive is a response to the lack of uniformity in 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. In certain instances the policy varies considerably between public sector bodies in the same country. The UK Advisory Panel on Crown Copyright claimed that adoption of the Directive would achieve:

- a single and consistent regime governing re-use of public sector information, applicable across the public sector;
- clarification of the rules reducing disputes;
- a simple and cost-effective means of redress in the event of non-compliance; and

⁹¹ Further information is available on the Advisory Panel on Crown Copyright’s website at <http://www.hmso.gov.uk/apcc/index.htm>.

⁹² 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).

⁹³ *Ibid.*, article 1.

⁹⁴ The terms ‘public sector body’ and ‘body governed by public law’ are defined in Article 2 of the Directive.

- a growth in value-added information products and services based on public sector information.⁹⁵

11.87 The Directive does not impose an obligation on member States in relation to allowing the re-use of documents but leaves it to their discretion. It applies only to ‘documents that are made accessible for re-use when public sector bodies licence, sell, disseminate, exchange or give out information’.⁹⁶ Thus it applies in circumstances where copyright has already been waived or licensed by the government of the member State. The Directive is expressed not to affect the intellectual property rights of public sector bodies.⁹⁷ Its main features are:

- public sector bodies shall make documents available in ‘any pre-existing format or language, through electronic means where possible and appropriate’;⁹⁸
- where charges are made, ‘the total income from supplying and allowing re-use of documents shall not exceed the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment’;⁹⁹
- conditions and charges on the re-use of documents must be transparent;¹⁰⁰
- public sector bodies may impose conditions on the re-use of documents in the form of a licence, and licences should be standardised;¹⁰¹
- practical arrangements must be in place to facilitate the search for documents available for re-use;¹⁰²
- any conditions on the re-use of documents must be ‘non-discriminatory for comparable categories of re-use’;¹⁰³ and
- no contract can grant exclusive rights to third parties – the re-use of documents shall be open to all.¹⁰⁴

⁹⁵ Advisory Panel on Crown Copyright, *Response to partial regulatory impact assessment on the EU Directive on the re-use of public sector information*, p. 1.

⁹⁶ Recital 9 of the Directive.

⁹⁷ Recital 22 of the Directive.

⁹⁸ Article 5 of the Directive.

⁹⁹ Article 6 of the Directive.

¹⁰⁰ Article 7 of the Directive.

¹⁰¹ Article 8 of the Directive.

¹⁰² Article 9 of the Directive.

¹⁰³ Article 10 of the Directive.

¹⁰⁴ Article 11 of the Directive. There is a public interest exception to this prohibition in Article 11(2).

11.88 The HMSO and the UK Department of Trade and Industry have jointly issued a Consultation Document seeking views on how the Directive may be most appropriately implemented in the UK by 1 July 2005. The Advisory Panel on Crown Copyright has supported implementation of the Directive within broader access and re-use policies.¹⁰⁵

New Zealand

11.89 In New Zealand there is no central agency administering Crown copyright and accordingly each individual agency manages its own. It is common practice for government departments in New Zealand to include a notice on Crown copyright materials such as the following:

The copyright owner authorises reproduction of this work, in whole or in part, so long as no charge is made for the supply of copies, and the integrity and attribution of the work as a publication of [*the relevant department*] is not interfered with in any way.¹⁰⁶

Canada

11.90 In Canada, copyright in federal Government material is administered by Canadian Government Publishing, which is responsible for granting permission and/or issuing licences. Requests are made either to the author department or directly to Canadian Government Publishing, which will grant permissions or licences once authorised by the author department.¹⁰⁷

11.91 As in Australia, different Provinces of Canada manage Crown copyright differently. For example, the legislation and regulations of Saskatchewan, Manitoba, Ontario, Prince Edward Island and New Brunswick are managed by the Queen's Printer, while legislation and regulations of Nova Scotia are managed by Legislative Counsel. British Columbia allows reproductions of specific Acts or regulations, in whole or in part, for personal or legal use,¹⁰⁸ whereas Alberta does not permit any reproduction of Acts or regulations for any

¹⁰⁵ Available at: http://www.hmso.gov.uk/apcc/reports/RIA_response.pdf.

¹⁰⁶ For an example of the use of this notice, see http://www.med.govt.nz/buslt/int_prop/digital/discussion/

¹⁰⁷ See further: <http://cgp-egc.gc.ca/copyright/agreement-e.html>.

¹⁰⁸ See further: <http://www.gov.bc.ca/bvprd/bc/content.do?brwld=%4020y6v%7C0YQtuW>.

purpose without the prior consent of the Queen's Printer.¹⁰⁹ Manitoba and Saskatchewan charge fees for access to their statutes (an annual subscription in 2000 of \$95 CA and \$275 CA respectively).¹¹⁰ In a 1998 survey, a third of subscriptions to the statutes of Saskatchewan had been purchased by the Saskatchewan Government.¹¹¹

11.92 The Canadian Legal Information Institute (CanLII) is a non-profit organisation initiated by the Federation of Law Societies of Canada. CanLII attempts to gather legislative and judicial texts from federal, provincial and territorial jurisdictions.¹¹²

The US

11.93 As noted in Chapter 3, copyright protection is not available for 'any work' of the US federal government, defined as work prepared by officers or employees in the course of their duties.¹¹³ However, the US Government may hold copyright that is transferred to it by assignment or otherwise. In addition, the restriction on copyright ownership does not apply to individual state governments.

11.94 The US Government Printing Office (GPO) was established in 1860 and its activities are defined in the US Code.¹¹⁴ The GPO produces, procures and disseminates printed and electronic publications of the Congress, executive departments and establishments of the Federal Government. The Public Printer is the head of the GPO and is appointed by the US President in consultation with the Senate. The Public Printer must maintain an electronic directory of Federal electronic information, provide a system of online access to the Congressional Record and the Federal Register, and operate an electronic storage facility for Federal electronic information.¹¹⁵ The GPO is subject to the Federal Depository Library Program and must provide official government

¹⁰⁹ See further: http://www.qp.gov.ab.ca/custom_page.cfm?page_id=22.

¹¹⁰ McMahon, *op cit*, p. 11.

¹¹¹ A Hubbertz, 'Response to Closing the Window: How Public Sector Restructuring Limits Access to Government Information', available at <http://www.usask.ca/library/gic/17/hubbertz.html>.

¹¹² CanLII is a part of the informal association of organisations including AustLII that publish legislative and judicial material freely on the Internet. See: http://www.canlii.org/infocollections_en.html.

¹¹³ US Copyright Act, section 105.

¹¹⁴ See the public printing and documents chapter of Title 44.

¹¹⁵ Under s 4101.

information products to regional depository libraries. Online only products are made available on its website.¹¹⁶

11.95 In relation to legal materials, the Legal Information Institute (LII) established in 1992 is part of the informal association of organisations that publish legal material on the Internet. It is managed and operated by the University of Cornell Law School and attempts to make law more accessible to US legal professionals, students, teachers, and the general public in the US and abroad.

The views of State governments

11.96 Most submissions from the States¹¹⁷ agreed that there was value in uniformity in copyright management but expressed some concern about the impact on their ability to develop their own policies.

11.97 The NSW Government supported uniformity in principle, but noted that the benefits would have to outweigh the likely costs involved in achieving uniformity. In its view, each jurisdiction might require a different approach based on individual requirements.¹¹⁸ The South Australian Attorney-General expressed similar views, noting that uniformity was unlikely to occur because of diverse views and practices.¹¹⁹ The Western Australian Department of Premier and Cabinet and the Western Australian Attorney-General considered uniformity desirable, but stated that it should be achieved by agreement between the relevant parties.¹²⁰

11.98 The Victorian Government noted that it is fundamental to a federation that States and the Commonwealth are entitled to adopt different positions. However, the Victorian Government supported the Commonwealth, referring the issue to the Standing Committee of Attorneys-General specifically to ‘consider the feasibility of uniform guidelines’ for administration and licensing.¹²¹

¹¹⁶ See: <http://www.gpoaccess.gov>.

¹¹⁷ No views were submitted by the ACT or NT governments.

¹¹⁸ *Submission 56*, p. 9.

¹¹⁹ *Submission 52*, p. 5. The Chief Justice of the Supreme Court of South Australia supported the principle of uniformity but did not place great importance on it (*Submission 39*, p. 2).

¹²⁰ *Submission 29*, p. 4; *Submission 34*, p. 5.

¹²¹ *Submission 64*, p. 11.

11.99 Submissions from the Queensland Government were less supportive. While agreeing that uniformity in government practice was a desirable goal, the Queensland Government submitted that there was no suitable single model either within or among the States, Territories and the Commonwealth.¹²² The Queensland Department of Natural Resources, Mines and Energy argued that a uniform approach was unnecessary and that it was not possible to adopt uniform access and licensing conditions for all material.¹²³

The Committee's views

11.100 The Committee notes that most States support the principle of uniformity in approach, while wishing to retain some flexibility. The implications of a uniform approach are significant and potentially wide-reaching. The Committee considers that there is significant merit in the Victorian Government's suggestion that the matter should be referred to the Standing Committee of Attorneys-General, in order that it may be explored in more depth.

Recommendation 12: The Committee recommends that uniformity in the management of Crown copyright across State and Territory Governments be referred to the Standing Committee of Attorneys-General for consideration.

11.101 In terms of having a central agency to administer government copyright, as is the case in the Commonwealth, the Committee notes that the Queensland Government opposed this approach.¹²⁴ Some States and Territories already have a central agency that is responsible for copyright administration, while others leave the task to individual agencies.

¹²² *Submission 71*, p. 14.

¹²³ *Submission 65*, p. 18.

¹²⁴ The Committee notes, as discussed above, that the Department of State Development and Innovation assumes a central role for a few agencies which have not been granted a beneficial use delegation under which they conduct their own licensing arrangements.

11.102 The Committee considers that a coordinated approach to common issues both ensures consistency and allows users to have access to information about copyright issues more easily. The Committee notes comments from FACS¹²⁵ and the National Archives¹²⁶ that uniformity is particularly important where agencies change their name or functions. Consequently the Committee encourages States and Territories that have not already done so to consider this option.

Recommendation 13: The Committee recommends that each State and Territory Government that has not already done so consider giving a central agency responsibility for managing Crown copyright, similar to the Commonwealth CCA model.

11.103 The Committee considers that the same arguments supporting uniformity in copyright administration for literary and other works should also apply to film and sound recordings where the Crown owns copyright. Consequently it supports the AFC's suggestion for a central agency to administer Commonwealth copyright in these materials, and considers that the existing framework of the CCA would make it a sensible choice.

Recommendation 14: The Committee recommends that the CCA be given responsibility for managing copyright in film and sound recordings where copyright is owned by the Commonwealth.

11.104 The Department of Education, Science and Training (DEST) submitted that copyright material should be made easily and freely available for education, training and research purposes.¹²⁷ DEST argued that the default position for access to materials produced with government funds should be that they are freely available for such purposes. DEST suggested that the default position should not apply where material has a planned commercial benefit for government or where the government intends the research to be

¹²⁵ *Submission 36*, p. 5.

¹²⁶ *Submission 37*, p. 7.

¹²⁷ *Submission 43*, p. 1.

commercialised. Decisions on which material should be freely available and which should be treated as commercial should be made ‘with consistency across Government’. DEST also supported the development of standardised licences which would detail the permitted uses of material.

11.105 The Committee notes that the CCA’s website has few materials available to provide guidance on copyright in material owned by government. While there is information on Commonwealth copyright notices and when permission is needed to use Commonwealth copyright material, no other information is available. This compares unfavourably with the UK, where the HMSO’s website provides guidance notes on a range of topics, such as reproduction of court forms, and copyright in public records.

11.106 Whilst the ACC’s website provides some information for government, the Committee considers that the CCA should produce more written information to provide guidance and advice for Commonwealth agencies as well as users. Expanding the CCA’s role to allow it to be more proactive would provide a clear and consistent approach to the management of Crown copyright and decrease the uncertainty about copyright issues that has featured so strongly in this inquiry.

Recommendation 15: The Committee recommends that the CCA’s role be expanded to provide advice and guidance on Commonwealth Crown copyright, and that further material be disseminated on its website.

The need for education for government and its employees

11.107 During this inquiry, the Committee heard significant criticism, particularly during the Sydney forum, that government employees were often unaware of the Part VII provisions and/or did not make provision for copyright ownership in relevant contracts. While some government agencies are no doubt very practised in developing suitable contracts, others may lack that experience and knowledge.

11.108 In addition to legislative reforms, the Committee considers that governments should increase their efforts to educate government employees on copyright and moral rights issues, both by the creation of guidelines and by specific training.

11.109 If sections 176–8 are repealed, governments may have to rely more heavily on contract to own copyright where a work is commissioned.

11.110 The Committee is mindful of the ANAO’s comment that ‘the management of intellectual property will often involve a series of complex decisions regarding the appropriate level of ownership and control of a particular intellectual property asset’.¹²⁸ However, only half of the Commonwealth agencies the ANAO surveyed had mechanisms to identify intellectual property.

11.111 The Committee was unable within the limits of this inquiry to examine in detail and compare the practices of different agencies at Commonwealth, State and Territory level. Some large agencies that are well-practised in negotiating large contracts with significant intellectual property implications, such as the Department of Defence, will no doubt be proficient. Smaller agencies may well benefit greatly from the provision of standard contracts and education in their legal and financial management responsibilities.

11.112 The ANAO found there was a need for broader guidance and support for agencies on the management of intellectual property¹²⁹ and recommended a whole-of-government approach and guidance for the Commonwealth.¹³⁰ The Committee endorses this recommendation and urges the Commonwealth Government to develop and implement comprehensive guidelines and policies as soon as possible.

11.113 The Committee also suggests that States and Territories should follow this approach if they have not already done so.

¹²⁸ ANAO, *op cit*, p. 69.

¹²⁹ *ibid*, p. 22.

¹³⁰ *ibid*, Recommendation 2.

Recommendation 16: The Committee recommends that the Commonwealth Government develop and implement comprehensive intellectual property management guidelines to promote best practice and assist agencies to meet their responsibilities. Education and training of government employees must also be a high priority. The Committee urges State and Territory Governments which have not already taken such steps to do so.