

CROWN COPYRIGHT

CONTENTS

Membership of the Committee	ix
Terms of reference.....	xi
Abbreviations	xv
Executive Summary.....	xix
Special Crown ownership provisions in the Copyright Act	xxi
Duration of Crown copyright.....	xxii
Employees' works.....	xxiii
Public policy considerations	xxiv
Abolition of copyright in certain materials.....	xxvi
Duty to disseminate.....	xxvi
Prerogative rights	xxvii
Exceptions to copyright infringement	xxvii
Whether an entity is part of the 'Commonwealth' or 'State'	xxviii
Moral rights	xxx
Crown copyright management.....	xxx
Chapter 1. Background to the inquiry	1
Key factors leading to the inquiry.....	1
Conduct of the inquiry.....	2
Scope of this report	3
Terminology used in this report.....	4

Chapter 2. The scope of Crown copyright	5
‘Crown copyright’	5
What is meant by ‘the Crown’	5
‘Crown in right of the Commonwealth or State’	7
‘Commonwealth’ and ‘State’	7
The scope of material in which government owns copyright.....	10
Chapter 3. Crown ownership of copyright	13
The current law in Australia	13
Legislative power with respect to copyright.....	13
Australia’s international obligations	14
The Copyright Act 1968.....	15
General copyright ownership.....	15
Crown prerogative.....	16
Part VII of the Act.....	16
Duration of copyright in government works	17
History of Crown copyright.....	20
A brief history of copyright law in England.....	20
Copyright law in Australia	22
Crown ownership under the 1911 UK Act.....	23
The 1956 UK Act.....	23
The Copyright Act 1968 (C’th)	24
Reviews of Crown copyright in other common law countries	25
United Kingdom.....	25
Other common law countries.....	27
The United States of America.....	29

Chapter 4. Public policy issues	31
Competition policy – the Ergas Committee’s report.....	31
Evidence to the Committee on the Ergas recommendation.....	33
The copyright balance	34
Policy issues.....	35
The range of material may affect policy considerations	36
Providing an incentive to create.....	38
Ensuring access to government copyright material	39
Protecting the integrity of information.....	53
Allowing cost-effective administration of government	56
Other public policy reasons for government ownership	59
Is copyright ownership of commissioned material necessary?.....	60
Chapter 5. Special Crown ownership provisions of the Act	63
The scope of the Part VII provisions: ownership of material made under the direction of the Crown	63
Possible interpretations of sections 176 and 178	64
Similar provisions in the <i>Copyright Act 1956</i> (UK)	65
Arguments for repeal of subsections 176(1) and 178(1).....	66
The ‘direction or control’ test	67
Works first published under the direction of the Crown	73
Who is the ‘Commonwealth’ in Part VII?.....	74
Relationship between Part VII and the rest of the Act.....	75
Section 177 and subsection 29(6)	76
Criticism of the Part VII provisions	78
Support for the Part VII provisions.....	81
The position in other common law countries	82
United Kingdom.....	82
Ireland.....	84
New Zealand.....	84
Canada	85

Chapter 6. The Crown prerogative	87
The history of the Crown prerogative	87
Is there a duty to disseminate information?.....	89
The scope of the prerogative.....	90
Judgments	90
New technologies.....	92
Evidence to the Committee.....	93
Are there any constraints on the Commonwealth’s power to legislate? ...	95
Statutory alternatives to the Crown prerogative	99
Chapter 7. Exceptions to infringement.....	103
Current exceptions under the Copyright Act.....	103
Section 182A – a single reprographic reproduction.....	105
Blanket licence scheme	109
Public interest defences and freedom of political communication	112
Chapter 8. Which government entities should be considered the ‘Commonwealth’ and ‘State’? ...	113
Terms used in the Act.....	113
Types of government entities.....	114
Common law	115
‘Shield of the Crown’ test.....	116
‘Federal’ test	117
Case study: the National Gallery and the National Museum.....	119
A non-exhaustive list of factors to be applied by the courts	120
The ‘fair dealing’ model.....	120
Possible factors to include	121
Other options for reform.....	124
Declaration of entities by the Attorney-General.....	124
Non-exhaustive list of entities	125

Chapter 9. The Committee's views	127
Ownership of copyright under Part VII.....	127
Employees' work	132
Abolition of copyright in certain materials	135
Crown prerogative.....	139
Exceptions to copyright infringement	141
Defining whether an entity is the 'Commonwealth' or 'State'	142
Who owns copyright: the entity or the executive government?	144
Chapter 10. Moral rights.....	147
What are moral rights?	147
Evidence to the Committee.....	148
The UK position.....	150
The Committee's view	151
Chapter 11. Management of Crown copyright	153
Commonwealth Crown copyright management	154
The Australian National Audit Office's report.....	155
Evidence to the Committee.....	157
Crown copyright management in the States and Territories	160
Policies and guidelines	162
A case study: primary legal materials	165
The Commonwealth	165
The States and Territories.....	166
Electronic dissemination	170
The views of legal publishers	171
International developments in Crown copyright management.....	174
The UK.....	175
Directive on the re-use of public information in the EU.....	177
New Zealand.....	179
Canada	179
The US.....	180

The views of State governments	181
The Committee’s views	182
The need for education for government and its employees.....	184
Additional Comments – Mr John Gilchrist	187
Appendix 1. List of submissions.....	193
Appendix 2. List of those who participated in the Committee’s consultations	197
Public forum, Sydney, 27 July 2004	197
Perth, 20 August 2004	200
Melbourne, 24 August 2004	200
Appendix 3. NSW waivers of copyright in judgments and legislation	203
Notice: Copyright in judicial decisions	203
Notice: Copyright in legislation and other material	206
Bibliography	209
Cases.....	209
Legislation	211
International agreements	213
Articles	213
Books, reports and other publications	215

LIST OF TABLES

Table 1	Types of material produced by or for government	11
Table 2	Comparison of terms of copyright protection under the <i>Copyright Act 1968</i>	18