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## Executive Summary

In the Copyright Law Review Committee's examination of Crown ownership of copyright, two important themes emerged and have formed the basis for the Committee's recommendations: ensuring that, as far as possible, government is on the same footing as other parties, and promoting the widest possible access to government-owned materials.

An important impetus for this inquiry was the Ergas Committee's<sup>1</sup> comments on section 176 of the *Copyright Act 1968* (the Copyright Act), which gives the Commonwealth and States ownership of copyright in works made by them or under their direction or control. The Ergas Committee argued that this provision places government in a privileged position compared with other contractors or employers, and that this situation was inconsistent with the principle of competitive neutrality.

Special statutory provisions applying to Crown copyright were first enacted in the Imperial *Copyright Act 1911*. At that time, the range of government functions was quite limited and the international copyright system was governed almost exclusively by the Berne Convention. The current Australian provisions are based on similar provisions in the *Copyright Act 1956* (UK), which was the first modern revision of the 1911 UK Act and marked the end of the Imperial law. The provisions of the 1956 UK Act formed, in turn, the framework for the copyright laws of many countries within the old British copyright system such as New Zealand, Ireland and Canada. But these laws, as in the UK, have either been significantly modified or will shortly be reviewed. The Committee was concerned to examine whether the policy justifications for those provisions applied with equal force today. In particular, the Committee considered the much broader scope of modern government functions, the wide range of government and semi-government agencies from traditional core government departments to commercially oriented bodies such as government business enterprises, and the more extensive range and scale of material produced by or on behalf of modern governments.

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<sup>1</sup> Intellectual Property and Competition Review Committee, Review of Intellectual Property Legislation under the Competition Principles Agreement, (Chairman Mr Henry Ergas), September 2000.

The Committee also considered the competing policy objectives that copyright law seeks to protect and promote. Copyright law is traditionally described as striking a balance between encouraging competition through rewarding effort and investment, and ensuring access to information. While the need to provide incentive does not apply to many works which governments are bound to produce, such as legislation, other justifications are often advanced for government copyright. They include allowing the integrity and accuracy of official documents to be protected and assisting in cost-effective administration by giving governments the capacity to recoup costs. Some also argued that governments must be able to own copyright to ensure that they have control over the reproduction, modification, adaptation and publication of works, and to ensure that the use of material is consistent with government policy. Weighed against these rationales is the importance of facilitating access to government material, as is discussed in more detail below.

This inquiry attracted significant interest from a wide range of those affected by Crown copyright ownership, including authors, publishers, libraries, law societies, judges, parliamentary departments, statutory agencies and State governments. Some concern was expressed about the possibility of recommendations that would remove the right of governments to own copyright in any circumstances. This concern appeared to lead some submissions to oppose strongly any amendment to the current law. However, the Committee reiterates that one of its main aims was to examine whether government should be in a privileged position compared with other owners of copyright. Consequently the opposition of some parties to legislative reform must be viewed in that context.

In conducting this inquiry, the Committee was particularly mindful of the experiences of other countries, particularly those that, like Australia, have their origins in English law. Although Australia's federal system raises some particular issues in terms of Crown copyright ownership and management, the Committee considered the experience of those countries and of general international trends to be very relevant.

## **Special Crown ownership provisions in the Copyright Act**

Key recommendations of the Committee relate to the special Crown copyright subsistence and ownership provisions in Part VII Division 1 of the Copyright Act (sections 176–9). Those provisions give the Commonwealth, States and Territories ownership of copyright in literary, dramatic, musical and artistic works, sound recordings and films made or first published by them or under their ‘direction or control’, unless a contrary written agreement applies. Subsections 176(1) and 178(1) also provide that where copyright would not otherwise subsist in works, sound recordings and films, copyright subsists by virtue of the sections.

The Committee has concluded that the special Crown subsistence and ownership provisions should be repealed for several reasons. First, the subsistence provisions are not clearly drafted and it is difficult to envisage situations where they would be relied upon today. Second, the ambit of the ownership provisions is uncertain and the Committee considers there is no justification for government to have a privileged position compared with other copyright owners. In particular, the Committee considers that the term ‘direction or control’ is potentially far too broad. Ownership of copyright in works commissioned by government from independent parties should not be determined by default provisions that alter the usual copyright ownership rules. Not only do these provisions give government a negotiating advantage, but the Committee also heard evidence that many creators have been unaware that in the absence of a written contractual provision with government, they have lost copyright in their creations.

The Committee is emphatic that the ‘first publication’ provision in section 177 should be repealed (that is, the provision whereby ownership of copyright vests in the Crown by virtue of the Crown being first to publish the material). During this inquiry, one submitter expressly withheld consent for the Committee to publish her submission on this basis, but others may have been unaware of the consequences of failing to do so. The Committee can see no justification for retaining this provision, under which an author’s copyright is extinguished merely by the fact of the Crown publishing his or her work first.

If the special Crown subsistence and ownership provisions in Part VII are repealed, government will still be able to claim copyright ownership under the general provisions of the Act. Repeal of these provisions would have the added benefit of removing doubt about the interaction of those provisions with the rest of the Act, a matter that is currently only partly addressed by section 182.

**Recommendation 1: The Committee recommends that the provisions relating to subsistence and ownership of Crown copyright in sections 176–9 of the *Copyright Act 1968* be repealed. (paragraph 9.09)**

## Duration of Crown copyright

The Committee considered whether its proposed reforms should allow for the fact that many individuals are often involved in the production of government work, and that accordingly it may be difficult to ascertain the author or authors of a work. However, the Committee concluded that while the scale of material that government produces may be greater than that produced by the private sector, in principle government is no different from the private sector in relation to potential problems arising from the existence of more than one author. Consequently, the Committee considers that the general provisions of the Act concerning joint authors should apply where work is produced by government.

The Committee did, however, consider that the likelihood of numerous authors should be taken into account in continuing to apply to government copyright material a defined statutory term of protection that is not determined by reference to the life of an author.

While a general review of the rules relating to copyright duration is beyond the Committee's terms of reference, the Committee recognises the benefit of fixed terms of copyright protection for government works in avoiding the difficulties of having to locate numerous authors in order to calculate the term. The Committee considers there is also a strong public interest in government materials being in the public domain. The public's right to have earlier access to government material is consistent with the Committee's views on access to particular categories of material such as primary legal materials, as outlined below. This approach also provides certainty for users, who would otherwise

need to expend time and resources in locating authors, and simplifies the administration of copyright. The Committee supports a term which is the same as that currently applying under the Part VII provisions (sections 180–2).

**Recommendation 2: The Committee recommends that a defined term of protection continue to apply to works, films and sound recordings where copyright is owned by the Crown or would, but for a contrary agreement made with a Crown officer or employee, be owned by the Crown. The duration of the term should be as follows:**

- in the case of literary, dramatic and musical works, films and sound recordings, fifty years after the end of the year of first publication;
- in the case of unpublished literary, dramatic and musical works, films and sound recordings, copyright should continue to subsist until fifty years after the end of the year of first publication; and
- in the case of artistic works, fifty years after the end of the year when the work is made. (paragraph 9.18)

## Employees' works

If the Part VII provisions are repealed, governments will rely heavily on subsection 35(6), the general provision that gives employers ownership of copyright in their employees' works.

In considering whether that provision is sufficiently broad to meet the legitimate needs of government, the Committee considered alternative overseas models. The UK's 1988 legislation, while retaining separate provisions for Crown copyright, replaced the phrase 'by or under the direction or control' with work made by 'an officer or servant of the Crown in the course of his duties'.<sup>2</sup> Ireland has a similar provision.<sup>3</sup> New Zealand, on the other hand, has extended Crown copyright ownership to works 'made by a person employed or engaged by the Crown under a contract of service, a contract of apprenticeship, or a

<sup>2</sup> *Copyright, Designs and Patents Act 1988* (UK), section 163.

<sup>3</sup> *Copyright and Related Rights Act 2000* (Ireland), section 191.

contract for services’, a definition which includes commissioned works.<sup>4</sup> The Committee prefers the narrower UK definition.

Ownership of copyright in films and sound recordings is covered by Part IV of the Act. Because those provisions<sup>5</sup> vest ownership in the maker (defined in relation to sound recordings as the person who owned the record and in relation to films as the person who made the necessary arrangements for making the film<sup>6</sup>), the Committee does not consider that specific amendments to those provisions are necessary.

**Recommendation 3: The Committee recommends that the general provision relating to copyright in the works of employees in subsection 35(6) of the Copyright Act be amended insofar as it applies to the Crown. Ownership of copyright in literary, dramatic, musical and artistic works produced by an officer or servant of the Crown in the course of his or her duties should vest in the Crown. (paragraph 9.26)**

## Public policy considerations

An argument often advanced in support of Crown copyright ownership is that it helps to promote the accuracy and integrity of official government publications. This was part of the original rationale for government ownership of copyright material, and it was restated in many of the submissions received. Reviews in other common law countries have also referred to this rationale in relation to their government materials, but often without exploring the validity of that view.

The Committee does not find those arguments persuasive in relation to materials such as statutes, judgments and official government reports. In particular, the Committee considers it unlikely that re-publishers of primary legal source materials would either deliberately or negligently disseminate inaccurate copies, as a lack of integrity, authority and accuracy in the materials would considerably affect the publisher’s reputation.

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<sup>4</sup> *Copyright Act 1994* (NZ), section 26.

<sup>5</sup> Subsections 97(2) and 98(2) respectively.

<sup>6</sup> Subsections 22(3) and (4) respectively.

Instead, the Committee considers that the strong public interest in making information accessible to the public carries more weight. Open access to government information is an essential characteristic of modern democracy, as has been increasingly recognised through a range of reforms, such as the introduction of freedom of information legislation throughout Australia in the past two decades. Technological advances in the electronic storage and dissemination of information have also had an impact on access to government material, with governments using the Internet and electronic databases to facilitate cheaper and more efficient access to information. There has been a growth in availability of legal information through a network of legal information institutes that provide free online access.

While new technology has improved the accessibility of information for many people, it has also allowed the development of new protection measures which can restrict that access. Internationally there have been increased efforts to ensure public access to government copyright material, including the United Nations' world summit on the information society in late 2003<sup>7</sup> and a 2003 European Commission Directive to facilitate the re-use of public sector information.<sup>8</sup> In the last few years, there have also been increasing calls for open access to research studies, particularly in science, and a dramatic increase in the number of open-access journals.

While some argued that copyright should not be used by governments to restrict access to their material, it is clear that governments have on occasion done so, as evidenced in *Commonwealth v Fairfax*<sup>9</sup> where the High Court granted an interim injunction on the basis of copyright to restrain the publication of certain government documents. This action did not protect the information, with much of the content of the documents being subsequently published in summary form. More recently, copyright is also reported to have been asserted in attempting to address the unauthorised release of a police video of the Port Arthur massacre.<sup>10</sup> The Committee considers that there are other more appropriate ways to address the adverse consequences of unauthorised release

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<sup>7</sup> United Nations, 'Draft Declaration of Principles', World Summit on the Information Society, Geneva 2003.

<sup>8</sup> Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information.

<sup>9</sup> (1980) 147 CLR 39.

<sup>10</sup> R Wade, 'Police probe on for video truth', *The Mercury*, 2 September 2004, p.11.

of information held by government. There is great danger in the possibility of government using copyright as an instrument of censorship.

## **Abolition of copyright in certain materials**

The Committee heard conflicting views on how access to certain government information may be ensured where there is a strong public interest in making it widely available. While some suggested retaining Crown copyright and introducing statutory exceptions or blanket licences, the Committee favours the view expressed in many submissions that called for the abolition of copyright in legislation and other primary legal materials, noting that in many countries there is no copyright in such works. Some suggested that certain executive materials should be treated in the same way, and the Committee considers that appropriate.

**Recommendation 4: The Committee recommends that copyright in certain materials produced by the judicial, legislative and executive arms of government be abolished. Those materials are:**

- **bills, statutes, regulations, ordinances, by-laws and proclamations, and explanatory memoranda or explanatory statements relating to those materials;**
- **judgments, orders and awards of any court or tribunal;**
- **official records of parliamentary debates and reports of parliament, including reports of parliamentary committees;**
- **reports of commissions of inquiry, including royal commissions and ministerial and statutory inquiries; and**
- **other categories of material prescribed by regulation. (paragraph 9.38)**

## **Duty to disseminate**

In view of the public interest in promoting the widest possible public access to the laws applying in Australia, the Committee also considers that, while there is

some evidence of a common law duty, there should be a statutory duty on the Commonwealth, States and Territories to disseminate legislation and judgments, as is the case in New Zealand in relation to legislation.

**Recommendation 5: The Committee recommends that the Commonwealth, States and Territories be under a statutory duty to disseminate legislation and judgments. (paragraph 9.39)**

## Prerogative rights

The Committee supports the many submissions that argued the Crown prerogative in the nature of copyright should be abolished, on the basis that it is an antiquated concept and not appropriate for Australia in the 21<sup>st</sup> century. Its application and extent are uncertain. It is generally accepted that the prerogative extends only to primary legal materials such as statutes. Whether it extends also to judgments is a matter of some contention.

While the Committee cannot state unequivocally that the Commonwealth has the legislative power under the Constitution to remove the Crown prerogative in the nature of copyright in right of the States, the Committee notes there is significant support for the contention that it may validly do so. That abolition should be prospective.

**Recommendation 6: The Committee recommends that prerogative rights in the nature of copyright in the right of the Commonwealth and of the States be abolished by amendment to the Copyright Act 1968. That abolition should be prospective. (paragraph 9.45)**

## Exceptions to copyright infringement

If contrary to the Committee's recommendation the Commonwealth Government should decide that copyright in primary legal materials should be preserved, the Committee considers that the prerogative should be replaced by statutory provisions for the sake of certainty. If such a course is followed, there

should be a statutory waiver of copyright in such materials because of the interest in their broad public dissemination.

**Recommendation 7: The Committee recommends that if, contrary to its recommendation, the Commonwealth Government decides that the Crown should continue to own copyright in primary legal materials, copyright in the materials currently covered by the prerogative be covered by statutory provisions and there be a statutory waiver of copyright in them. (paragraph 9.46)**

The Copyright Act permits various uses of copyright material for such purposes as research or study, review, news reporting and judicial proceedings. In addition, section 182A specifically permits a single reprographic reproduction of prescribed primary legal materials such as Acts and judgments.

The Committee received compelling evidence to suggest that amendments to section 182A were necessary to ensure proper access, particularly given technological developments since the provision was enacted in 1976. Some submissions suggested that multiple copies should be allowed, while others argued that copying by means other than by reprographic reproduction should be permitted. Still more suggested that the category of prescribed works in subsection 182A(3) should be expanded. Problems were also identified in the terminology used to refer to judgments and orders of courts and tribunals. The Committee found many of these arguments persuasive. If, however, its recommendation is followed, copyright will not subsist in the prescribed works covered by the provision and consequently it will have no practical effect.

**Recommendation 8: The Committee recommends that section 182A be repealed. (paragraph 9.50)**

## **Whether an entity is part of the ‘Commonwealth’ or ‘State’**

The Committee notes that there is evidence of an increasing tendency, in legislation establishing government entities, to state expressly whether the

entity is part of the Crown. The Committee encourages this as a useful practice that would remove much uncertainty in relation to the status of future bodies.

However, in the absence of such express provisions, it is evident that much uncertainty about the status of various entities remains, particularly where they are not core government agencies. While the courts have referred to certain factors that may provide guidance as to whether an entity should be considered to be part of the Crown, the increasingly diverse range of entities created by government has meant that there is no universally applicable test.

After considering several options, the Committee has concluded that the compilation of a non-exhaustive list of Crown entities, similar to the Crown bodies list maintained by Her Majesty's Stationery Office (HMSO) in the United Kingdom, will provide greater clarity and certainty. While some concern was expressed about the possible administrative burden on government, the Committee considers that information about the United Kingdom experience dispels these concerns. Because of Australia's federal system, the Committee considers each jurisdiction should have responsibility for creating its own non-exhaustive list of government bodies for the purposes of the Copyright Act. At present the most relevant organisation to compile and maintain the Commonwealth's list would be the Commonwealth Copyright Administration (CCA). Which agency is best suited to create and maintain a non-exhaustive State and Territory list should be a decision for each State and Territory government.

While such a list would not be exhaustive and would not preclude a final determination of an entity's status in the courts, the Committee considers that it would have significant educative value, providing a very useful starting point for government entities and those contracting with them as to which entities are the Crown for the purposes of copyright.

**Recommendation 9: The Committee recommends that a non-exhaustive list of entities included as part of the 'Commonwealth and or a State' be created by the Commonwealth for Commonwealth entities and by the individual States/Territories for State/Territory entities. (paragraph 9.61)**

The Committee also recommends that guidelines be developed and published by the CCA in consultation with the Australian Government Solicitor and the Attorney-General's Department, listing the factors that may be considered when determining the governmental status of an entity.

**Recommendation 10: The Committee recommends that to increase public awareness of the factors to be considered in determining whether an entity should be listed, the CCA in consultation with the Australian Government Solicitor and the Attorney-General's Department should develop and publish guidelines. (paragraph 9.61)**

## **Moral rights**

Consistent with its view that government should be treated no differently from any other employer or contracting party, the Committee considers that there should be no change to the current moral rights provisions insofar as they relate to government. This view accords with most of those in submissions. In addition, the Committee considers that the factors set out in sections 195AR and 195AS, provisions which allow exceptions to infringement where reasonable, provide sufficient safeguards for government.

**Recommendation 11: The Committee recommends that there be no change to the current moral rights provisions in Part IX of the *Copyright Act 1968* insofar as they relate to government. (paragraph 10.16)**

## **Crown copyright management**

Proposed legislative reforms are only part of the solution to the problems the Committee has identified during its inquiry. The Committee has made a series of recommendations aimed at promoting consistent copyright management practices in government agencies and increasing the awareness of relevant issues amongst public service employees and those with whom they interact.

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.<sup>11</sup> Poor management of Crown copyright can result in unnecessary restrictions to access to government copyright material and less cost-effective management. In particular, governments may not need to own copyright in material commissioned from third parties – a licence to use material may be sufficient to achieve their aims.

Most submissions supported the goal of uniform management of government copyright material by governments throughout Australia. Most States supported the principle of uniformity in approach, while wishing to retain some flexibility to suit particular circumstances. Because the implications of a uniform approach are potentially wide-reaching, the Committee considers 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. (paragraph 11.100)**

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. Uniformity is particularly important where agencies change their name or responsibilities. Consequently the Committee encourages those States and Territories that have not already done so to consider allocating responsibility for general copyright administration to a central agency, similar to the CCA.

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<sup>11</sup> Australian National Audit Office, Intellectual property policies and practices in Commonwealth agencies, 2003–04, ANAO.

**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. (paragraph 11.102)**

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. A central agency should administer Commonwealth copyright in these materials, with the CCA's existing framework making 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. (paragraph 11.103)**

The Committee notes that the CCA's website contains only limited information to provide guidance on copyright in material owned by government. This compares unfavourably with the United Kingdom, where the HMSO's website provides guidance notes on a range of topics, such as copyright in public records. The Committee considers that the CCA should produce more information to provide guidance for Commonwealth agencies and 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. (paragraph 11.106)**

The Committee considers that governments must increase their efforts to educate government employees on copyright ownership and moral rights issues, both by the creation of guidelines and by specific training.

If the Part VII provisions are repealed as the Committee has recommended, governments will rely more heavily on contract to own copyright where work is commissioned. The Committee was unable during this inquiry to examine in detail the practices of different agencies at Commonwealth, State and Territory level. Some large agencies which are well-practised in negotiating large contracts with significant intellectual property implications 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.

The ANAO found there was a need for broader guidance and support for agencies on the management of intellectual property and recommended a whole-of-government approach and guidance for the Commonwealth.<sup>12</sup> The Committee endorses this recommendation and urges the Commonwealth Government to develop and implement comprehensive guidelines and policies as soon as possible. The Committee also urges State and Territory governments to follow this approach if they have not already done so.

**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. (paragraph 11.113)**

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<sup>12</sup> ANAO, op cit, p. 22.

