

Additional Comments – Mr John Gilchrist

One Committee member, Mr John Gilchrist, supports all of the recommendations of the Committee, but has additional comments in respect of recommendations 1, 4, 7 and 8.

Recommendation 1: The Committee recommends that the provisions relating to the subsistence and ownership of Crown copyright in sections 176-179 of the Copyright Act 1968 be repealed.

Mr Gilchrist supports this recommendation but notes that the Committee received submissions from Government concerning their need to undertake acts comprised in the copyright in works, which may be privately owned, produced under statutory requirements and in fulfilment of statutory obligations imposed on Government. An example is the submission of survey plans for registration under state land and planning laws. Submissions by the WA Department of Land Information, the Queensland Government and Queensland Department of Natural Resources, Mines and Energy in particular pointed to this need. These governments to some extent presently rely on s176(2) and s177 for that purpose, but the unanimous view of the Committee is that those sections should be repealed.

With the abolition of these provisions, the authors of these submitted works would normally retain copyright in them. But Mr Gilchrist considers that Government would generally be entitled, under an implied licence, to do limited acts comprised in the copyright in the submitted works without infringement of copyright for the purposes of fulfilling their statutory functions.

However he considers it unreasonable to base the government's rights on what is implicit from the process. Mr Gilchrist considers that there is a compelling public interest for a provision to be inserted in the Copyright Act, similar to s 48 of the United Kingdom Copyright, Designs and Patents Act, to expressly enable Government to effectively carry out its public duties. As there is an independent review of Crown use provisions, it may be appropriate to consider this question in the context of that review.

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.**

Mr Gilchrist considers that if this recommendation is not followed, the statutory licence discussed under Recommendation 7 (below) dealing with primary sources of the law for Australian publishers should extend to enable the reproduction, publication and communication to the public of the listed parliamentary and executive materials. He considers that the public interest in access to, dissemination of, and use by, the public of these materials outweighs other interests. In the case of some executive materials it may be reasonable to restrict this to a proportion (say 30% of the number of pages in those works) but if such a restriction is imposed it should still, for example, be sufficient to enable an executive summary of all the recommendations of a report to be commercially published under the statutory licence. The statutory licence should only cover Crown copyright materials. It should not extend to cover privately owned copyright works by way of illustration, appendix or otherwise in these materials, or to reports and other materials that may be published by the Commonwealth or a State but in which copyright vests in a third party such as the annual reports of CAL and Telstra. The likelihood of privately owned copyright works appearing in these materials will increase if the Committee's recommendations to abolish Division 1 of Part VII of the Act, (specifically s176(2) and s177) are implemented and in these circumstances it is important to the functioning of this licence that Crown publishers and communicators of

these executive materials clearly indicate the ownership of works contained within them. The need to identify privately owned copyright works applies equally to our recommendation that these Crown materials be placed in the public domain.

This statutory licence or waiver should not affect the copyright in the published edition of judicial, legislative and executive materials owned by Government. Thus, for example, commercial reproduction for publication of these materials without infringement of this right would either require a different typographical layout or a licence from the Government to facsimile reproduce that published edition.

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.

Mr Gilchrist considers that it is open to the Commonwealth to seek the cooperation of other governments to replace the Crown prerogative rights over primary source materials with a copyright and with the prospect that Government should have rights in primary sources of the law as works under the Copyright Act.

There are a number of encouragements to do so. The prerogative right is limited in its scope to printing and publication. The works it covers are the subject of some uncertainty. The modern concept of copyright in works enshrined in the Copyright Act contains within it rights which are broader in their nature and reflect current means of dissemination and exploitation. The coverage of copyright in works is clear. Copyright also extends worldwide. The prerogative right does not. Mr Gilchrist considers that these two rights do not coexist over primary sources of the law and that copyright may provide a better basis for those legitimate public interests in the accuracy and integrity of this material which Governments have sought in licensing practice to preserve. Indeed, two out of three of the major Australian commercial law publishers' submissions to

this Committee favoured the abolition of prerogative rights but the retention of Crown rights in judicial and legislative material by substitution with a copyright.

If copyright in primary legal materials is subject to a broad statutory licence under the Copyright Act, that statutory licence or waiver should enable any Australian publisher (commercial law or otherwise), to reproduce, publish and communicate to the public primary legal materials without infringement of copyright in the works, and to do so without charge, licence fee or royalty to the copyright owner. As an incentive for all the governments in the Australian federation to achieve a consistent approach to this policy objective, the Commonwealth and the States should seek to establish uniform conditions in the statutory licence to preserve the accuracy and integrity of material subject to the licence but in no case should these conditions be capable of being used as an instrument of censorship.

Recommendation 8: The Committee recommends that section 182A be repealed.

If contrary to our recommendations, the Crown should continue to own prerogative rights in primary source materials, those prerogative rights will continue to subsist in the prescribed works listed in s182A. As mentioned above, it is nonetheless open to the Commonwealth to seek the cooperation of other governments to replace the Crown prerogative rights over primary source materials with a copyright and with the prospect that Government should have rights in primary sources of the law as works under the Copyright Act.

If that occurs, Mr Gilchrist considers that s 182A of the Act should be widened in its effect. The section should be amended to provide that any person may reproduce for a particular purpose or communicate to another person for a particular purpose a whole copy of a Government primary legal source and/or executive and parliamentary work listed in Recommendation 4. That is, the section should be amended to enable all forms of reproduction and communication. Any such act should neither be an infringement of copyright in the work or the published edition copyright owned by Government that may subsist in the work. The precise scope of primary legal works listed in the

existing s 182A should also be clarified to ensure complete coverage of the law in the light of comments by Ricketson and Creswell referred to in Chapter 7 of this Report. In the light of submissions received by the Committee, the section should also make it clear that it does not cover commercially produced material, such as ‘value-added’ material in the form of summaries, notes and commentaries.

The Copyright Law Committee on Reprographic Reproduction (the Franki Committee) some years ago proposed that the provision enable an organisation to make copies for distribution to its members. The section incorporated in the Copyright Act appears to be narrower in scope than that intended (see *Baillieu v Australian Electoral Commission* (1996) 33 IPR 494). The section should be amended to give effect to this wider intention and to enable any educational institution to reproduce or communicate those works for its students. In all circumstances the acts permitted under s 182A should be subject to the present ‘non-commercial’ limitation on charging. If multiple reproduction or communication of these Government materials is undertaken in a non-facsimile form under this section, then similar conditions concerning the accuracy and integrity of material for the proposed broader commercial publication licence ought to be imposed.

