



# The Royal Australian Institute of Architects

## Review of Crown Copyright

Submission to  
Copyright Law Review  
Committee.

September 2004

---

## SUBMISSION BY

The Royal Australian Institute of Architects  
ABN 72 000 023 012  
National Office  
2a Mugga Way  
Red Hill ACT 2603  
PO Box 3373  
Manuka ACT 2603  
Telephone: 02 6273 1548  
Facsimile: 02 6273 1953  
email: national@raia.com.au

## PURPOSE

- This submission is made by The Royal Australian Institute of Architects (RAIA) to the Copyright Law Review Committee (CLRC) as follow up to the CLRC's Consultation Forum on 27 July 2004, attended by Rick Barton, RAIA Company Secretary and Legal Counsel.
- At the time of this submission the Executive of the RAIA is: Warren Kerr (National President), Robert Nation (President-Elect), David Parken (Immediate Past President), Alec Tzannes and Carey Lyon.
- The Chief Executive Officer is Christine Harvey.

## INFORMATION

### ***Who is making this submission?***

- The RAIA is an independent voluntary subscription-based member organisation with approximately 9,100 members, of which 6,730 are architect members.
- The RAIA, incorporated in 1929, is one of the 96 member associations of the International Union of Architects (UIA) and is represented on the International Practice Commission.

### ***Where does the RAIA rank as a professional association?***

- At approximately 9,100 members, the RAIA represents the largest group of non-engineer design professionals in Australia.



# The Royal Australian Institute of Architects

## Review of Crown Copyright

---

## **Contents**

- 1 Introduction**
- 2 Focus of RAI A' s interest in the Crown Copyright provisions.**
- 3 Whether section 176 is being correctly applied in practice**
- 4 Sections 176 and 177 should be amended**
- 5 Negotiation imbalance**
- 6 Ownership of copyright by government is unnecessary**
- 7 Loss of copyright is a disincentive to a creative author**
- 8 Conclusion**

---

## **1 Introduction**

The CLRC is reviewing the appropriateness of the law relating to government ownership of copyright material in Australia – referred to as Crown Copyright. This submission is made subsequent to the CLRC's 27 July 2004 Consultation Forum attended by the RAIA.

The RAIA was not able to provide an earlier formal submission to the Committee, but is grateful for the opportunity to make a submission at this time. However, this submission is being made after the Forum for which the CLRC had prepared a Discussion Paper summarising the submissions already received, and at which various points were raised by RAIA and others on tape recording. The RAIA is confident that the general points it would wish to make have been well made by others, particularly the Australian Copyright Council.

For these reasons, the RAIA's submission will be narrowly focussed and brief.

## **2 Focus of the RAIA's interest in the Crown Copyright provisions.**

The RAIA's primary concern is about the application of the relevant sections of the Copyright Act 1968 (the Act) to those who are contractually engaged by government to produce copyrightable works. The RAIA has no objection to the operation of the Crown Copyright sections on government employees, such that as is the usual case, copyright subsists with a person's employer.

Therefore, the RAIA is concerned with the situation of an architect as a contractor or subcontractor to government. Section 176 of the Act is problematic for architects engaged or contracted for specific tasks or projects by government, whether the architect is an individual or is a business entity.

This submission is therefore focused on the effect of section 176 on the engagement by government of an architect, although RAIA's concerns have obvious parallels for the author of any copyrightable work, artistic work as defined in the Act or not, who is not an employee of government.

We consider that section 177 may also be of relevance for the architect's plans and other documents. Section 177 provides that government owns copyright in a work first published in Australia if it is first published by, or under the direction and control of government. It is open to some debate as to just when, if at all, an architect's drawings and other documents are first published, if their purpose and distribution is only as required to produce another copyright work, the building.

In practice, the operation of section 176 and section 177 is coloured by section 179 which allows the effect of each of them to be modified by agreement.

---

### **3 Whether section 176 is being correctly applied in practice**

Before considering these sections further, it is necessary to consider the interesting point raised by Professor Lahore, chairing the Consultation Forum, about whether section 176 is being applied correctly.

Paragraph 12 of the CLRC's Crown Copyright Issues Paper of February 2004 points out that subsection 176 (1) only operates where copyright would not otherwise subsist.

Subsection 176(1) provides that copyright subsists where it would not otherwise do so for works made by, or under the direction or control of, government.

As was pointed out by Professor Lahore at the Forum, it then begs the interesting question of statutory interpretation whether subsection (1) of section 176 is a condition precedent to subsection (2), such that the whole of the section only applies where copyright would not otherwise subsist.

The RAI A acknowledges that on a strict or correct interpretation, it may be that as was pointed out, section 176 would not generally apply. It is then difficult to imagine what practical application section 176 would have and so its effect may well be nugatory. The same argument would apply to section 178.

However, in the RAI A's view, the question of how section 176 should be interpreted is now academic. It is our experience, and which appeared to be shared by comments made by others at the Forum, that interpretation in common use for practical purposes hinged on applying subsection 176(2) in isolation, such that government asserts the presumption of ownership repeatedly, and that this is the reality in the community. While the RAI A readily accepts that it would be possible for someone to seek a declaration from the appropriate Court on the correct interpretation, and pursue the inevitable appeals, the practical effect would (eventually) be no different to simply repealing these sections, or amending them to exclude from operation, works contracted by government from third parties such as architects.

It is our belief that repeal or amendment is therefore preferable, more immediate, and more easily and effectively disseminated to the community than a declaration of correct interpretation.

### **4 Sections 176 and 177 should be amended**

The RAI A believes section 176 and section 177 should be amended. Its reasons are based on notions of fairness.

The problem with section 176 in particular is the presumption under subsection 176(2) of government ownership of copyright for works produced under the direction and control of government. This is opposite to the

---

presumption applying generally to the rest of the community – that is, that the author of a copyrightable work owns copyright unless there is agreement to the contrary with the person commissioning the work.

When it comes to government being in a different position to any private person or entity commissioning a work, there is in our view, simply no justification for the different standard. The CLRC reports in its discussion paper for the Consultation Forum on several submissions from government and government agencies in support of retaining the presumption.

With respect, in the RAlA's view, the arguments could be summarised as "laziness" on the part of government. No sustainable reason was advanced that government should not be required to put in place contractual arrangements that meet its needs in the same way that every other person, small business or large business is required to do.

In practical effect, the operation of section 176 probably makes section 177 immaterial. The copyright in plans and other documents such as specifications produced for the project being built are probably owned by government under section 176 in any case.

## **5 Negotiation imbalance**

The operation of section 179, which provides that the presumption can be negated by agreement, is subject to negotiation power imbalance. It is trite to say that section 179 requires the author being commissioned to negotiate, for negotiation is only as powerful as the relative positions of the parties.

It is the RAlA's experience that clients or potential clients are almost invariably in a stronger bargaining position. The architect in the ordinary situation of a non-government client, is at least able to negotiate copyright ownership from a presumption that the architect owns it, when faced with commercial pressure.

That is not to say that in many cases an architect retains copyright after negotiation, but at least the architect begins from a position that it may make a concession to a pre-existing right, rather than being faced with the prospect of seeking a right from a weaker negotiating position.

Similarly, a government client is rarely in a weaker position than the architect seeking to be engaged. Because the presumption is opposite to the norm by virtue of section 176, the architect must seek to obtain a right from a stronger party in negotiation.

The practical reality is that although a government officer about to engage an architect may know, in theory, that the copyright ownership presumption can be reversed by agreement, there is no incentive to make such an agreement from a stronger bargaining position. It is perhaps a generalisation, but government officers are also less likely to have individual discretionary power when engaging an architect for a project than many non-government procurement personnel or private individual clients.

---

## **6 Ownership of copyright by government is unnecessary**

This reluctance to negotiate is compounded where government procurement officers are ignorant of the operation of copyright licences, particularly for architectural works. There is simply no need for ownership of copyright by an architect's client in the vast majority of cases due to the operation of either an express licence in the commissioning agreement, or the implied licence arising from common law, either of which enable a client to have built and to maintain what has been designed by the architect.

If there is a peculiar need for copyright ownership by an architect's client, such as a requirement for repetition, the architect and client can negotiate different copyright ownership, repeat licensing, or some other arrangement. This is the situation for non-government projects and there is no reason why it cannot be applied by government, without need for a presumption of copyright ownership.

## **7 Loss of copyright is a disincentive to a creative author**

Copyright entitles the owner to reproduce the whole of the work and substantial parts of it. To a creative author, the ability to re-use physical expressions of ideas or to further develop them in subsequent works is a valuable aspect of the author's intellectual property. Lack of copyright means that a visual element of a building for example, cannot be reproduced or further developed in a subsequent project.

While it is difficult to quantify or to find specific examples, this factor has the potential to operate at a subjective level at least, against full application of effort by a creative author. The effect may well be that government, without substantial reason for owning copyright other than having maintained the presumption of ownership, is not getting the value for money from a creative author that it might.

## **8 Conclusion**

The RAIA generally objects to the notion that government is presumed to own copyright in relation to any contract with a third party who is not an employee of government. It therefore calls for amendment or replacement of sections 176 and 177 so that this presumption is removed. At minimum, the presumption should be removed for "artistic works" into which falls buildings, plans and drawings. However, as an a significant part of an architect's usual work such as specifications and reports falls under the Act's definition of "literary works", it is preferable that removal of the presumption should apply to any kind of work done by a third party who is not an employee of government.

6 September 2004