

PRELIMINARY SUBMISSION TO THE COPYRIGHT LAW REVIEW COMMITTEE REVIEW OF GOVERNMENT COPYRIGHT

FLEXIBLE LEARNING ADVISORY GROUP

Introduction

FLAG would like the Committee to note that this submission represents the preliminary views of the VET sector. Police services, security, health, defence and other government agencies provide substantial training and may be registered training organisations of VET. It was not possible, in the short time between the release of the Issues Paper and the deadline for submissions, to undertake wide consultation or prepare anything more than a preliminary submission on the matters raised in the Issues Paper. FLAG urges the Committee to provide further opportunities for consultation and submissions on the very important issues under consideration in this inquiry.

The **Flexible Learning Advisory Group** (FLAG) is the lead national body for flexible learning in the vocational and educational training (VET) sector and is an advisory group to the national VET committee ANTA CEOs. The Australian National Training Authority (ANTA) is a Commonwealth statutory authority providing a national focus for vocational education and training.

FLAG is responsible for facilitating national collaboration in the development of flexible learning from which significant resources have been developed for the VET sector. Its key document is the Australian Flexible Learning Framework 2000-2004 [<http://www.flexiblelearning.net.au>] Its key program of activities is the \$80million five year Australian Flexible Learning Framework 2000-2004, to support the uptake of flexible learning in the VET sector.

FLAG welcomes this opportunity to make representations to the Copyright Law Review Committee (the Committee) regarding the appropriateness of the law relating to government ownership of copyright material.

Background

The VET sector includes colleges and institutes of Technical and Further Education (TAFE's), adult and community education providers (ACE), private training colleges, and industry bodies all providing nationally recognised vocational education and training. Most VET institutions are either government owned or in receipt of substantial government funding. Some, however, are private organizations.

The sector is both user and creator of copyright material.

In what follows – and subject to one important caveat - FLAG submits that a more liberalised approach to the question of exploitation of government copyright is appropriate. In FLAG's submission, such material should, for the most part, be available for use by the public *without charge*.

The caveat is this; as the public education sector has become increasingly financially self reliant, TAFE's and other publicly funded institutions have achieved considerable success in carving out a [local and overseas] market for training and other related materials produced by the sector. If *these* materials were to be made freely available as part of a general liberalisation of government exploitation of Crown copyright material, the result could deliver an unfair competitive advantage to non-public training organizations. In this regard, the VET sector is potentially in a different position to both schools and universities.

It may be that a similar rationale would support extension of such a caveat to other government bodies which, like TAFE's, are in the nature of enterprises, and which rely on exploitation of copyright material in order to more efficiently and cost-effectively deliver goods or services of a *public* nature.

Finally, FLAG would like the Committee to note that this submission represents the *preliminary* views of the VET sector. Police services, security, health, defence and other government agencies provide substantial training and may be registered training organisations of VET. It was not possible, in the short time between the release of the Issues Paper and the deadline for submissions, to undertake wide consultation or prepare anything more than a preliminary submission on the matters raised in the Issues Paper. FLAG urges the Committee to provide further opportunities for consultation and submissions on the very important issues under consideration in this inquiry.

Response to Issues Paper

FLAG does not propose to respond exhaustively to the matters raised in the Issues Paper. What follows is our response to those issues which we consider to be of most importance and relevance to the education sector.

Issue 3: The Committee seeks your views as to whether moral rights should apply in the context of government copyright.

FLAG can see no justification for treating authors of government copyright material differently to any other author of copyright material. In the event that there are circumstances which make it reasonable for the government to decline to comply with the moral rights of attribution and integrity, the government can seek to rely on the reasonableness exceptions contained in ss 195AR and 195AS of the Act. A blanket waiver of the obligation to comply with moral rights would, in FLAG's view, impinge unnecessarily on the rights of authors employed by government or producing copyright material under the direction or control of government.

Issue 4: The Committee seeks your views as to whether the legislative scheme establishing government ownership of copyright material is appropriate. In particular, should the government acquire ownership of copyright material by virtue of:

- (a) sections 176 and 178 (works, sound recordings and cinematograph films made by, or under the direction or control of, the government),**
- (b) section 177 (works if published by, or under the direction or control of, the government),**
- (c) section 35(6) (works made pursuant to the terms of employment under a contract of service or apprenticeship)?**

Increasingly, activities which are “governmental” in nature are contracted out; not only to statutory bodies but also to private corporations contracted to provide services to government. In the event that there is any question as to who owns copyright in such material, the government or the statutory body/private contractor, there is a potential for the public to be denied access to copyright material generated by such bodies. This uncertainty also imposes a burden on parties dealing with such bodies.

In FLAG’s submission (and subject to the abovementioned caveat regarding training and other related materials produced in the VET sector), it would be unfortunate if the Committee were to recommend a more liberal approach to use of *government* copyright material and not seek to ensure that the approach applied, prima facie, to all copyright material generated by or for government at the expense of the public purse. The policy reasons which justify providing limited free public access to copyright material generated by government apply equally to copyright material generated by bodies acting *on behalf* of government. A statutory body or corporation set up to carry out an activity which was previously undertaken by government – eg a corporation charged with operating public transport - should not, in FLAG’s view, be treated as a private body so far as the question of ownership and exploitation of copyright material is concerned. Similarly, if the Crown is a co-owner of copyright with a collaborator, any limited rights of free use that would apply if the Crown was the sole owner should not be restricted by the need to obtain the consent of the collaborator.

Issue 5: The Committee seeks your views as to whether the Copyright Act should make express provision with respect to copyright in materials produced by:

- (a) the executive;**
- (b) the judiciary; and**
- (c) the legislative.**

FLAG supports adoption of the US approach to copyright in materials produced by the judiciary and the legislative arms of government; ie that the Act should be amended to provide that such materials are “copyright free” and thus in the public domain. It should be made clear, if thought necessary, that this applies also to the extent that such materials are the subject of any prerogative right.

As will be discussed below in our response to Issue 9 (and subject to the abovementioned caveat regarding training and other related material produced in the VET sector), FLAG submits that all other government copyright material – including material produced by the executive, by statutory bodies and governmental corporations and by private contractors "by or on behalf of" the government – should be the subject of a broad statutory exception. Our reason for submitting that material produced by the judiciary and the legislative ought to be treated differently under the Act has more to do with the symbolism of such a gesture than it does to do with any practical difference which would flow from the different treatment. We refer the Committee to Street CJ (as he then was) in *R v Greiciun-King* (1 October 1981 unreported) noted (1982) 56 ALJ 326, 327):

'In a free and democratic society the law and all its documentation, both statutory and interpretive, that is to say both in Acts of Parliament and in judgements, must be public juris - available to all to be studied, to be used and to be quoted as a matter of public entitlement.'

In FLAG's submission this principle is most fully reflected in a regime which treats such documents as copyright free.

Issue 6: The Committee seeks your views as to what entities should be included as part of 'the Commonwealth or a State' for the purposes of the Copyright Act and how this should be determined.

For the reasons given in response to Issue 4 above, FLAG submits that copyright in material produced by statutory bodies and government corporations as part of a government function should be deemed to have been created by the government, and that no distinction should be made between bodies which have legal capacity to acquire, hold and dispose of real or personal property and those which don't.

Issue 7: The Committee seeks your views as to whether all material produced as part of a government function be deemed to have been created by the government. If so, in whom should copyright vest?

For the reasons given in response to Issue 4 above, FLAG submits that all material produced as a part of a government function should be treated in terms of any exceptions, waivers or the like as if it had been created by the government. Unless the material falls within the category of material in which, in our submission, no copyright should subsist, the owner of copyright should be the relevant government

Issue 8: The Committee seeks your views as to the appropriate duration of government copyright. Should it be the same as for non-government copyright material?

In FLAG's submission there should be a uniform approach to term of copyright.

Issue 9: The Committee seeks your views as to the application of the exceptions to government copyright material. Should the exceptions apply to government copyright material in the same way as they do to non-government copyright material? Should there be a special exception for copyright material owned by the government?

As noted above in response to Issue 5, FLAG submits that except for material produced by the legislative and judicial arms of government (which should be copyright free), and subject to the caveat expressed above in the section headed Background, all other government material - including material produced by the executive, by statutory bodies and governmental corporations and by private contractors "by or on behalf of" the government – should be the subject of a broad statutory exception.

The exception should *not* be subject to the existing purpose and reasonable portion tests contained in the Act with respect to the fair dealing provisions. To do so would be to fail to recognize the fundamental difference between government ownership and private ownership of copyright material, and would unduly restrict access to such material. While each of the purpose-based and portion-based limitations on the existing fair dealing exceptions can be justified with respect to *privately* owned copyright material in terms of the balance which is sought to be struck between owners and users of such material, there is no such argument in favour of imposing limits on use of *government* owned material. The material has been produced with public money and should be freely available without charge.

If the Committee is not minded to recommend such a broad exception as that proposed, FLAG submits that there should *at least* be an exception for "any non-commercial purpose", and that the Explanatory Memorandum should make clear that this includes communication and multiple copying by or on behalf of an educational institution whether or not the institution operates for profit.

It should be made clear that any exception extends to "copyright" subsisting as a result of the prerogative rights of the Crown.

Issue 10: The Committee seeks your views as to whether the licence in s 182A to reproduce legislative materials and the decisions of courts and tribunals should be expanded to allow multiple copies? Alternatively, is a blanket licence scheme an appropriate model?

In FLAG's submission, s 182A of the Act is unduly restrictive. In practice, the provision has been the subject of disputes regarding the scope of its operation: see *Baillieu and Poggioli v Australian Electoral Commission and the Commonwealth* (1996) 63 FCR 210. FLAG is also aware that the operation of s 182A was the subject of dispute between CAL and the universities, with considerable time and legal resources being devoted to seeking an agreed position in the scope of the exception and a regime whereby universities could avoid being invoiced by CAL for making multiple copies of such material for distribution to students.

FLAG's preferred approach, as discussed above, is for material produced by the legislative and judicial arms of government to be copyright free. If this proposal were adopted s 182A could be repealed.

In the event that the Committee is not minded to adopt FLAG's recommendation, we submit that s 182A ought to be amended to make clear that it applies to multiple copying (we note in this respect that the Copyright Law Committee on Reprographic Reproduction (the Franki Committee) envisaged that s 182A *would* allow an organization to make multiple copies for distribution to its members, but that the question whether s 182A in fact applies to multiple copying has been the subject of dispute between CAL and the universities). The exception should also apply to communications and be rendered technology neutral; at present it applies only to reprographic reproductions.

Issue 13: The Committee seeks your views as to the practical operation of the law relating to the administration or licensing of copyright material. In particular, should government practice be encouraged to achieve uniformity throughout the different Australian jurisdictions?

FLAG does not view licensing of government copyright material as the most appropriate answer to the questions raised in this review of Crown copyright. As discussed above, we see a combination of copyright free status and a broad statutory exception as being the most appropriate means of dealing with government copyright.

In the event that the Committee is minded to recommend a license-based approach to government copyright, FLAG urges the Committee to recommend a uniform approach to licensing across the Commonwealth and the states. It has been the experience of the VET sector that the differential approach of the Commonwealth and the states to the granting of licenses has imposed an unnecessary burden on educational institutions wanting to use this material. Further, notwithstanding that some state governments (eg New South Wales) have issued waivers in respect of certain material, these are expressly stated to be subject to revocation, variance or withdrawal. If licensing were considered the appropriate option for government copyright material FLAG would urge that there be wide consultation with the educational sector to ensuring that any licence did not impose undue burdens on potential education sector users.

Issue 14: The Committee seeks your views as to the appropriateness of the law relating to government ownership of copyright given the operation of freedom of information and privacy laws in regulating access to, and use of, personal and government information.

Historically, copyright has been relied on by governments as a means of restricting public access to information for reasons unrelated to those traditionally associated with copyright. In FLAG's submission, copyright is ill-suited to such a role. Reliance on copyright in such circumstances carries with it the risk that the *real* reason behind the attempted restriction - ie national security, privacy, political embarrassment - is effectively masked, leading to an erosion of open and transparent government and the notion of copyright for the public good.

Issue 16: The Committee seeks your views as to whether, as a matter of public policy, the government should own copyright in materials produced by the:

- (a) executive arm of government?**
- (b) legislative arm of government?**
- (c) judicial arm of government?**

See submission in relation to Issue 5 above.

Issue 17: The Committee notes that these models, and other overseas models, do not treat government copyright material in a uniform manner and seeks your views as to whether any of them provide useful models for Australia.

See submission in relation to Issue 5 above.

Issue 18: The Committee seeks your view as to options for reform, legislative or otherwise, and the costs and benefits of those options.

See above. As to cost, FLAG notes that Australia is a net importer of copyright material with an annual outflow of copyright licence fees in the order of \$1 billion to \$2 billion. This figure is likely to increase as a result of the proposed extension of term of copyright to life plus 70 years. In this context, the extension contended for by FLAG is likely to provide a net benefit to the Australian economy. In terms of efficiency, at present the VET sector must rely on the educational statutory licence contained in Part VB of the Copyright Act in order to reproduce and communicate government copyright material which is not the subject of a free licence. This sees the sector paying a licence fee to the declared copyright collecting society, Copyright Agency Limited (CAL). Some 18 per cent of the money paid to CAL by educational institutions goes towards CAL's administrative and running costs. The broad exception proposed by FLAG would avoid the need for this inefficient "roundabout" where money gets moved from one government entity (a TAFE, school or university) to another, with CAL taking 18 per cent off the top.

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