



Law Council  
OF AUSTRALIA

*From the Office of  
the President*

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Dear Sir or Madam,

**Copyright Law Review Committee – Crown Copyright Issues Paper**

I have pleasure in enclosing a submission which has been prepared by the Intellectual Property Committee of the Business Law Section of the Law Council of Australia in response to the Issues Paper on Crown Copyright which was released by the Copyright Law Review Committee in February 2004.

Yours faithfully,

Bob Gotterson QC

30 March 2004

Enc.

## **Copyright Law Review Committee: Crown Copyright**

Submission of the Intellectual Property Committee of the Business Law Section of the Law Council of Australia ('LCA')

Please note that this submission has been endorsed by the Business Law Section but has not been considered by the Council of the Law Council of Australia.

### **Summary of Recommendations**

This submission does not respond to all the issues raised in the Issues Paper published by the Copyright Law Reform Committee. A summary of the LCA's submission follows. Any prerogative rights remaining in Australia should be abolished and the copyright legislation should be the sole source of copyright law in Australia.

Copyright (whether statutory or prerogative) should not subsist in materials created by the judicial, legislative and at least certain parts of the executive arms of government. No copyright should exist in these works whether the work in question was made before or after the commencement of the amending legislation.

The special rules for subsistence, ownership and duration of copyright set out in Part VII should be repealed. Subject to 1 and 2 above, the same rules should apply to the Crown as apply generally.

The LCA does not believe the introduction of a form of moral right to the government over Crown copyright material is appropriate and suggests inserting an additional provision to ensure preservation of the integrity of the legal source material.

### **Public Policy**

The present Crown copyright provisions in the Copyright Act 1968 (Cth) vest copyright in a wide range of material, particularly as governments are often involved in the production or first publication of a diverse range of materials. The subsistence of Crown copyright in Australia can be a significant barrier to access to legal sources and official government material. It is the LCA's strong view and a view generally held, that public access to sources that record the law is essential in a democracy.

'People are assumed to know the law. They are punished for breaches of the law even though ignorant of it. It is therefore essential that Parliament use every reasonable endeavour to make the law known and accessible to all in the community'  
(Senate Standing Committee on Legal and Constitutional Affairs, 1993, p.15)

In a free and democratic society the law and all its documentation, both statutory and interpretative, that is to say in both Acts of Parliament and in judgements, must be publici juris - available to all to be studied, to be used and to be quoted as a matter of public entitlement' Chief Justice of New South Wales, Sir Laurence Street in *Reg v Greciun-King* ( 1 October 1981 unreported) noted (1982) 56 ALJ 326, 327)

The LCA also refers you to the 1996 Liberal and National Parties Coalition policy statement in Crown copyright in "Law and Justice Policy" which states:

"the retention by the Government of Copyright in legislation and related documents imposes an unnecessary cost or barrier to ordinary Australians wishing to access the law".

It is the LCA's strong view that public access to legal information such as legislation, reports of cases and extrinsic material necessary for the interpretation of law should be readily available and accessible at no cost to the public.

### **Prerogative rights**

Issue 11: The Committee seeks your views as to the appropriate nature and scope of prerogative rights. Should prerogative rights in the nature of copyright be clarified or replaced by legislation?

The retention or preservation of prerogative rights does not advance any of the foregoing objectives. As the Issues Paper indicates, the precise scope and duration of any prerogative rights in Australia is quite unclear. This is a most unsatisfactory state of affairs in the 21st century. The preservation of prerogative rights is the opposite of making the law known and accessible. At a minimum, the subject matter of copyright should be dealt with clearly and succinctly in one place - the copyright legislation.

It is not clear to the LCA that abolition of any prerogative right in the nature of copyright is an acquisition of property subject to s 51(xxxi) (see e.g. *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 - 1). The replacement of common law copyrights by the substituted rights effected by the Copyright Act 1912 also suggests that it is not.

### **Abolition of Crown Copyright**

Consistently with the public policy objectives referred to above, the LCA recommends the abolition of Crown copyright in certain material following the approach taken in New Zealand's copyright legislation.

The LCA submits the Copyright Act 1968 (Cth) should be amended to provide that no copyright will exist in any of the following materials, wherever those materials made:

- any Bill introduced into the Parliament;
- any Act of Parliament;
- any regulations; rules, ordinances, Orders-in-Council, statutory rules, legislative instruments, statutory instruments, subordinate or subsidiary legislation;
- any by-law;
- any parliamentary debates;
- Reports of Select committees and Standing Committees;
- judgments of any courts or tribunal;
- Reports of Royal Commissions, commissions of inquires, ministerial inquiries or statutory inquiries;
- any explanatory memorandum to legislation and other extrinsic material used to interpret legislation;
- government and parliamentary press notices and promotional materials;
- judicial, legislative or administrative forms;
- materials on official websites made by the executive, legislative or judicial arms of government;
- texts of ministerial and parliamentary speeches, articles and papers.

As the Issues Paper noted, copyright cannot provide any incentive for the creation of these materials. On the contrary, its only role is to provide a mechanism for control or potential control. The LCA does not see that the use of copyright to regulate the dissemination and use

of government material is a benefit at all. On the contrary, it is inconsistent with the public policy objectives identified above. The LCA further submits that concerns that the removal of copyright protection will lead to concerns about integrity and authenticity are misplaced. The most important remedy for such concerns is to ensure that accurate, up to date official versions are available and readily accessible. There are also laws which may operate to prevent material being represented to the public as "official" or "authorised" texts when in fact they are not. Those laws may not always be effective. For example, the trade practices legislation requires the misrepresentation to be made in trade or commerce. Accordingly, there should be a statutory prohibition on representing material as an official version when it is not.

The LCA notes that the non-subsistence of copyright in the US government materials in some respects goes more broadly than the recommendation above. The range and scope of materials currently subject to Crown copyright in Australia is so broad and diverse, however, that it cannot simply be assumed that the same rules should apply.

Waiver of Crown Copyright

The LCA is aware that waiver schemes exist in the United Kingdom and in New South Wales and the Northern Territory in Australia. This approach deals with government's need to preserve the integrity and official status of government material, especially where Crown copyright operates as brand or mark of authenticity of the status and authority of government material. The waiver approach allows Crown copyright to be asserted, then waived, to ensure minimum management or restriction of material where it is in the government's interest to encourage unrestricted use.

Rather than adopt a waiver scheme, the LCA supports abolition of copyright in the material identified above.

The LCA anticipates there will be a few instances where the material may be inadvertently and unintentionally reproduced with minor errors. However, to impose a requirement that material should be reproduced accurately may be overly onerous and creates the potential for control and censorship which is unwarranted. The Committee considers that, as long as the reproduction is not presented as an official version, the above concerns in relation to the Crown authority and branding being misused do not arise. Accordingly, the Committee submits that an additional provision should be included in the Copyright Act which requires that where the legislative, judicial and executive material referred to above is used or reproduced:

- (a) the source of the material must be acknowledged, and
- (b) the reproduction must not be represented as an official version

### **Scope of Crown Copyright Protection**

Issues 4, 5, 6, 7, 8 and 9

As the Issues Paper notes, it is far from clear what entities can claim the benefits of the extended provisions in Division 1 of Part VII of the Act. Nor is it clear when material is made "by, under the direction or control of" the "Crown".

The concept of "direction or control" of the Crown extends beyond material written by government employees to commissioned works and the right to material first publicised by the Crown. The LCA questions whether the Crown ought to be entitled to such extensive protection.

Similar wording was contained in Copyright Act 1956 (United Kingdom). The Whitford Committee recommended that the Crown copyright provisions, particularly the first publication provision be repealed. The LCA notes that the Copyright Designs Patents Act 1988 (United Kingdom) changed the criteria for Crown copyright from "direction or control" and "first publication" to "works made in the course of duties". Crown copyright is defined in Section 163 of that Act as works "made by her Majesty or by an officer or servant of the Crown in the course of his duties".

New Zealand made similar amendments in the Copyright Act 1994 (New Zealand). Section 26(1) of that Act provides that copyright will subsist in any work created by any person who is:

- (a) employed or engaged by the Crown;
- (b) under a contract of service, a contract of apprenticeship or contract for services.

The New Zealand amendments appear to have a wider operation than the UK amendments in that the former still affects ownership of materials made pursuant to contracts for services (i.e. independent contractors).

The resulting uncertainty and confusion increases costs and is a significant barrier to access and understanding of the law. The LCA submits therefore that it would avoid much uncertainty and confusion if the same rules which apply to non government material applied equally to government material. The LCA endorses the Intellectual Property and Competition Committee recommendation that section 176 of the Copyright be amended to place the Crown in the same position as any other contracting party. Furthermore, the LCA believes that s 177 should be repealed altogether, as there seems to be no logic behind a provision that can vest copyright in the Crown in situations that would not otherwise be covered by s 176. These changes can most effectively be made by repealing Division 1 of Part VII of the Act or at least sections 176 - 181 and amending section 182 by omitting "(other than the provisions of that Part relating to the subsistence, duration or ownership of copyright)" in both subsections.

In this connection, the LCA further notes that section 176(1) may have been appropriate in former times particularly when membership of the Berne Convention did not include significant countries such as the USA and the then USSR. The rationale for the provision has been substantially superseded by the inclusion of TRIPS in the WTO and the much wider membership of the Berne Convention.

### **Moral rights**

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

Under the present provisions of the Copyright Act 1968, officers of the Crown such as judges and other Crown employees and contractors retain moral rights in works created during the course of their employment, government appointment or contract for service. Arguably, there is scope for conflict here between the requirements for public access to and use of legislative and policy documents in a democracy and the individual author's moral rights. The LCA notes that the provisions of Part IX of the Act do provide some scope for resolving that conflict, particularly through the reasonableness defences. The Issues Paper that preceded the legislation also contains some interesting observations on types of uses which may, or may not, infringe a government employee's moral rights. It may be arguable that art 6bis of the Berne Convention proceeds on the basis that moral rights must subsist only in materials in which there are economic rights. It is not clear to the Committee, however, that this is so.

## **International models**

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

Please note our comments above in relation to the abolition of copyright in certain material.

The LCA has reviewed the waiver scheme administered in the United Kingdom. The LCA notes the waiver of certain types of Crown copyright material, the establishment of an Advisory panel and the implementation of streamlined non exclusive click licences for core material and value added material. Her Majesty's Stationery Office manages and licenses the re-use of Crown copyright material and, where appropriate, delegates certain Crown copyright licensing responsibilities to other government department and agencies and maintains overall responsibility for the delegated responsibilities. It is often the point of first contact for users and provides advice and guidance on range of copyright matters.

Australia does not possess a centralised office or agency that can easily assume such a role. The resources needed to establish a centralised office or agency are likely to be substantial. The Commonwealth will need to consult with the States and Territories and agree on apportionment of funding and resources. The Committee also anticipates that the States and Territories may be unwilling relinquish their Crown copyright administration to such an agency, and, if they administer these rights separately, inconsistencies will arise.

Given these complexities, the LCA believes that abolition of certain Crown copyright materials is a simpler and more cost effective means of ensuring free access to public government documents.

## **Other Matters- Privilege**

The LCA notes that its proposals will not affect the rules of privilege attaching to submissions made to Parliamentary committees. The LCA also notes that those rules do not fall within the CLRC's terms of reference. The LCA does add, however, that members of the public making submissions to Parliamentary committees are often unaware of the rules and the potential ramifications of breach. Accordingly, the LCA submits that it would be appropriate for these issues to be explored further by an appropriate body.