

**South Australian Attorney-General's Response to Copyright Law Review Committee  
"Crown Copyright" Issues Paper (February 2004).**

**Issue 1: The Committee seeks your views as to whether government ownership of copyright material should extend to all works and subject matter. For example, should it only apply to literary works? Should artistic works such as architectural plans be excluded?**

The issues paper does not set out any basis for discriminating between the types of work to which Crown copyright should or should not apply.

It is submitted that Crown copyright should continue to apply to those works and subject matters to which it currently applies. Creating further sub-categories of subject matter to which Crown copyright does not attach would tend to create confusion, and may leave works such as architectural plans unprotected and open to inappropriate exploitation. In addition, narrowing the scope of Crown copyright may result in government having to deal more often with collecting societies, which has led to administrative difficulties in the past.

It is not considered necessary to expand the works covered by Division 1 of Part VII to published editions or television or sound broadcasts.

It is submitted that it is in the public interest for the Crown to continue to have a custodial role over the control and use of government material. It is acknowledged that the Crown is not always in the best position commercially to exploit copyright in these works. Nevertheless, it is considered that the Crown is in the best position to preserve the integrity of copyright works and to ensure that any subsequent exploitation provides the greatest benefit to the public of South Australia.

**Issue 2: The Committee seeks your views as to whether the government should enjoy all the exclusive rights of copyright.**

It is submitted that government should continue to enjoy all the exclusive rights of a copyright owner. If it is considered necessary to ensure greater public access to works subject to Crown copyright, it is considered preferable that this occurs by creating broader exceptions to infringement, rather than by limiting the exclusive rights of the Crown as copyright owner.

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

Moral rights are a relatively new concept in Australian intellectual property law. As moral rights are personal and non-assignable, they cannot attach to the Crown itself.

In the context of Crown copyright, it is considered that either:

1. moral rights should not apply, or
2. moral rights of government employees over work created in the course of employment should be able to be waived as an incident of the contract of employment.

It could be argued that moral rights should not apply automatically to any material created during the course of employment. An author who creates material on behalf of, or at the

request of, their employer during the course of their employment, is not necessarily producing the work on their own behalf, or to convey their own ideas. This argument applies equally to government employees. In this regard, it is submitted that a distinction be drawn between commercial work and creative work. For example, in the case of material that is generally considered to be creative work, eg. commissioned paintings, there is a stronger claim that moral rights should apply, whether or not the work is created in the course of the creator's employment.

The existence of moral rights in the context of government copyright raises particular problems. For example:

- If a ministerial adviser writes part of a Minister's speech or judge's associate writes part of a judgment, the right of attribution of authorship may mean that the writer could enforce their moral right to be represented as the author of the work.
- The right of integrity of authorship may mean that it is more difficult to alter material created by a government employee to adapt to different uses, eg. to change part of a computer program's code to suit a new use.

Accordingly, it may be argued that moral rights should not apply in the context of Crown copyright on the ground that an author seeking to enforce such moral rights might impede peace, order and good government by seeking injunctions, declarations or damages against 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:**

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

It is submitted that the current legislative scheme is effective and worthy of retention. It is appropriate that copyright over material be vested in government by dint of:

- sections 176 and 178;
- section 177, and
- section 35(6).

**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:**

- The executive;**
- The judiciary; and**
- The legislative.**

It is submitted that the *Copyright Act* should be amended to clarify the scope of the Crown copyright provisions. In particular, the Act should expressly state that Crown copyright applies to materials created by the executive, the judiciary and the legislature. The Crown copyright provisions are currently expressed in terms of both the "Crown" and "Commonwealth or the State". Generally, the term "Crown in right of the State" is understood to refer only to the executive. It is acknowledged that interpreting the limits of Crown copyright under the current

sections may cause more difficulty for the Commonwealth than for the States, as the doctrine of separation of powers is interpreted more strictly in that context.

It is submitted that the Crown copyright provisions should apply to material created by all three arms of government. Defining the “Crown” to include all three arms of government would be the most practical solution as the executive generally administers the copyright material for all three arms. Currently in South Australia, for example, the Attorney-General licenses the copyright in judgments to Butterworths’ Publishing Company, and legislation is often created wholly or partly by the Office of Parliamentary Counsel. It is therefore considered that, for the purposes of the *Copyright Act*, the term “Crown” should encompass Parliament and the judiciary, in addition to the executive arm of government.

**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.**

It is noted that the Australian Copyright Council has suggested including a list of statutory bodies that will be covered by Crown Copyright in the Regulations of the *Copyright Act*, following the UK model. One disadvantage of this approach is that it could be restrictive and would necessitate regular checking and updating.

**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 who should copyright vest?**

It is considered preferable that all material produced as part of a government function should continue to be deemed to have been created by the government for the purposes of copyright. In South Australia currently, the Attorney-General is responsible for dealing with copyright on behalf of the Crown in right of the State. It is submitted that this system works well and should continue.

**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?**

It is considered that the current duration of government copyright is appropriate and does not require revision.

**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 to non-government material? Should there be a special exception for copyright material owned by the government?**

It is considered that the general fair dealing defences to infringement of copyright (research or study, criticism or review, reporting the news and professional legal advice) provide adequate public access to copyright material owned by government.

It is submitted that no further exception is required.

**Issue 10: The Committee seeks your views as to whether the license in s182A to reproduce legislative materials and the decisions of courts and tribunals should be expanded to allow multiple copies?**

**Alternatively, is a blanket license scheme an appropriate model?**

The limited license contained in section 182A of the *Copyright Act*, enabling the public to copy certain copyright works of the Crown without infringing copyright, is considered to provide adequate public access to these copyright works.

It is not considered necessary to expand section 182A to allow multiple copies to be made. An individual should not need multiple copies of a judgment or Act, other than for purposes already dealt with by the Act (eg. education) or to publish the material for profit. It is submitted that the policy objective behind s182A, namely to maximise and facilitate public access to the law, is achieved by the section as currently drafted.

It is considered that limiting copying under this section preserves the integrity of these important public documents. It is submitted that public information about the law is more likely to be accurate if government itself or a body authorised by government publishes and distributes the material. In that event, government can take responsibility for ensuring that the information is correct and updated.

It is noted that the NSW Government has adopted the practice of issuing an express general waiver over legislative and judicial material, subject to certain conditions including that re-publications not purport to be official or bear the arms of the State. Under this model, it is submitted that it is still possible for re-publications to contain inaccuracies or mislead the public as to the law, if members of the public are unaware that official copies of legislation are distinguished by bearing the arms of the State.

It is submitted that the determination of who is to be permitted to reproduce or publish legislation or judgments is a public policy decision that is best made at the local level. It is not considered necessary to enshrine a waiver of rights into the *Copyright Act*, which could cause problems such as those discussed with respect to the NSW model.

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

It is considered that common law prerogative rights in the nature of copyright are appropriate and do not require revision or replacement by legislation.

**Issue 12: The Committee seeks your views as to any issues arising under the Commonwealth Constitution and how these may affect the possible options for reform.**

Any reform of the Crown copyright provisions will need to be consistent with the various existing treaty obligations concerning copyright and intellectual property.

It is suggested that these are far-reaching issues that should form the basis of a separate issues paper.

**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?**

It is considered that the goal of achieving uniformity throughout all Australian jurisdictions is desirable, but unlikely to occur in practice as diverse views and practices exist across the jurisdictions. Moreover, any move to uniformity should not be at the expense of the States' ability to decide how to deal with Crown copyright issues.

**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.**

It is considered that the disclosure and protection of personal information is a separate issue from Crown ownership of intellectual property.

**Issue 15: The Committee seeks your views as to the effect of new technologies on government ownership of copyright material. In particular:**

- (a) Does copyright continue to be relevant?**
- (b) How does one safeguard against the distortion or inappropriate use of government material made available through new technologies?**
- (c) Is facilitating government information online inconsistent with policy objectives behind government ownership of copyright?**

- a) It is considered that the concept of copyright continues to be relevant. Although technological developments raise challenges for the enforcement of copyright, they do not diminish the value of the copyright system as a means of protecting intellectual property.
- b) It is submitted that the problems faced by government in guarding against the unauthorised use of copyright material differ little from those faced by organisations in the private sector. Both government and private organisations must be aware of the increased risks associated with publishing information on-line, and that new technology will likely continue to increase opportunities for copyright infringement. Copyright infringers can now scan documents, download files, copy text and attempt to access password protected information, among other things. Awareness of these increased risks is important, as are technological safeguards such as anti-circumvention devices. This notwithstanding, it may not be possible for governments or others completely to safeguard against these increased opportunities for copyright infringement. Nevertheless, this does not mean that the copyright system is no longer of value.
- c) Facilitating government information online is now a well-established practice. The policy objective behind publishing government information online is to make government information more accessible to the public. Part of the policy objective behind government copyright relates to retaining control of information and ensuring its accuracy. Although these two policy aims may seem at odds, the ability to access government information online does not devalue the concept of government copyright. While material that is accessible online may be copied or distorted with greater ease than previously, this is a separate technological problem that must be accepted and dealt with on that basis.

The websites of ScalePlus (operated by the Australian Attorney-General's Department) and AustLII (jointly operated by the University of Technology Sydney and the University of New South Wales), provide a reliable source of online information about legislation and case law to the public. Members of the public should be made aware that these are legitimate websites to visit for these purposes. Although material from these websites could be re-published inaccurately and in breach of copyright, retention of government copyright would constitute some impediment to infringing copying and subsequent distortion.

**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?

It is submitted that it is good public policy to retain government ownership of:

- a) Executive material
- b) Legislative material
- c) Judicial material.

Government copyright ownership will help ensure the consistency and reliability of such materials as legislation, reports, judgments and registers. Members of the public rely on this information and will do so to their detriment if documents are inaccurate. As discussed above in relation to Issue 15, two public policy issues arise:

1. that information relating to the law or emanating from the government is accurate, and
2. that members of the public have access to this material.

While there may be some tension between these two considerations, it is submitted that the preferable course is to retain government ownership of copyright in such material so that government can ensure it remains accurate and easily accessible for personal, not-for-profit use.

**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.**

#### NSW

It is noted that the NSW system is similar to that in South Australia, except for the issue of express waivers over legislative and judicial materials.

If the express waiver is in response to uncertainty as to whether or not the material is subject to Crown copyright, it is submitted that it would be preferable expressly to *include* this material in the ambit of Crown copyright, rather than issuing a waiver to exclude them. If, on the other hand, it is considered necessary to waive copyright over these materials, then the conditions adopted by the NSW Government are considered appropriate.

#### UK

Section 164 of the *Copyrights, Design and Patents Act 1988* (UK), which provides that Acts of Parliament are a sub-group of works to which Crown copyright applies, is considered useful as

it has the effect of clarifying that there is a wider meaning to the term “Crown” than would otherwise apply in the context of the Act.

The Australian *Copyright Act* could be amended to include similar provisions for legislation and possibly also judgments, though defining the terms “Crown” and “Commonwealth or a State” could achieve the same end, more simply.

Several of the guiding principles contained in the new framework for managing Crown copyright are also considered useful, especially the principle that, when the Crown licenses its copyright, there should be transparency in licensing and charging terms.

### Canada

It is considered that there is merit in the management of Canadian Crown copyright by Canadian Government Publishing. Centralised copyright administration, to process requests and grant permission for use and licensing agreements for Federal copyright material, promotes consistency and transparency. It is submitted that a similar body in Australia would assist in maximising financial return from government copyright material.

The Canadian Federal Law Order allowing judgments and legislation to be reproduced as long as the reproducer shows due diligence in maintaining accuracy is similar to the NSW model. Again, it is submitted that it is preferable for government to retain copyright and then consider whether or not it should be waived at the policy level.

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

It is not considered that any major reform of the current Crown copyright laws is required. It would, however, be beneficial to clarify the definitions of “the Crown” and “the Commonwealth or a State” for the purposes of Part VII of the *Copyright Act*.

This could be achieved by amending the Act’s definition section, or by inserting new sections into Part VII to provide that Crown copyright extends to the legislative, executive and judicial arms of government. The extent to which statutory bodies and corporations are part of the Crown could also be clarified, although it is considered that following the UK-model of listing statutory bodies in the Act may be too restrictive.

It is submitted that retaining the current legislation and amending the Act to clarify the scope of Crown copyright is also the most cost-effective way of reforming Crown copyright laws.

Should more extensive reform be considered necessary, it is considered that the NSW model of licensing copyright is preferable.

### **Issue 19: The Committee seeks your views as to any transitional issues arising out of the options for reform.**

Since it is submitted that the current system of government ownership be retained, no major transitional issues arise.

**Issue 20: The Committee seeks your views as to any other matters arising out of the Issues Paper.**

It is not considered that any further matters arise.