Chapter 2
The scope of Crown copyright

> 'The original justification for Crown copyright appears to be that copyright subsist in, and the Crown control the use of, materials which were 'governmental' in nature … The expanding role of governments has meant that a provision which initially had a quite limited effect now applies much more broadly.[1]'

2.01 The Australian Copyright Council's (ACC) views were echoed in many other submissions to this inquiry. Before considering the policy issues relating to government ownership of copyright in detail, this chapter briefly discusses two key matters:

- the meaning of the terms used in the Copyright Act in connection with Crown copyright; and
- the scope of materials covered by Crown copyright.

'Crown copyright'

2.02 As noted in the previous chapter, the terms 'Crown copyright' and 'government copyright' are often used interchangeably. There are also references in different parts of the Copyright Act to ownership of copyright by 'the Crown', 'government' or 'the Commonwealth or a State'. The meaning of those terms is considered below.

What is meant by 'the Crown'

2.03 The Copyright Act contains various references to 'the Crown'. The Act is expressly stated to bind the Crown subject to Part VII.[2] The heading to Part VII Division 1 (which gives special copyright ownership rights to the

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[1] ACC, *Submission 27*, p. 3.
[2] Section 7.

Commonwealth, States and Territories) refers to 'Crown copyright'. The sub-headings to relevant sections of that Part (but not the sections themselves) also refer to the Crown,[3] as do the sections referring to prerogative rights in the nature of copyright.[4]

2.04 The scope of what is meant by 'the Crown' is somewhat uncertain. The term stems from Australia's historical ties with the British Crown,[5] Australia being a constitutional monarchy. The Commonwealth Constitution is based on the doctrine of separation of powers, which divides the functions of government into three distinct arms: the legislature, the executive and the judiciary.[6] The Queen or her representative forms part of each Australian Parliament and assents to legislation. The Queen is also the formal head of both Commonwealth and State executive governments,[7] and courts administer justice in the name of the Queen.

2.05 Thus the term 'the Crown' in its broadest sense can encompass the whole system of government, that is, the executive, legislative and judicial arms.

2.06 However, when referred to in legislation, 'the Crown' is usually understood only to refer to the executive arm of government.[8] In that context, the Crown is understood to include a complex system of individuals and

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[3] Sections 176–81. While headings to Parts and Divisions are considered to be part of an Act, headings to sections are not (*Acts Interpretation Act 1901* (Cth), section 13), although they may be considered as an aid to interpret the section (section 15AB).

[4] Sections 8A, 182A.

[5] Section 16 of the *Acts Interpretation Act 1901* (Cth) states that references to the Crown 'shall unless the contrary intention appears be construed as references to the Sovereign for the time being'.

[6] Chapter I of the Commonwealth Constitution deals with the Parliament, Chapter II with the Executive Government and Chapter III with the Judicature.

[7] See generally, P Hanks, P Keyzer & J Clarke, *Australian Constitutional Law*, 7th ed, Butterworths, Australia, 2004, pp. 464–6. Section 61 of the Commonwealth Constitution provides that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of the Constitution and the laws of the Commonwealth. See also section 2 of the Commonwealth Constitution, which appoints the Governor-General as the Queen's representative in the Commonwealth, and section 7 of the *Australia Act 1986* (Cth) which does likewise in relation to the Governors in the States.

[8] Where a statute specifically refers to the Crown, it is assumed to refer to the Crown in its executive capacity: see *Commonwealth v Rhind* (1966) 119 CLR 584, Barwick CJ at 599; *West Lakes Ltd v South Australia* (1980) 25 SASR 389 (FC), Zelling J at 407. See also Australian Law Reform Commission, *The judicial power of the Commonwealth,* Discussion Paper 64, ALRC, 2000, p. 405.

institutions (Ministers, Cabinet, the Executive Council, the Governor or Governor-General, government departments, public servants and statutory agencies) of which the formal head is the monarch, although the power is not exercised personally by the monarch.

2.07 The notion of the Crown as the personification of the government has been criticised as a 'relic of medieval monarchy [which] fails to fit neatly into our contemporary political and governmental system', particularly given Australia's federal system of autonomous governments.[9] However, the notion is deeply embedded in Australian law.[10]

'Crown in right of the Commonwealth or State'

2.08 In order to distinguish between the various governments in Australia's federal system, executive power is often referred to as being exercised by the 'Crown in right of' the Commonwealth or a particular State.

2.09 This conception is adopted in subsection 10(1) of the Copyright Act, where the Crown is defined for the purposes of the Act to include the Crown in right of a State, the Northern Territory and Norfolk Island, as well as the administration of a Territory other than the Northern Territory and Norfolk Island.

'Commonwealth' and 'State'

2.10 Apart from the references in the Copyright Act to 'the Crown' as set out above, the Part VII provisions relating to Crown ownership of copyright refer to ownership by the 'Commonwealth or a State'.[11] This phrase includes the Territories.[12]

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[9] See Hanks, Keyzer & Clarke, op cit, p. 467, where it is noted that some High Court justices have expressed dissatisfaction with use of the term because it is 'no longer consonant with Australia's true constitutional arrangements' (referring to *Commonwealth v Western Australia* (1999) 196 CLR 392, per Gleeson CJ & Gaudron J at 410).

[10] ibid.

[11] See for example sections 176–81.

[12] Territories are included in the phrase 'Commonwealth or State' by virtue of paragraph 10(3)(e) and the definitions of 'the Crown' and 'the Commonwealth' in subsection 10(1) of the Copyright Act.

2.11 As with the use of the term 'Crown', there is some disagreement as to whether the terms 'Commonwealth' and 'State' in the Copyright Act refer only to the executive arm of government, or whether they include the judicial and legislative arms. In the opinion of a former Solicitor-General, the term 'Commonwealth' in the Copyright Act encompasses only the executive arm.[13]

2.12 However, this view is not universally shared.[14] For example, during this inquiry the New South Wales Government submitted that the Part VII provisions apply to all three arms of government:[15]

> While in constitutional law, a reference to the Crown 'in right of the Commonwealth or State' is a reference to the executive, common sense suggests that a reference in the Act to 'the Crown' comprehends the legislature and judiciary …The legislature and judiciary also exercise the authority of the Crown and there is no reason why, outside the convention of constitutional law usage, a reference to the Crown should not comprehend all arms of government. It follows that references in Part VII of the Act to the 'Commonwealth or a State', each falling under a heading containing the words 'Crown copyright' are references to the three arms of government …[16]

2.13 The Committee notes also that Justice Harper of the Supreme Court of Victoria in 2000 held that the Supreme Court was the 'State' for the purposes of section 176 of the Copyright Act '[as] one of the three arms of government of

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[13] Department of Communications, Information Technology and the Arts (DCITA) *Submission 60*, Attachment A, p. 2, referring to an advice from Dr Gavan Griffith QC, then Solicitor-General, dated 12 May 1989.

[14] For example, J Gilchrist, 'Crown copyright: An analysis of rights vesting in the Crown under statute and common law and their interrelationship', LLM thesis (unpublished), Monash University, 1983, argued that the 'Commonwealth' and 'State' should not be limited to the executive government, particularly as the *Acts Interpretation Act* defines 'Commonwealth' as 'the Commonwealth of Australia', 'that is, the body politic of Australia' (p. 116).

[15] NSW Cabinet Office *Submission 57*, pp. 5–6; NSW Attorney-General's Department *Submission 57*, p. 3.

[16] NSW Attorney-General's Department *Submission 57*, p. 3. The Committee notes, however, that the NSW Government relies on the Crown prerogative in relation to copyright in judgments and legislation (discussed further in Chapter 6).

the State of Victoria'.[17] The South Australian Attorney-General suggested that clarification would be beneficial, and supported the application of the Part VII provisions to all three arms of government.[18] Some practices of the Commonwealth and State support this wider view, such as the licences issued by the NSW Government over judicial, statutory and related material (reproduced in Appendix 3).

2.14 Monotti[19] notes that some references in Part VII suggest the broader interpretation: for example, paragraph 182A(3)(c) refers specifically to enactments of the 'Commonwealth, State or Territory' (implying that the legislature is included), while subsection 183(2) uses the term 'Government of the Commonwealth' (raising the question of why it was considered necessary to use that phrase if the 'Commonwealth' refers only to the executive). By contrast, subsection 183(4) which refers to the 'Commonwealth' implies action by the executive only. Key cases, while not determining the point, tend to support the more restrictive interpretation.[20] On balance, Monotti concludes that the meaning of the terms as used in Part VII should be restricted to the executive.[21]

2.15 The Committee also notes that the United Kingdom (UK) faced similar uncertainties when reviewing its equivalent of the Part VII provisions in 1988. The UK *Copyright Act 1956* referred to first publication of works under the direction or control of 'Her Majesty or a government department'. It was considered that the abolition of that provision would raise uncertainty as to the

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[17] *Linter Group Ltd (in liq) v Price Waterhouse* (2000) VSC 90, Harper J, para 7. The case concerned an application for access to the transcript of judicial proceedings in the Supreme Court, the transcript having been produced under the direction of the court pursuant to the *Evidence Act 1958* (Vic), sections 130 and 134.

[18] *Submission 52*, p. 7.

[19] A Monotti 'Nature and basis of Crown copyright in official publications' (1992) 9 EIPR 305–16, at 312–3.

[20] ibid, citing amongst other cases *Re Australian Performing Right Associations Ltd's Reference; Re Australian Broadcasting Commission* (1982) 45 ALR 153 where the Federal Court held that the ABC was not within the meaning of 'Commonwealth' in section 183 as it was not an 'agent or instrumentality of the Commonwealth'; and *Director-General of Education v Public Service Association of New South Wales* (1982) AIPC 90–244, where the court referred to 'the Crown in right of the State' for the purposes of section 176.

[21] ibid, p. 313.

ownership of copyright in parliamentary material, particularly *Hansard*.[22] It was for this reason that a separate system of parliamentary copyright was established.[23]

2.16 Even if the terms 'Commonwealth' and 'State' are understood to be confined to the executive arm of government, there is significant uncertainty as to the range of government agencies that may fall within their ambit. These issues are discussed in more detail in Chapter 8.

The scope of material in which government owns copyright

2.17 Central to the Committee's examination of public policy considerations in government copyright is the scope of material in which copyright is owned.

2.18 Given the extensive range of current government functions, copyright will subsist in a broad range of material produced by or for government. The following list is not exhaustive and the Crown will not necessarily own all material in that category, depending on who creates or first publishes the material or whether copyright ownership is stipulated by contract. However, the list gives an indication of the types of material which will be covered by Crown copyright.

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[22] E P Skone James, G Davies, J E Rayner James & K M Garnett, *Copinger and Skone James on copyright*, 14th edition, Sweet & Maxwell, London, 1999, p. 591, referring to the UK Government's 1986 White Paper *Intellectual property and innovation*, Cmnd 9712, para 16.9.

[23] While initially intending to vest copyright in the Crown under the Act, the UK Government considered it undesirable to do so 'apparently because it would have the effect of vesting the control of parliamentary papers with the controller of [Her Majesty's Stationery Office] rather than with the House in question' (ibid).

Table 1. Types of material produced by or for government

Acts, bills and regulations	judgments of courts and tribunals
architectural plans	maps
circulars and guidelines issued by departments	official documents such as birth, death and marriage certificates, passports and drivers' licences
coin and medal designs	photographs
computer software	posters and signs
databases in print and electronic form	procedures manuals used by departmental officers
educational curricula	public registers, such as land title registers
films and audio-visual presentations	reports of advisory committees to government
government forms such as application or registration forms	scientific research studies
Hansard and other records of parliamentary proceedings	sound recordings
Industry standards and codes	statistics
information brochures and pamphlets issued by government agencies	unpublished papers from government departments

2.19 Such a wide range of materials raises different policy issues in terms of the public interest in their accessibility. For example, for some material there is a clear public interest in providing the widest possible dissemination. This includes primary legal materials and government publications designed to promote public discussion, educate the public or facilitate access to government services. For other material, the public interest in dissemination is not as strong, for example, computer software or databases created solely for government purposes. These policy issues are discussed in Chapter 4.

2.20 Most submissions were in favour of government owning copyright in all works and subject matter covered by the Copyright Act, regardless of its form. The Queensland Department of Natural Resources, Minerals and Energy, for example, stated:

> Where works or other subject matter are produced by or for a government, there would not appear to be any basis for excluding material because of the form of its embodiment, eg, as text, a table, compilation or a computer program (literary work), a diagram or photograph (artistic work) or visual images produced by a software program (cinematograph film).[24]

2.21 However, others such as the ACC (quoted at the start of this chapter) argued that the government copyright ownership provisions should not apply to all works that government produces because of the wide range of such materials. These policy issues are considered in more detail in Chapter 4.

[24] *Submission 65,* p. 6.