Chapter 6

The Crown prerogative

6.01 Section 8A of the Copyright Act preserves the Crown's prerogative right in the nature of copyright.[1] Unlike statutory rights, prerogative rights are of indefinite duration. During this inquiry, the Committee sought views on the appropriate nature and scope of prerogative rights, and whether they should be clarified or replaced by statutory provisions.

6.02 Consideration of issues relating to the Crown prerogative overlaps with consideration of whether as a matter of public policy the government should own copyright in materials produced by the legislature and the judiciary as well as the executive, and whether the Copyright Act should make express provision in relation to each of those three arms of government. While few submissions commented in any detail on the Crown prerogative, many of those that did linked their arguments to their views on whether legal materials should be in the public domain or otherwise freely available.

The history of the Crown prerogative

6.03 The Crown prerogative in the nature of copyright has been described as 'a relic of the censorship and concern with public order evinced by the Crown in Anglo-Australian copyright law'.[2]

6.04 As outlined in Chapter 2, the Crown took a close interest in publishing from the beginning of the development of printing in England. The Crown's grant of exclusive rights to print and publish specific books and certain categories of books was partly a reward to favourites and a source of Crown

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[1] Section 8A was inserted in the Copyright Act by the *Copyright Amendment Act 1980* (Cth) as part of major amendments to extend and clarify permitted copying under the Copyright Act. Prior to section 8A, the original subsection 8(2) preserved Crown prerogative rights.

[2] J McKeogh, K Bowrey & P Griffith *Intellectual Property: Commentary and Materials*, (3rd ed), Law Book Co, Sydney, 2002, p. 138.

revenue,[3] and partly a means of control by the Crown over all forms of publishing in the 16th and 17th centuries.[4]

6.05 Over time various explanations have been given as to the basis of the prerogative. Monotti[5] notes that explanations include that it was based in property,[6] that it reflected 'the character of the monarch as the head of the church and the political constitution',[7] and that it was the monarch's duty 'to superintend the publication of and to promulgate certain works'.[8] In the 17th century the House of Lords in *Roper v Streater*[9] upheld the validity of a patent from the Crown to print law books, stating that the printing of law books concerned the state and was 'a matter of public care'. This appears to be the first reference to that rationale.[10] However, Monotti states that from the late 18th century:

> … a consistent theme emerged, namely that the sovereign has a duty, based on the grounds of public utility and necessity, to superintend and ensure authentic and accurate publication of matters of national and public concern relating to the government, state and the Church of England. That duty carries with it a corresponding prerogative which is not specifically defined in any of the cases, but clearly extends to publishing and printing that material.[11]

6.06 The leading judgment of the Supreme Court of New South Wales in *Attorney-General (NSW) v Butterworth & Co (Australia) Ltd*[12] reflects this interpretation, finding that the Crown prerogative appears to arise from the historic duty of the monarch 'to superintend the publication of acts of the

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[3] Under Queen Elizabeth I in particular, printing patents were abused for mercenary reasons: see Monotti, op cit, p. 306.
[4] Gilchrist, 'Crown copyright: An analysis of rights vesting in the Crown under statute and common law and their interrelationship', op cit, p. 6.
[5] Monotti, op cit.
[6] *The Company of Stationers v Seymour* (1677) 1 Mod 256; *Millar v Taylor* (1769) 4 Burr 2303.
[7] *Millar v Taylor* (1769) 4 Burr 2303, Yates J (dissenting).
[8] *The Universities of Oxford and Cambridge v Richardson* (1802) 6 Ves Jun 691, 31 ER 1260; *Eyre & Strahan v Carnan* (1781) Bac Abr, Volume VI 509; *Manners v Blair* (1828) III Blight NS 391, 4 ER 1379.
[9] (1672) Bac. Abr. 7th ed., Vol. VI, 507.
[10] J Gilchrist, 'Crown copyright: An analysis of rights vesting in the Crown under statute and common law and their interrelationship', op cit, p. 11.
[11] Monotti, op cit, pp. 306–7, referring to *Roper v Streater* (1672) Bac Abr, volume VI 507.
[12] (1937) 38 SR (NSW) 195 at 229, per Long Innes CJ. The judgment has also been referred to with approval in leading texts on copyright in other common law countries, such as Skone James et al, op cit, 13th ed, p. 382.

legislature and acts of state of that description, carrying with it a corresponding prerogative'.[13] Long Innes CJ found that the prerogative right in relation to copyright in statutes was vested in the Crown in right of the colonies before federation[14] and had not fallen into desuetude. His Honour also categorised the prerogative in relation to copyright as a proprietary right.[15]

6.07 It should be noted that unlike England, the Crown prerogative in Australia is considered never to have applied to religious works, as there is no established state religion.[16]

Is there a duty to disseminate information?

6.08 It has been argued that it may be implied from the nature of the works falling within the prerogative right and the granting of exclusive rights to print and publish that the government is under a duty to meet public demand for those works.[17] During this inquiry, the NSW Attorney-General's Department argued in a similar vein that the existence of the prerogative promotes the public interest 'by imposing on the Crown, through historical usage, an obligation to disseminate certain information it produces'.[18] The Committee notes, however, that such an obligation could be included in statutory form if considered desirable: in New Zealand, for example, there has long been a statutory duty to make legislation available to the public at a reasonable cost.[19]

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[13] ibid at 229.

[14] ibid at 245.

[15] ibid at 246–7. His Honour supported Evatt's classification of the prerogatives in three categories: executive powers; certain immunities and preferences; and proprietary rights (H V Evatt 'Certain aspects of the Royal Prerogative', unpublished thesis, 1924, published in H V Evatt *The Royal prerogative*, 1987. See also Evatt J in *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278.)

[16] Evatt op cit, p. 138, citing *Nelan v Downes* (1917) 23 CLR 546, at 550 per Barton J, 568 per Isaacs J. Section 116 of the Constitution also prohibits the Commonwealth from making any law for establishing any religion.

[17] Gilchrist, 'Crown copyright: An analysis of rights vesting in the Crown under statute and common law and their interrelationship', op cit, p. 14, citing *Eyre and Strahan v Carnan*, (1781) Bac Abr &th Ed, Vol VI 509, 512 per Skinner LCB, and *The Universities of Oxford and Cambridge*, (1802) 6 Ves Jun 689, 704 per Lord Eldon LC.

[18] *Submission 57*, p. 7.

[19] *Acts and Regulations Publication Act 1989* (NZ), section 4. The Committee notes, however, that New Zealand has only recently developed a Public Access to Law on-line initiative, whereas in Australia most jurisdictions have had legislation on-line for many years through AustLII and through government on-line facilities such as the Commonwealth's SCALEPLUS. The Copyright Act through section 182A already

6.09 It is unclear if this duty that arguably arises under the prerogative has been relied upon to compel government to disseminate information. There is some suggestion in case law that the duty may also include an obligation to ensure that an unreasonable price is not charged for that dissemination.[20]

The scope of the prerogative

6.10 The scope of Crown prerogatives generally is uncertain[21] and the Crown prerogative in the nature of copyright is no different. As outlined above, the right is generally considered to have arisen from the Crown's role as disseminator of the law and (in England) authorised works of the established religion.

6.11 While it appears to be widely accepted that legislation falls within the prerogative, there is debate about what else the prerogative covers, particularly in relation to two matters:

- whether judgments are included within the prerogative; and
- whether the prerogative extends beyond printing to newer technologies, such as on-line services.

Judgments

6.12 A key area where the law has not been settled is whether Crown prerogative rights cover judgments.[22] Some argue that judges have copyright in their own judgments,[23] while others contend that as judges deliver judgments in

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recognises the desirability of making legal materials available to the public, although that section currently allows only for the making of a single copy of prescribed works (see further discussion in Chapter 7).

[20] Gilchrist. 'Crown copyright: An analysis of rights vesting in the Crown under statute and common law and their interrelationship', op cit, p. 14, citing *The Universities of Oxford and Cambridge v Richardson* (1802) 6 Ves Jun 689, 712, per Lord Eldon.

[21] Evatt op cit, pp. 7–9. Evatt was writing in 1924 about Crown prerogatives generally, and cites Dicey (*The law of the Constitution*, 8th ed, 1904, p. 420), who described the prerogative as a term 'which has caused more perplexity to students than any other expression referring to the Constitution'.

[22] See for example, 'The Crown and copyright in publicly delivered judgments', 56 *Australian Law Journal*, 326–8.

[23] Taggart op cit.

the name of the monarch, the Crown has a prerogative right in those judgments.[24]

6.13 In the 18th century, several of the majority in *Millar v Taylor*[25] expressed doubt as to the continued existence of the prerogative in law reports. However, while it is not settled, the weight of opinion supports the view that prerogatives are not lost by disuse and must be expressly removed by statute.[26]

6.14 Ricketson has argued that the better view is that a prerogative right in relation to the sole printing of judgments continues to exist, separate from any statutory copyright in such things as law reporters' headnotes and typographical arrangements.[27] However, not all commentators agree. Taggart,[28] for example, argues that the 17th century cases upholding patents to publish law reports can be 'simply explained by the then extant prerogative control over all printing'.[29] He argues that the prerogative extends only to the duty to publish statutes[30] and that the historical basis for this duty 'is entirely foreign to reasons for judgments and law reports'.[31]

6.15 Members of the judiciary did not offer definite views on the issue but commented on the implications of the Crown having copyright in judgments. Chief Justice Doyle of the Supreme Court of South Australia stated that he considered it appropriate that copyright in judicial material vest in the Crown in the right of the state of South Australia, but noted that Crown copyright could be used to place 'inappropriate restrictions' on publication and dissemination.[32] Chief Justice Black of the Federal Court of Australia submitted that judgments should be in the public domain, or alternatively, that copyright should subsist in

[24] Bannon op cit. See further discussion in Chapter 5.
[25] (1769) 4 Burr 2303 at 2329 (Willes J), 2404 (Lord Mansfield CJ).
[26] See Skone James et al, op cit, 14th ed, p. 572, and discussion in *Attorney-General v Butterworth* (1938) 38 SR NSW 195, where Long Innes CJ found it unnecessary to decide the question in relation to statutes as the right had continued to be asserted (pp 226–7).
[27] Ricketson & Creswell, op cit, para 14.200. See also Gilchrist 'Crown copyright: an analysis of rights vesting in the Crown under statute and common law and their interrelationship' op cit, pp. 27–31; Manotti op cit, pp. 305–16.
[28] See Taggart, op cit. Taggart concludes that individual judges own copyright in their judgments.
[29] ibid, p. 320.
[30] ibid, pp. 324–5.
[31] ibid, p. 325.
[32] *Submission 39*, p. 1.

individual judges and be subject to a broad statutory licence.[33] Judge McGill of the District Court of Queensland, on the other hand, favoured the vesting of copyright in judicial materials in the courts collectively rather than abolishing copyright.[34] These issues are discussed in more detail in Chapter 4.

6.16 Submissions from some State governments, by contrast, supported the prerogative in their brief comments on the issue. The NSW Government noted that its waiver (reproduced in Appendix 3) relied in part on the Crown prerogative in relation to judgments and legislation.[35] Two WA government submissions (WA Attorney-General and WA Department of Premier and Cabinet) favoured legislative amendment to state expressly that judgments are protected by Crown prerogative rights.[36]

New technologies

6.17 Some commentators argue that the prerogative is flexible and can be adapted to changing circumstances, including new technologies such as on-line printing, provided that the fundamental aim of the exercise remains the same.[37] However, others have doubted that the prerogative extends beyond printing and publishing.[38]

6.18 In submissions, only the WA Attorney-General addressed this issue directly, arguing that clarification of the prerogative by statute should be directed to ensuring that the prerogative covered certain materials, regardless of the medium in which such materials were reproduced (such as CD ROMS and on-line services).[39] This was in keeping with views the Committee received on the general issue of whether government copyright should extend to all material covered by the Copyright Act.

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[33] *Submission 61*, p. 3. The President of the Australian Industrial Relations Commission, Justice Giudice, indicated his general agreement with Chief Justice Black's views (DEWR, *Submission 74*, p. 3).
[34] *Submission 70*, p. 2.
[35] *Submission 56*, p. 8.
[36] They argued that natural justice would prevent a judge from adjudicating on this issue.
[37] Ricketson & Creswell op cit, para 14.205. See also Monotti op cit, pp. 307–9, where she cites amongst others H V Evatt *The Royal Prerogative*, Law Book Co, 1987, p. 141: '… the Prerogative as part of the common law is a living organism capable of meeting the requirements of a growing community'. The book published Evatt's 1924 doctoral thesis, 'Certain aspects of the Royal Prerogative: a study in constitutional law'.
[38] Gilchrist 'The role of government as proprietor and disseminator of information', op cit, p. 65.
[39] *Submission 34*, p. 5.

Evidence to the Committee

> 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.[40]

6.19 This statement by the Law Council of Australia expressed the view of most submissions that commented on the prerogative. While the majority supported the abolition of the prerogative, several more suggested that its extent should be clarified by legislation. Only a few submissions favoured retaining the prerogative in its current form, for reasons that are discussed below.

6.20 Most submissions that addressed the Crown prerogative in relation to copyright favoured its abolition.[41] For example, the ACC argued it was 'an outdated and uncertain mechanism' for ensuring that legal materials are freely and easily available to the public. Of the three publishers of legal materials, Thomson expressed concern that 'a government may at any time use the prerogative to prevent publishers from publishing material', and argued instead for a statutory licence regime for such material, while AustLII argued that public legal materials should be placed in the public domain. CCH made no direct submission on the issue of Crown prerogative but noted its support for a blanket licensing scheme for legal materials.

6.21 Some submissions (WA Attorney-General, WA Department of Premier and Cabinet, DFAT, Vi$copy, AIIA, APRA/AMCOS and the Victorian Government) favoured clarification of the prerogative, although their reasons differed. The WA Department of Premier and Cabinet, arguing for the retention of Crown copyright in legislative and judicial material, noted that legislative action may be necessary either to expressly provide for these rights or to clarify the existence of the prerogative rights, particularly in relation to material produced by the judiciary.[42] The WA Attorney-General commented further that perpetual copyright in such materials was appropriate 'given the long periods for which they are of relevance'.[43] However, the WA Attorney-General

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[40] *Submission 33*, p. 3.
[41] Thomson, Law Council of Australia, ACC, Screenrights, CAL, CAUL, ALIA, AustLII and the Department of Veterans' Affairs.
[42] *Submission 29*, p. 2.
[43] *Submission 34*, p. 5.

supported clarification to ensure that material was covered regardless of the medium in which they were reproduced, as noted above. The Department of Foreign Affairs and Trade argued that the Crown prerogative should include the texts of bilateral treaties negotiated between the Australian Government and the governments of other countries.[44]

6.22 APRA noted briefly that in light of the indefinite duration of prerogative rights, 'it is clearly in the interests of both Government and users' that the scope of the prerogative be clarified.[45] AIIA supported clarification 'in principle' while expressing no view on the scope of the prerogative right.[46] A note of concern was sounded by the Victorian Government, which stated that replacing the prerogative with statutory provisions 'may inadvertently reduce the protection available to the State over copyright material', but did not elaborate on this point.[47]

6.23 Only the NSW Attorney General's Department, the Attorney-General for South Australia, the Queensland Government and the Law Institute of Victoria favoured the status quo. The NSW Attorney General's Department argued that in the absence of evidence of detriment to the public or private interests, clarification was unnecessary.[48] The other three submissions were even briefer. The Queensland Government acknowledged that the scope of the prerogative was not clear but argued that its present form should be unchanged as it was 'not considered to be presenting any difficulties'.[49] The Law Institute of Victoria argued simply that 'This area has a long history which has served the public and government well.' The Attorney-General for South Australia merely commented that the prerogative rights were 'appropriate' and did not require revision.[50]

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[44] *Submission 51*, p. 2; further correspondence October 2004.
[45] *Submission 59*, p. 4.
[46] *Submission 21*, p. 8.
[47] *Submission 64*, p. 10.
[48] *Submission 57*, p. 7.
[49] *Submission 71*, p. 8.
[50] *Submission 52*, p. 4.

Are there any constraints on the Commonwealth's power to legislate?

6.24 Three State governments (WA, NSW and Victoria) expressed some concern about the implications of abolishing Crown prerogative in the right of the States, indicating that they would have to consider their position. The ACC also stated, without elaborating, that the States and Territories may have to repeal the common law relating to the Crown prerogative themselves.[51]

6.25 The issue to be considered is whether the copyright power in section 51(xviii) would be regarded as a power necessarily impacting on the States' prerogatives in the nature of copyright and whether this would apply to a Commonwealth law abolishing all prerogative rights in the nature of copyright.

6.26 The extent of the Commonwealth's power to legislate so as to affect the States' prerogative in relation to copyright is not settled. Certainly sections 8A and 182A of the Copyright Act permit limited defences to infringement in the Copyright Act to apply to prerogative rights works and allow limited reproduction of legal materials. These provisions were enacted in 1980 as part of the major reforms to the Copyright Act in relation to photocopying. There is no reference in the Second Reading Speech[52] or the Explanatory Memorandum[53] to consideration of the Commonwealth's power to affect the Crown prerogative in right of the States.

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[51] *Submission 27*, p. 5.

[52] Senator F Chaney, Minister for Aboriginal Affairs 'Copyright Amendment Bill (no. 2) 1979: Second Reading Speech', *Senate Hansard*, 4 June 1979, pp. 2533–2537.

[53] The *Copyright Amendment Bill (No. 2) 1979: Explanatory Memorandum* refers only to amendments that relate to 'extension and clarification of the provisions relating to Crown Copyright' (p. 1) and, in relation to section 8A, note only that it is 'in order to make it clear that the "fair dealing" and similar provisions apply to Crown copyright as they do to privately owned copyright' (p. 2).

6.27 It is a well-established principle from the High Court's decision in the *Engineers Case*[54] that Commonwealth legislation can bind the States.[55] There are, however, some limitations on the Commonwealth's power: the Commonwealth may not impose a discriminatory burden on a single State or the States,[56] or impair a State's capacity to function.[57] These two exceptions have in more recent cases been described as two elements of the same principle arising from the nature of Australia's federal system.[58]

6.28 Impairment of a State's capacity to function must amount to more than impairment of a particular function the State chooses to exercise, as Mason J stated in the *Tasmanian Dams case:*

> … it is not enough that Commonwealth law adversely affects the State in the exercise of some governmental function as, for instance, by affecting the State in the exercise of a prerogative. Instead, it must emerge that there is a substantial interference with the State's capacity to govern, an interference which will

[54] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. The joint judgment of Knox CJ, Isaacs, Rich and Starke JJ stated (at 153): 'The Commonwealth Constitution as it exists for the time being, dealing expressly with sovereign functions of the Crown in its relation to Commonwealth and to States, necessarily so far binds the Crown, and laws validly made by the authority of the Constitution, bind, so far as they purport to do so, the people of every State considered as individuals or as political organisms called States – in other words, bind both Crown and subjects.'

[55] This principle was restated by Dixon J in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 78–79: 'The prima-facie rule is that a power to legislate with respect to a given subject enables the Parliament to make laws which, upon that subject, affect the operations of the States and their agencies.'

[56] *Commonwealth v Tasmania* (1983) 158 CLR 1 (the Tasmanian Dams case); *Melbourne Corporation v. The Commonwealth* (1947) 74 CLR 31 at 66 per Dixon J referring to 'a law which discriminates against States, or a law which places a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its constitutional powers'. This doctrine has been developed by the High Court over the years, most recently in *Austin v the Commonwealth* (2003) 77 ALJR 491 and *Bayside City Council v Telstra Corporation Limited* [2004] HCA 19 (28 April 2004).

[57] *Melbourne Corporation v. The Commonwealth* (State Banking Case) (1947) 74 CLR 31.

[58] *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192, Mason J at 217. In *Austin v the Commonwealth* (2003) 77 ALJR 491, Gaudron, Gummow and Hayne JJ stated 'There is, in our view, but one limitation, though the apparent expression of it varies with the form of the legislation under consideration.' Kirby J agreed with that point, Gleeson CJ left the question open and McHugh disagreed. In *Bayside City Council v Telstra Corporation Limited* [2004] HCA 19 (28 April 2004) Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ construed the doctrine as presenting 'an inquiry whether the federal law in question, looking to its substance and operation, in a significant manner curtails or interferes with the capacity of the States to function as governments' [para 31]. On this basis, they held that the Commonwealth law in question was valid. McHugh J agreed in a separate judgment (retaining a strict two element approach to the principle), while Callinan J dissented.

> threaten or endanger the continued functioning of the State as an essential constituent element in the federal system.[59]

6.29 While the High Court in the *Engineers' Case* left open the question of the impact of Commonwealth legislation on State prerogatives,[60] later cases have indicated that some grants of power under section 51 of the Constitution can be regarded as necessarily impacting on State prerogatives, thus giving the Commonwealth power to regulate them.

6.30 In *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd*,[61] a case which concerned the prerogative in relation to debts owing to the Crown, Dixon J held that where the Constitution granted power to the Commonwealth which by its nature included power over a State prerogative, the Commonwealth Parliament would have power to regulate that prerogative. The judgment suggests that this principle may apply to the copyright power.[62]

6.31 This principle was affirmed by members of the High Court in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*[63] and *Commonwealth v Tasmania*[64] (the *Tasmanian Dams* case). In the latter case Brennan J, while noting that the prerogative in relation to State waste lands had been overtaken by State legislation, endorsed Mason J's statement in *Victoria v BLF*[65]:

> There is no secure foundation for an implication that the exercise of the Parliament's legislative powers cannot affect the prerogative in right of the

[59] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 139.
[60] *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129, at 143. In their joint judgment Knox CJ, Isaacs, Rich and Starke JJ reserved the right to reconsider the issue when it arose.
[61] (1940) 63 CLR 271.
[62] ibid at 315–6, where Dixon J stated 'Neither in the nature nor in the form of the taxation power is there anything to suggest that the relations of the two governments inter se or any rights of the States are involved. Indeed, in the Engineers' Case the taxation power was singled out as an instance of a legislative power the extent of which in relation to the States might in the future come up for special consideration. It is not like powers over specific fields of law or of activity or conduct, such as bankruptcy and insolvency, bills of exchange and promissory notes, copyright, patents and trade marks ... The specific subject matter in powers of that character could not be effectually regulated if, when the State in the course of its operations entered on the field, it was immune from the Federal law.'
[63] (1982) 152 CLR 25.
[64] (1983) 158 CLR 1.
[65] (1982) 41 ALR 71, at 117–8.

> States and the weight of judicial opinion, based on the thrust of the reasoning in the Engineers' Case, is against it.
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> If for the protection of the States as constituent elements in the federation an implication needs to be made, then the implication that should be made is that the Commonwealth will not in the exercise of its powers discriminate against or 'single out' the States so as to impose some special burden or disability upon them, unless the nature of a specific power otherwise indicates, and will not inhibit or impair the continued existence of the States or their capacity to function.

6.32 Brennan J concluded:

> The prerogative argument is thus subsumed into the principal argument that the powers of the Executive Government are immune from impairment by Commonwealth laws. Both arguments fail.[66]

6.33 It would appear there is significant support for the contention that the Commonwealth may legislate to remove the States' prerogative in the nature of copyright.

Acquisition on just terms

6.34 Another issue the Committee examined in considering possible changes to the prerogative is whether the Commonwealth may be obliged to provide compensation to the States on the basis that property must be acquired on just terms.[67] The NSW Government's submission noted its 'significant concerns' over possible changes to Crown ownership and referred to this issue.[68]

6.35 The Law Council of Australia disputed that the abolition of the prerogative right would amount to an acquisition of property,[69] referring to

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[66] (1983) 158 CLR 1, at 215–6.
[67] As required by section 51(xxxi) of the Constitution.
[68] *Submission 56.*
[69] *Submission 33*, p. 3.

Nintendo Co Ltd v Centronics Systems Pty Ltd.[70] While that case did not concern prerogative rights but rather copyright under the *Circuit Layouts Act 1989* (Cth), the full court of the High Court held that to the extent that the legislation involved an acquisition of property from those adversely affected by the intellectual property rights it created and confirmed, it did not infringe the 'just terms' provision. The majority stated:

> It is of the essence of that grant of legislative power [under s. 51(xviii)] that it authorises the making of laws which create, confer, and provide for the enforcement of, intellectual property rights in original compositions, inventions, designs, trade marks and other products of intellectual effort … Inevitably, such laws may, at their commencement, impact upon existing proprietary rights.[71]

6.36 Chief Justice Black of the Federal Court of Australia noted that the better view may be that there would not be an *acquisition* of property, but rather an *extinguishment* of property.[72]

Statutory alternatives to the Crown prerogative

6.37 Two alternative models have been implemented in New Zealand and the United Kingdom:

- abolition of the prerogative in relation to primary legal materials and placement of those materials in the public domain, as in New Zealand; and
- modification of the prerogative in relation to statutes by vesting copyright in the Parliament, as in the United Kingdom and Ireland.[73]

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[70] (1994) 181 CLR 134. The Law Council also suggested 'The replacement of common law copyrights by the substituted rights effected by the *Copyright Act 1912*, also suggests that it is not.'
[71] Per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ, at 160–1. The majority held that the operation of section 51(xxxi) to confine other heads of legislative power was subject to an express or manifest contrary intention in those grants. The *Circuit Layouts Act 1989* (Cth) was a law for the adjustment and regulation of the competing claims, rights and liabilities of the designers or makers and those who benefit from their work, and accordingly was beyond the reach of the 'just terms' provision.
[72] *Submission 61*, p. 2.
[73] *Copyright and Related Rights Act 2000* (Ireland). While Ireland, being a republic, does not have Crown prerogatives, section 77 of that Act provides that nothing in the Act affects any 'right or privilege of the Government' subsisting otherwise than under an enactment.

New Zealand

6.38 In New Zealand Crown prerogative rights are preserved by statute.[74] However, the placing in the public domain of primary legal and parliamentary materials such as legislation, bills, regulations, judgments of courts and tribunals and parliamentary debates and reports appears to cover all those materials widely accepted as being within the scope of the prerogative,[75] thus raising the question as to what is left.

6.39 New Zealand government representatives told the Committee that the decision to abolish copyright in most official materials was taken 'on the grounds primarily of accessibility (to allow the specified materials to be freely copied and disseminated …), and the inappropriateness of continuing to retain a Crown prerogative over materials in which the public has an interest'.[76] Subsequent advice from New Zealand stated that the preservation of prerogative rights was thought to have been included in the legislation 'out of an abundance of caution, just in case there was anything that needed preservation, rather than to preserve any known right or privilege of the Crown'.[77]

The United Kingdom

6.40 As outlined in Chapter 2, United Kingdom copyright law was extensively reviewed by the Whitford Committee in 1977.[78] However, that review did not consider the issue of Crown prerogative other than briefly in relation to what it termed 'Bible rights', where it was concluded that further inquiry as to the extent and scope of those rights might be warranted.[79] Nor did the report discuss copyright in legislation or judgments in any detail, stating that it was 'arguable' that they should be free of copyright.[80]

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[74] Paragraph 225(1)(b).
[75] *Copyright Act 1994* (NZ), section 27.
[76] 'The New Zealand experience: Background information from the Ministry of Justice, Ministry of Economic Development and the Parliamentary Counsel Office', correspondence to the Committee, 30 September 2004, p. 3.
[77] Correspondence to the Committee from the Deputy Chief Parliamentary Counsel for New Zealand, 4 October 2004.
[78] Whitford Report, op cit.
[79] ibid, p. 167.
[80] ibid, p. 149.

6.41 The UK's current copyright legislation,[81] which was subsequently enacted, established a system of parliamentary copyright and restricted government ownership of copyright to works made by officers or employees in the course of their duties. While Crown prerogative is preserved generally,[82] together with the rights and privileges of Parliament and of any person under an enactment, it is abolished in relation to Acts and measures.[83]

6.42 It has been noted that accordingly, prerogative copyright in the UK is now 'probably of practical importance only to the publishers of copies of the King James translation of the Bible and the Book of Common Prayer'.[84] In relation to judgments, a leading copyright text has argued that the 17th century cases that upheld patents to print law reports,[85] while never overruled, should not be followed today:

> … it would not be difficult for a court to reach a view that the seventeenth century cases were decided at a time of 'high prerogative' and ought not to be followed. It seems highly unlikely that any prerogative claim will now be asserted by the Crown in respect of judgments or law reports. Even if it was, it would no doubt be met with the contention that any prerogative copyright has been removed by section 45(2) of the 1988 Act, which provides that copyright is not infringed by anything done for the purposes of reporting judicial proceedings.[86]

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[81] *Copyright, Designs and Patents Act 1988* (c. 48) (UK).

[82] Section 171. Similar provisions have been in the UK's previous *Copyright Acts* of 1911 (s. 18) and 1956 (s. 46(2)).

[83] That is, measures of the General Synod of the Church of England. Subsection 164(4) states that copyright in Acts and measures belongs to the Queen. Subsection 166(7) vests copyright in bills in Parliament.

[84] Skone James et al, op cit, 14th ed, p. 571. The Queen's Printers and the Universities of Oxford and Cambridge hold patents from the Crown to print the King James version of the Bible and other books containing the rites and ceremonies of the Church of England (p. 572). New translations of the Bible in which copyright subsists cannot be claimed under the prerogative (p. 573, citing *Universities of Oxford and Cambridge v Eyre & Spottiswoode Ltd* [1964] 1 Ch 736).

[85] *Atkins v Company of Stationers* (1666) Carter 89 and *Roper v Streater* (1685), both cited in *Millar v Taylor* (1769) 4 Burr 2303.

[86] Skone James et al, op cit, 14th ed, p. 574. The Committee notes that section 43(1) of the Copyright Act provides similarly that copyright in a work is not infringed by anything done for the purposes of a judicial proceeding or of a report of a judicial proceeding.

6.43 While there is a similar Australian provision in relation to reporting of judicial proceedings,[87] the Committee does not necessarily agree with the reasoning that equates a provision that copyright is not infringed by certain acts to a finding that copyright no longer subsists. The Committee also notes that, unlike the UK, several Australian jurisdictions have continued to assert the prerogative in relation to copyright in judgments. Moreover, as Ricketson and Creswell note,[88] most Australian jurisdictions have set up Councils of Law Reporting which on behalf of the Crown license the making of law reports by private publishers.[89]

6.44 The New Zealand and UK alternatives attracted some comment in submissions, with many supporting the placing of legal and judicial material in the public domain. These issues are discussed in more detail in Chapter 4.

[87] Subsection 43(1).
[88] Ricketson & Creswell, op cit, para 14.200.
[89] See *Council of Law Reporting Act 1967* (Vic); *Council of Law Reporting Act 1969* (NSW); *Council of Law Reporting Act 1990* (Tas); *Law Reporting Act 1981* (WA).