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## Chapter 7

### Exceptions to infringement

7.01 Exceptions to infringement of Crown copyright are an integral part of an effective Crown copyright regime. As mentioned in Chapter 4, the copyright balance as articulated in the Preamble to the WIPO Copyright Treaty 1996 recognises the ‘larger public interest’ in education, research and access to information. These and other policy issues influence the nature and scope of the exceptions to infringement.

7.02 This chapter considers:

- the current exceptions to infringement,
- section 182A which allows for single copies of prescribed works, and
- the option of a statutory blanket licence scheme.

#### Current exceptions under the Copyright Act

7.03 The Copyright Act provides a range of exceptions to copyright infringement and these apply equally to government and non-government owned copyright.<sup>1</sup> For example, exceptions, known as ‘fair dealing’ exceptions, apply where the use of the copyright material is for the purpose of:

- research or study,
- criticism or review,
- reporting news, or
- judicial proceedings and professional advice.<sup>2</sup>

7.04 There are also exceptions relating to library and archives, including parliamentary libraries, temporary reproductions and computer programs, and a range of miscellaneous matters, including section 182A (discussed in more detail below).<sup>3</sup>

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<sup>1</sup> See section 182 of the Copyright Act. For further information on the exceptions to copyright infringement see Copyright Law Review Committee, *Copyright and Contract*, op cit, Chapter 3.

<sup>2</sup> See: ss 40–43 and 103A–103C of the Copyright Act.

<sup>3</sup> See: Copyright Law Review Committee, *Copyright and Contract*, op cit, Appendix D. As the Committee noted in that Report (at para 7.32), the statutory licences in Parts VA, VB, VC and section 183 of the

7.05 During this inquiry the Committee sought views as to whether the exceptions should apply to government copyright material in the same way as they apply to non-government copyright material. Several submitters including CCH, Thomson and ACC stated that they should. Others, such as AIIA, the WA Attorney-General, the Law Institute of Victoria and APRA/AMCOS, stated that the existing provisions are adequate.

7.06 However, a number of submissions, including those from the National Archives of Australia, AVCC, the Department of Health and Ageing, FLAG, CAUL, Swinburne University of Technology and the ABC, favoured wider exceptions. Generally, these submitters called for a blanket licence or statutory waiver to allow the reproduction and communication of government copyright material. Some submissions such as those from the WA Department of Premier and Cabinet and the Victorian Government argued for wider exceptions based on the organisation that owns the copyright rather than the material. The ACC, Swinburne University of Technology and the Department of Health and Ageing, on the other hand, considered that exceptions should be based on the type of material.

7.07 The Department of Health and Ageing also submitted that the exceptions should provide for issues of public health, bio-terrorism and national security. The ABC called for a range of changes to improve public access to government material and supported a compulsory licensing scheme to permit broader access to material on the public record, such as archival footage.

7.08 The Committee considers that the current exceptions to infringement as outlined above are appropriate and should continue to apply to government and non-government material in a like manner. The Committee considered two options for reform to ensure public access to government copyright material: amending section 182A and the issue of blanket licences to educational institutions and publishers for multiple reproductions.

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Copyright Act 'are not true exceptions to the extent that the copyright owner's exclusive right is affirmed, and might more properly be referred to as limitations. Each provides for the equitable remuneration of copyright owners in a situation where individual licensing would be impractical. As such, the statutory licence schemes are an efficient means of overcoming market failure.'

## Section 182A – a single reprographic reproduction

7.09 In addition to the general exceptions, section 182A of the Copyright Act specifically permits reproductions of prescribed primary legal materials.<sup>4</sup> Section 182A was introduced in 1980 as a result of the Franki Committee's recommendation:

The Act should also be amended to make it clear that a person is entitled to make reprographic reproductions of a statute, an order, judgment or award of court or other tribunal, or of the reasons for decision of a court or other tribunal. The sale of a copy so made should not be permitted, except that this should not prevent the cost of making the copy being recovered from a person to whom the copy is supplied.<sup>5</sup>

7.10 Subsection 182A(1) provides that:

The copyright, including any prerogative right or privilege of the Crown in the nature of copyright, in a prescribed work is not infringed by the making, by reprographic reproduction, of one copy of the whole or of a part of that work by or on behalf of a person and for a particular purpose.

7.11 This section does not apply where a charge is made for making and supplying that copy, unless the charge does not exceed the cost of making and supplying that copy.<sup>6</sup> Subsection 182A(3) of the Act defines 'prescribed work' as:

- (a) an Act or State Act, an enactment of the legislature of a Territory or an instrument (including an Ordinance or a rule, regulation or by-law) made under an Act, a State Act or such an enactment;
- (b) a judgment, order or award of a Federal court or of a court of a State or Territory;
- (c) a judgment, order or award of a Tribunal (not being a court) established by or under an Act or other enactment of the Commonwealth, a State or a Territory;

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<sup>4</sup> Section 182A was inserted in the Copyright Act by section 23 of the *Copyright Amendment Act 1980* (Cth).

<sup>5</sup> Copyright Law Committee on Reprographic Reproduction, *op cit*, pp. 59, 144.

<sup>6</sup> Section 182A(2) of the Copyright Act.

- (d) reasons for a decision of a court referred to in paragraph (b), or of a Tribunal referred to in paragraph (c), given by the court or by the Tribunal; or
- (e) reasons given by a Justice, Judge or other member of a court referred to in paragraph (b), or of a member of a Tribunal referred to in paragraph (c), for a decision given by him or her either as the sole member, or as one of the members, of the court or Tribunal.

7.12 The effect of section 182A is that a person may make one exact copy of a prescribed work, but a publisher may not commercially reproduce and distribute such copies.<sup>7</sup> The section appears less useful in the face of technological changes since its enactment, in that it only allows reprographic reproduction.

7.13 The Franki Committee's terms of reference required it to examine the impact of reprographic reproduction on the balance of interests between owners of copyright and the users of copyright material. The term 'reprographic reproduction' was defined as including any system or technique of making facsimile reproductions. Means of reproducing material have been greatly expanded by technological developments since 1974.

7.14 A number of submissions including those from the Victorian Government, Law Institute of Victoria and the WA Department of Premier and Cabinet favoured retaining section 182A in its current form. However, most submitters who commented on this provision, including Vi\$copy, the Association of Parliamentary Libraries of Australasia, CAUL, ALCC/ADA, the University of Melbourne, FLAG, AVCC, ACC, Arts Law, the Law Society of WA, FACS, Department of Veterans' Affairs, CCH, Swinburne University of Technology and the WA Attorney-General, supported amendment in some form.

7.15 The Swinburne University of Technology, the Association of Parliamentary Libraries of Australasia, the WA Attorney-General, the ACC and CCH were generally of the view that section 182A should allow multiple

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<sup>7</sup> In *Baillieu v Australian Electoral Commission* (1996) 63 FCR 210, Sundberg J held that section 182A applies only to the making of exact copies (because of paragraph 10(3)(g) of the Act and the definition of 'facsimile'). Furthermore (in obiter), Sundberg J stated that the person for whom the copy is made must be known at the time at copying. Thus a publisher cannot make multiple copies of a prescribed work for persons to be determined at a later date.

copies, although the ACC specified that conditions to ensure the authenticity of material should be imposed.<sup>8</sup>

7.16 However, CAL and Thomson expressed concern about amending section 182A to allow for increased public access to legal materials. CAL stated that under this exception commercial versions of legal materials (which usually contain additional material such as summaries, annotations, catchwords and phrases) are being reproduced along with official versions, and favoured amendment of section 182A to clarify that it only applies to official versions.<sup>9</sup> Section 112 of the Copyright Act provides that a copy made under section 182A will not infringe any copyright subsisting in the published edition of a work.

7.17 Thomson and CAL both argued that if section 182A were amended to permit multiple copying of prescribed works, a further provision should be inserted in the Copyright Act to ensure that users are aware that it does not apply to non-government owned material, especially that of legal publishers (similar to the UK's Guidance Note 6<sup>10</sup>). CAL noted concern that users 'do not currently differentiate between official Crown versions of documents and value-added products of legal publishers, such as annotated legislation and case-law'.<sup>11</sup> Without express protection under the Copyright Act, users may mistakenly rely on the extended exception, which 'would erode the markets of legal publishers and diminish the incentive for them to invest their resources in the production of these highly valuable works'.<sup>12</sup>

7.18 Thomson expressed similar concerns about the possibility of further infringements of non-government copyright material if multiple reproductions were allowed under section 182A without clarification in relation to non-

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<sup>8</sup> Submission 27, p. 9.

<sup>9</sup> Submission 48, p. 7.

<sup>10</sup> HMSO, Guidance Note 6: Reproduction of United Kingdom, England, Wales and Northern Ireland Primary and Secondary Legislation, HMSO, London, 2002, para 15: '... users are permitted to reproduce the Material as it appears either in the Official published version or by downloading it from the legislation web sites. Under this Guidance Note users are not authorised to copy the Material from other sources, such as commercial products published by law publishers, for example. Nor do users have an automatic right to reproduce the Material from the Government's Statute Law Database product or any other value added legislation product or service provided by Government. Such use would be the subject of separate and specific licensing arrangements.'

<sup>11</sup> Submission 48 (3), p. 2.

<sup>12</sup> *ibid.*

government versions.<sup>13</sup> Thomson argued also that such a move could have a negative impact on government expenditure in the longer term:

If, as a consequence of changes made to section 182A, publishers elected that it was no longer commercially viable to produce products which primarily contained section 182A prescribed works, or official or authorised versions of those works, then it would be left to the government and courts to make that material available to the general public. This would require a significant capital outlay to put in place the requisite infrastructure. It would be an inefficient use of public funds ... Law publishers already have this infrastructure in place and can benefit from the economies of scale ...<sup>14</sup>

7.19 The WA Department of Premier and Cabinet, the Department of the House of Representatives and the NSW Government expressed concern that if section 182A were expanded, commercial publishers would be able to exploit the provision on a for-profit basis.

7.20 In 1998 the Committee as it was then constituted briefly considered section 182A in the context of its report on exceptions to the exclusive rights of copyright owners.<sup>15</sup> The then Committee recommended that section 182A be retained and amended to include published editions of prescribed works, and that section 112 be amended accordingly. This Committee notes that there has been no official response as yet from the Commonwealth Government to that report and that the recommendation has not been implemented.

7.21 Some submissions also argued that the range of prescribed works under section 182A should be increased. The Law Society of WA recommended that parliamentary debates and reports should be included.<sup>16</sup> (The Law Society further submitted that where reproduction was for a commercial purpose, the Crown should be able to grant or decline permission and impose conditions on use.) The Association of Parliamentary Libraries of Australasia (APLA) argued that multiple copies of most information generated by the executive, legislature and judiciary should be ‘readily available’, except where such information had

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<sup>13</sup> Submission 13, p. 6.

<sup>14</sup> *ibid.*

<sup>15</sup> Copyright Law Review Committee Simplification of the Copyright Act 1968: Part 1, *op cit*, pp. 158–9.

<sup>16</sup> Submission 44, p. 9.

been created with a commercial objective in mind.<sup>17</sup> The Committee notes that Ricketson and Creswell also argue that various other works such as Royal Commission and government reports, transcripts of judicial proceedings, white papers and other parliamentary papers, could be reasonably expected to be included within the list of prescribed works.<sup>18</sup>

7.22 Some submissions also supported the extension of section 182A to allow copying by means other than by reprographic reproduction, for example, to print out a copy after accessing the document on-line.<sup>19</sup> Some submissions also argued that section 182A should be amended to allow the communication of a prescribed work, such as Swinburne University of Technology in relation to communication for non-commercial, educational purposes,<sup>20</sup> FLAG<sup>21</sup> and AVCC.<sup>22</sup> The Committee notes also the concerns raised by Ricketson and Creswell<sup>23</sup> in relation to the use of the word ‘judgment’ in subsection 182A(3).

## Blanket licence scheme

7.23 Another option considered by the Committee was to ensure that certain material is freely available for public use by the introduction of a statutory blanket licence scheme.

7.24 As discussed in Chapter 4, the NSW Government and the NT Government have issued non-statutory blanket waivers of copyright in certain

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<sup>17</sup> Submission 22, p. 3. The APLA gave as an example CSIRO patents.

<sup>18</sup> Ricketson & Creswell, *op cit*, para 11.355.

<sup>19</sup> Law Society of Western Australia Submission 44, p. 9. FLAG (Submission 46, pp. 5–6) and the AVCC (Submission 49, p. 6) also submitted that section 182A should be amended to be technology neutral.

<sup>20</sup> Submission 12, p. 4.

<sup>21</sup> Submission 46, p. 5–6.

<sup>22</sup> Submission 49, p. 6.

<sup>23</sup> Ricketson & Creswell, *op cit*, para 11.355. Ricketson and Creswell state that the meaning of ‘judgment’ in paragraphs (b) and (c) is arguably very narrow in referring only to the actual decision of the court or tribunal (such as to dismiss an appeal or grant the relief sought), rather than the commonly understood meaning of ‘what the judge or tribunal member said’. This interpretation is supported by paragraphs (d) and (e) which separately allow copying of ‘reasons’ of the court or tribunal. The authors argue that most ‘judgments’ in the most commonly understood sense of the word consist of more than the reasons for decision: they also contain a statement of the facts of the case, the relevant law and submissions by counsel or the parties. Ricketson and Creswell argue that if the purpose of section 182A(3) was to allow the copying of all parts of a court or tribunal decision, the definition of ‘prescribed works’ could be clarified by deleting paragraphs (d) and (e) and commencing paragraphs (b) and (c) with the words ‘a judgment and order or award’.

primary legal materials. Both waivers allow works to be reproduced if certain conditions are met.

7.25 The NSW Government has issued express waivers for copyright in legislative materials and judicial decisions<sup>24</sup> provided that:

- copyright continues to reside in the State of NSW;
- the waiver may be revoked, varied or withdrawn if the conditions are breached, or otherwise on reasonable notice;
- publication of material must not purport to be an official version;
- in the case of judicial decisions, the material must not reproduce any headnotes or editorial material prepared by the Council of Law Reporting or other agency without their further authority;
- the arms of the State must not be used in connection with publication of material without authority; and
- the material must be accurately reproduced in proper context and be of an appropriate standard.

7.26 The NT Government will waive copyright in legislation and judgments if certain conditions are met, including:

- the reproduction must not claim to be an official version;
- the arms of the Northern Territory must not be used in connection with the reproduction;
- the reproduction must be accurate; and
- the waiver may be revoked, varied or withdrawn its permission on reasonable notice.<sup>25</sup>

7.27 The University of Melbourne and the ALCC/ADA supported a blanket licence for legislative and judicial material on the condition that the material was accurately reproduced and did not claim to be an official version. However, in relation to copyright in judgments, Chief Justice Black of the Federal Court

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<sup>24</sup> The Hon John Hannaford MLC, Attorney General, 'Notice: Copyright in Legislation' *NSW Government Gazette* No.94 (27 August 1993) p. 5115; The Hon John Hannaford MLC, Attorney General, 'Notice: Copyright in Judicial Decisions' *NSW Government Gazette* No.23 (3 March 1995) p. 1087; The Hon JW Shaw QC, MLC, Attorney General, 'Notice: Copyright in legislation and other material' *NSW Government Gazette* No. 110 (27 September 1996) p. 6611 (extending the 1993 waiver to include a broader range of legislative materials). The waivers are reproduced at Appendix 3.

<sup>25</sup> 'Copyright policy in judgments of the courts of the northern Territory', *Northern Territory Government Gazette*, G48, 9 December 1998; Northern Territory Copyright policy concerning legislation, 8 October 1996.

of Australia expressed the view that a unilateral waiver by government allowing the reproduction of judicial material would be unsatisfactory:

... first, because it leaves untouched the possibility that the judges, and not the government, own the copyright in judgments, and, secondly, because some governments might not waive copyright.<sup>26</sup>

7.28 Thomson submitted that any statutory licence scheme should operate so that government cannot refuse permission to use government copyright material, stating:

Some government bodies, in addition to not knowing whether their material is protected by Crown copyright, will exercise a discretion as to whether or not they will grant a licence and, we suspect, that inequities have emerged where some publishers are granted a more favourable position under a contract to be the official publisher than other publishers who wish to use the same material.<sup>27</sup>

7.29 However, it was the WA Attorney-General's Department's clear view that whether or not to grant a waiver was a matter for each jurisdiction rather than for legislation.<sup>28</sup> The SA Attorney General's Department agreed, stating 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.<sup>29</sup>

7.30 The NSW Government also favoured the continuation of its waiver system.<sup>30</sup>

7.31 Swinburne University of Technology argued that there should be a blanket licence for educational use for the reproduction and communication of all government copyright material and making multiple copies, for non-commercial educational purposes.<sup>31</sup> Similar views were expressed by others, most notably those in the library and education sectors. For example, the APLA

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<sup>26</sup> Submission 61, p. 2.

<sup>27</sup> Submission 13, p. 5.

<sup>28</sup> Submission 34, p. 4.

<sup>29</sup> Submission 52, p. 4.

<sup>30</sup> Submission 56, p. 7.

<sup>31</sup> Submission 12, p. 4.

stated that executive, legislative and judicial material should be freely available.<sup>32</sup> The AVCC was in favour of a statutory waiver for educational institutional use of government copyright material.<sup>33</sup>

## Public interest defences and freedom of political communication

7.32 Ms Judith Bannister submitted that a public interest defence to copyright infringement should be considered in the context of open access to information about government.<sup>34</sup> She referred to the implied constitutional right of freedom of political communication; a right established in *Nationwide News Pty Ltd v Wills*<sup>35</sup> and *Australian Capital Television Pty Ltd v the Commonwealth*<sup>36</sup> and developed in subsequent cases such as *Theophanous v Herald & Weekly Times Ltd*,<sup>37</sup> *Lange v Australian Broadcasting Corporation*<sup>38</sup> and *Kruger v The Commonwealth*.<sup>39</sup> Ms Bannister suggested consideration should be given to whether the provisions in the Copyright Act are adequate in relation to recognising this implied right.<sup>40</sup> The ABC also suggested that the Copyright Act should expressly recognise this implied right.<sup>41</sup>

7.33 The Committee considers, however, that given the broad range of matters potentially encompassed by this term, it is likely to extend far beyond material in which governments own copyright.<sup>42</sup> Accordingly, the Committee has not considered it in the course of this inquiry.

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<sup>32</sup> Submission 22, p. 3.

<sup>33</sup> Submission 49, p. 6.

<sup>34</sup> Submission 58 (unpublished).

<sup>35</sup> (1992) 177 CLR 1.

<sup>36</sup> (1992) 177 CLR 106.

<sup>37</sup> (1994) 182 CLR 104.

<sup>38</sup> (1997) 189 CLR 520.

<sup>39</sup> (1997) 190 CLR 1.

<sup>40</sup> Submission 58 (unpublished).

<sup>41</sup> Submission 54, p. 1.

<sup>42</sup> For example, in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 Mason CJ, Toohey and Gaudron JJ defined 'political speech' as referring to 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about'.