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## Chapter 9

### The Committee's views

9.01 This chapter discusses various options for change to the current law under which the Crown owns copyright and presents the Committee's recommendations on those issues. The following matters are discussed:

- ownership under Part VII of the Copyright Act;
- abolition of copyright in certain materials;
- the Crown prerogative;
- exceptions to infringement; and
- defining 'Commonwealth' and 'State'.

9.02 Other areas where reform is recommended, namely, moral rights and management of Crown copyright, are discussed in the last two chapters.

#### **Ownership of copyright under Part VII of the Act**

9.03 In the course of this inquiry, some concern was expressed in submissions and during consultations that the Committee may have been considering recommending the removal of the right of government to own copyright in any circumstances. This view appeared to lead some submissions to oppose strongly any amendment to the current law. However, the Committee reiterates that one of the main aims of its inquiry was to consider whether government should be in a privileged position compared with other owners of copyright, with particular regard to the findings of the Ergas Committee (discussed in Chapter 4). Consequently the opposition of some parties to legislative change must be viewed in that context. As explained below, if the ownership provisions in Part VII Division 1 are repealed, governments will still be able to own copyright under the general provisions of the Copyright Act.

9.04 The Committee considers that the Part VII Division 1 provisions relating to Crown ownership of copyright should be repealed, on the basis that there is no justification for government to have a privileged position compared with

other copyright owners. The Committee is mindful of the fact that these provisions are based on legislation first introduced in the UK in 1911 and expanded in 1956. Since that time, the range of government activity has increased significantly from activities which are considered ‘core’ traditional government activities to include those which are much more commercial in nature. Correspondingly, the range of material protected by copyright law and the scope of government-produced material have also expanded significantly, so that the provisions have a much broader operation than when they were first enacted. The Committee also notes that the UK, New Zealand and Ireland which have had similar provisions to Part VII have reviewed and restricted their operation in recent years.

9.05 Although it is possible under section 179 of the Copyright Act for parties to negotiate agreements which override the Crown ownership provisions, the Committee does not consider it appropriate that the default position should be ownership of copyright by government. Not only does this put government in a stronger negotiating position than the other party with which it is contracting, but the Committee also heard evidence that many creators have been unaware that in the absence of a written contractual provision, they have lost copyright in works they created for government.

9.06 The Committee is particularly concerned that the ‘first publication’ provision in section 177 should be repealed. During this inquiry, one submitter withheld consent for the Committee to publish her submission on this basis, but others may have been unaware of the implications of failing to address this issue. The Committee can see no justification for retaining this provision, under which an author’s copyright is extinguished merely by the fact of the Crown publishing his or her work first.

9.07 The Committee also considers that the ambit of the term ‘direction or control’ is uncertain and potentially far too broad. It should be clear whether or not copyright in works commissioned by government remains with the creator or vests in the government. Rather than relying on default provisions under the Copyright Act which alter the usual position between contracting parties, such matters should be stipulated in contract.

9.08 If the Part VII Division 1 ownership provisions are repealed, government will still be able to claim copyright ownership under the general provisions of the Copyright Act:

- subsection 35(6) for work created by government employees;
- subsection 35(5) for commissioned portraits and engravings;
- subsections 97(3) and 98(3) for films and sound recordings made pursuant to agreements for valuable consideration;
- subsections 97(2) and 98(2) for films and sound recordings of which the government is the ‘maker’;
- section 100 for published editions of works where the government is the publisher; and
- section 99 for broadcasts made by government.

9.09 Removal of the Part VII Division 1 ownership provisions would have the added benefit of removing doubt about the interaction of those provisions with the rest of the Copyright Act, a matter only partially addressed by section 182.

**Recommendation 1: The Committee recommends that the provisions relating to subsistence and ownership of Crown copyright in sections 176–9 of the *Copyright Act 1968* be repealed.**

### ***Joint authorship and duration of government copyright***

9.10 The Committee considered whether its proposed reforms should make allowance for the fact that many individuals are often involved in the production of government work, and that accordingly it may be difficult to ascertain the author or authors of a work.

9.11 However, the Committee considered that while the scale of material, particularly written material, that government produces may be greater than that produced by the private sector, in principle government is no different from the private sector in relation to potential problems arising from the existence of more than one author. Consequently, the Committee considers that the general provisions of the Copyright Act concerning joint authors should apply where work is produced by government.

9.12 The Committee also considered whether the likelihood that government-produced material would have numerous authors should be taken into account in determining whether there should be a defined statutory term for government-owned copyright works.

9.13 As set out in Chapter 3, the duration of government-owned copyright under Part VII Division 1 differs from the duration that applies under the general copyright ownership provisions of the Copyright Act. Under Part VII copyright in a literary, dramatic or musical work subsists as long as a work remains unpublished, and where the work is published, for fifty years after the end of the year of publication.<sup>1</sup> In the case of an artistic work, the duration of copyright is fifty years after the end of the year in which the work is made,<sup>2</sup> and for engravings and photographs, it is fifty years after the end of the year of first publication.<sup>3</sup> These terms apply not only when government actually owns copyright but also when it would, but for a contrary agreement with the author, own copyright under Part VII Division 1.<sup>4</sup>

9.14 Under the general copyright ownership provisions of the Copyright Act, the term of copyright for published works is the life of the author plus 70 years.<sup>5</sup> In relation to subject matter other than works, the Copyright Act provides for terms of 70 years from the end of the first year of publication for sound recordings and films and 50 years from the making of broadcasts,<sup>6</sup> and 25 years for published editions of works.<sup>7</sup>

9.15 The ACC argued that the term of copyright protection for government copyright material should be the same as for other material, and supported a

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<sup>1</sup> Subsection 180(1). This provision was not altered by the US Free Trade Agreement Implementation Act 2004, as the US federal government does not have an equivalent to the Crown copyright provisions: see Chapter 5 for further details.

<sup>2</sup> Subsection 180(2).

<sup>3</sup> Subsection 180(3).

<sup>4</sup> Subsections 180(1) - 180(3), referring to an agreement made pursuant to section 179.

<sup>5</sup> Section 33, recently extended under the *US Free Trade Agreement Implementation Act 2004*. Where the work has not been published at the time of the author's death, copyright continues to subsist until 70 years after the end of the year of publication (section 33(3)). Anonymous and pseudonymous works are dealt with in section 34.

<sup>6</sup> Sections 93 – 95. The terms of protection for sound recording and films were extended from life of the author plus 50 years to life plus 70 years by virtue of the *US Free Trade Agreement Implementation Act 2004*.

<sup>7</sup> Section 96.

simplification of the rules of duration for both existing and future material.<sup>8</sup> A general review of the rules relating to copyright duration is beyond the Committee’s terms of reference. However, the Committee recognises the benefit of having fixed statutory terms of protection for government works in avoiding the difficulties of having to locate the authors, of whom there may be many, in order to calculate the term of life plus 70 years. This was the reasoning adopted by the UK when enacting the *Copyright, Designs and Patents Act 1988* (UK).<sup>9</sup>

9.16 The Committee considers there is also a strong public interest in government materials being in the public domain. For this reason, the Committee favours a limited statutory term, rather than the life of the author plus 70 years which will apply to literary, dramatic and musical works. The community’s right to have more ready access to government material is consistent with the Committee’s views about access to particular categories of material such as primary legal materials, as discussed later in this chapter. This approach also provides certainty for users, who otherwise would need to expend time and resources in locating authors, and simplifies the administration of copyright.

9.17 The Committee therefore considers that the current term of protection in sections 180 and 181 (effectively, 50 years after the end of the year of first publication) should continue to apply to works, sound recordings and films in which the government owns copyright.<sup>10</sup> In the case of unpublished material, copyright should continue to subsist until 50 years after the end of the year of first publication, the period which currently applies under sections 180–81.<sup>11</sup>

9.18 The Committee notes, as set out above, that the more restricted duration provisions in sections 180 and 181 currently apply not only where the government owns copyright but where it would, but for a contrary agreement

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<sup>8</sup> Submission 27, pp. 4 and 5.

<sup>9</sup> Skone James et al, op cit, 14<sup>th</sup> edition, p. 577, para 10–13, citing Hansard, HL, vol 491, col 559.

<sup>10</sup> The Committee notes that these provisions are not affected by the extension of terms under the *US Free Trade Agreement Implementation Act 2004*.

<sup>11</sup> The general term of protection for unpublished works in section 33 was recently increased from 50 years to 70 years after publication, by virtue of the *US Free Trade Implementation Agreement Act 2004*. Rather than have a separate part of the Act that deals with the duration of government copyright, the Committee considers that the duration provisions should be moved into Parts III and IV of the Act respectively.

with the author, own copyright. This situation should continue to apply under the Committee's proposed reforms in relation to ownership of employees' works.<sup>12</sup>

**Recommendation 2: The Committee recommends that a defined term of protection continue to apply to works, films and sound recordings where copyright is owned by the Crown or would, but for a contrary agreement made with a Crown officer or employee, be owned by the Crown. The duration of the term should be as follows:**

- in the case of literary, dramatic and musical works, films and sound recordings, fifty years after the end of the year of first publication;
- in the case of unpublished literary, dramatic and musical works, films and sound recordings, copyright should continue to subsist until fifty years after the end of the year of first publication; and
- in the case of artistic works, fifty years after the end of the year when the work is made.

### **Employees' work**

9.19 If the Part VII provisions are repealed, governments will need to rely heavily on subsection 35(6) for ownership of copyright. Subsection 35(6) currently provides that an author will not own copyright in any literary, dramatic, artistic or musical work where it is made in pursuance of his or her employment, or under a contract of service or apprenticeship. Section 17 of the Copyright Act provides that employment under a law of the Commonwealth or a State otherwise than under a contract of service or apprenticeship shall be treated for the purposes of the Copyright Act as if it were employment under such a contract.

9.20 However, the Committee acknowledges that subsection 35(6) may not cover all situations in which government might own copyright, for example,

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<sup>12</sup> Subsection 35(3) allows for a contrary agreement in relation to ownership of employees' works.

where the government has appointed officers (such as members of tribunals), or other situations where work is being produced for the government (such as by a committee of inquiry or by an independent party).

9.21 During its inquiry the Committee considered two statutory alternatives in other common law countries. The UK’s 1988 legislation, while retaining separate provisions for Crown copyright, replaced the phrase ‘by or under the direction or control’ with work ‘made by an officer or servant of the Crown in the course of his duties’.<sup>13</sup> Ireland has a similar provision relating to work ‘made by an officer or employee of the Government or of the State in the course of his or her duties’.<sup>14</sup>

9.22 It has been suggested that the term ‘officer or servant of the Crown’ in the UK provision refers to persons who are engaged in the service of the executive branch of government.<sup>15</sup> In the UK, Crown servants are ‘servants at will’ and are not employed under a contract of service.<sup>16</sup> Elsewhere in the UK copyright legislation, the term ‘employee’ is used.<sup>17</sup> It has also been stated that mere holding of a public office does not make a person an officer of the Crown, and that judges are not officers of the Crown within the meaning of this provision.<sup>18</sup>

9.23 The New Zealand *Copyright Act 1994*, while also restricting the ambit of the provision, has different wording from that of the UK. Section 26 provides that the Crown will own copyright in a work ‘made by a person employed or engaged by the Crown under a contract of service, a contract of apprenticeship, or a contract for services’ (subject to any contrary agreement). The inclusion of the term ‘contract for services’ provides for commissioned works and allows

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<sup>13</sup> *Copyright, Designs and Patents Act 1988*, section 163 which provides that Her Majesty owns copyright in a work made by ‘Her Majesty or by an officer or servant of the Crown in the course of his duties’. The ‘direction or control’ test continues to apply to parliamentary copyright (section 165).

<sup>14</sup> *Copyright and Related Rights Act 2000* (Ireland), section 191.

<sup>15</sup> H Laddie, P Prescott, M Vitoria, Speck & Lane, *The modern law of copyright and designs*, 3<sup>rd</sup> edition, 2000, para 36.4. The authors note that on one view the term ‘servant’ in section 163 conveys the same idea as ‘employee’, but a broader view is that the term ‘servant’ may also be used to convey ‘servant’ or minister of the Crown or of the state’, which would include, for example, a police constable who is not an employee.

<sup>16</sup> *Dunn v R* [1896] 1 QB 116; *Nixon v A-G* [1930] 1 Ch 566.

<sup>17</sup> For example, subsection 11(2) and section 178. Section 165(4) relating to parliamentary copyright also refers to works made by an ‘officer or employee’.

<sup>18</sup> Laddie et al, *op cit*, paras 36.4, 36.42–44.

the Crown to own copyright in a class of works similar to the class of works covered under the term ‘direction’.<sup>19</sup>

9.24 The Committee considers that since governments will rely to a greater extent on subsection 35(6) in relation to the works of its employees if the Part VII Division 1 provisions are abolished, subsection 35(6) should be amended to meet the legitimate needs of government.

9.25 The Committee notes that at common law the terms ‘master’ and ‘servant’ were traditionally used to describe the employment relationship, but that ‘employer/employee’ reflects more current usage.<sup>20</sup> As State and Territory legislation may use a range of different terms to refer to those employed or engaged by government agencies, the Committee has used the term ‘officer or servant’ to encompass those people who are engaged in the service of the executive branch of government, including those employed by government agencies which provide services to parliament and the courts (such as departments of court administration and parliamentary departments). The Committee does not support extension of the provision to contracts for services, as in New Zealand.

9.26 Ownership of copyright in sound recordings and films is covered by Part IV of the Copyright Act. Because those provisions (subsections 97(2) and 98(2) respectively) vest ownership in the maker (defined in relation to sound recordings as the person who owned the record and in relation to films as the person who made the necessary arrangements for making the film<sup>21</sup>), the Committee does not consider that specific amendments to those provisions are necessary to cover material produced by government employees.

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<sup>19</sup> Gilchrist, ‘Crown copyright: An analysis of rights vesting in the Crown under statute and common law and their interrelationship’, op cit, p. 108.

<sup>20</sup> For example, the *Public Service Act 1999* (Cth) refers to ‘employees’, whereas the former *Public Sector Act 1922* (Cth) referred to ‘officers’ of the Commonwealth Public Service. The definition of ‘public sector employment’ in the *Workplace Relations Act 1996* (Cth) includes references to both ‘employment’ and ‘service’.

<sup>21</sup> Subsections 22(3) and (4) respectively.

**Recommendation 3: The Committee recommends that the general provision relating to copyright in the works of employees in subsection 35(6) of the Copyright Act be amended insofar as it applies to the Crown. Ownership of copyright in literary, dramatic, musical and artistic works produced by an officer or servant of the Crown in the course of his or her duties should vest in the Crown.**

## **Abolition of copyright in certain materials**

9.27 The Committee considers for the reasons discussed in Chapter 4 that copyright in certain materials produced by government should be abolished where there is a strong public interest in their wide dissemination.

9.28 The Committee considers that the main reasons traditionally claimed for copyright ownership, that is, providing an incentive for creators and safeguarding the integrity of material, are not persuasive in relation to primary legal materials. Judgments, legislation and similar materials will be produced regardless of financial incentives, and the Committee believes they should be available as widely as possible and at minimal or no cost.

9.29 There is a worldwide trend to make such material freely available, as evidenced by the growth of international websites which provide free access. Many countries, such as the federal government of the USA and civil law countries such as France, Germany, the Netherlands, Sweden, Finland and Spain, do not recognise copyright in legislation or judgments. Moreover, there is no obligation at international law to protect such materials, and the Committee notes that the European Commission is encouraging member States to make such material freely available, as discussed in Chapter 4.

9.30 In addition, the Committee is concerned about the capacity for copyright to be used as a tool of censorship, as Sir Laurence Street warned.<sup>22</sup> It is desirable that governments should not be able to withdraw their consent to publish legal materials, an option which is always available if copyright subsists.

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<sup>22</sup> See Chapter 4.

9.31 The Committee also considers that the argument that copyright ensures the integrity of material is over-stated in relation to primary legal materials. There is no incentive for legal publishers to misrepresent legislation or judgments when publishing them, as their reputations for accuracy and due care are crucial. Nor does the Committee consider it likely that there would be any increased tendency to plagiarise or misrepresent judgments if copyright were removed, as was suggested during the inquiry. The Committee notes the comment that ‘It is ... clear that in those countries that do not restrict the copyright of primary legal materials, a majority worldwide; there is no glut of bogus legislation.’<sup>23</sup> The Committee does not consider that there will be significant impact on the market for ‘value-added’ products if copyright is removed; indeed, it has been suggested that the removal of restrictions on reproduction is more likely to stimulate the production of value-added resources.<sup>24</sup>

9.32 In addition to legislative and judicial materials, the Committee considers that certain materials produced by the executive government should also be made freely available and that copyright accordingly should not exist in them.

9.33 As discussed in Chapter 4, the Law Council of Australia proposed the abolition of copyright not only in judgments, Acts, bills and other legislative material, but also in the following:

- parliamentary debates and reports of parliamentary committees;
- reports of commissions of inquiries, including royal commissions and ministerial and statutory inquiries;
- government and parliamentary press notices and promotional materials;
- judicial, legislative and administrative forms;
- material on official websites of the executive, legislative or judicial arms of government; and
- texts of ministerial and parliamentary speeches, articles and papers.<sup>25</sup>

9.34 The Committee notes that this list may include material created by third parties, particularly material on government websites, and consequently appears to be too wide.

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<sup>23</sup> M Perry, ‘Acts of Parliament: privatisation, promulgation and Crown copyright – is there a need for a Royal royalty?’ *New Zealand Law Review*, 1998, vol 3, pp. 493–529, p. 523.

<sup>24</sup> *ibid*, p. 528.

<sup>25</sup> Submission 33, p. 3.

9.35 The Committee considered section 15AB(2) of the *Acts Interpretation Act 1901*, which lists certain material that may be considered in interpreting Commonwealth legislation. The list includes relevant reports of Royal Commissions, Law Reform Commissions, committees of inquiry or other similar bodies; parliamentary reports; treaties and other international agreements; explanatory memoranda and second reading speeches for bills; and relevant material in official records of parliamentary proceedings.<sup>26</sup>

9.36 The Committee has examined the UK model (which has also been adopted in Ireland) whereby a system of separate Parliamentary copyright has been created, and notes that both the Department of the House of Representatives and the Department of the Senate support this model.<sup>27</sup> The Committee notes also evidence of concerns in the UK that the abolition of its ‘first publication’ provision would remove protection for parliamentary materials unless additional protection was provided. The UK considered it appropriate that copyright in parliamentary materials be administered by the parliament rather than the executive.

9.37 However the Committee does not support the establishment of parliamentary copyright, on the basis that materials such as records of proceedings and parliamentary reports should be made available as widely as possible and that accordingly copyright in them should be abolished. The normal rules of copyright ownership would apply to other works produced by employees or independent parties commissioned by parliament to produce work.

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<sup>26</sup> The Committee also considered the *Legislative Instruments Act 2003* (Cth), which includes in the definition of ‘legislative instrument’ regulations, statutory rules, ordinances of non self-governing territories, proclamations and disallowable instruments under the *Acts Interpretation Act 1901*.

<sup>27</sup> Submission 23; Submission 67.

9.38 The Committee recommends that copyright should not exist in certain materials, whether published or unpublished, as outlined below.

**Recommendation 4: The Committee recommends that copyright in certain materials produced by the judicial, legislative and executive arms of government be abolished. Those materials are:**

- **bills, statutes, regulations, ordinances, by-laws and proclamations, and explanatory memoranda or explanatory statements relating to those materials;**
- **judgments, orders and awards of any court or tribunal;**
- **official records of parliamentary debates and reports of parliament, including reports of parliamentary committees;**
- **reports of commissions of inquiry, including royal commissions and ministerial and statutory inquiries; and**
- **other categories of material prescribed by regulation.**

### ***Duty to disseminate***

9.39 The Committee also considers that in view of the public interest in promoting the widest possible public access to the laws applying in Australia, there should be a statutory duty on the Commonwealth, States and Territories to disseminate legislation and judgments, as is the case in New Zealand in relation to legislation.<sup>28</sup> The Committee notes that a common law duty to disseminate such material may exist, but considers that in any case such a duty should be enshrined in legislation.

**Recommendation 5: The Committee recommends that the Commonwealth, States and Territories be under a statutory duty to disseminate legislation and judgments.**

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<sup>28</sup> Discussed in Chapter 3.

## **Crown prerogative**

9.40 The Committee considers that the Crown prerogative in the nature of copyright should be abolished. It is an antiquated concept that is not appropriate in Australia in the 21<sup>st</sup> century and its application and extent are uncertain. It is generally accepted that the prerogative extends to primary legal materials such as statutes. Whether it extends also to judgments is a matter of some contention.

9.41 A central issue that the Committee considered is the extent to which the Crown prerogative in relation to copyright has been relied upon. Those who supported the status quo, including the Victorian Government, expressed concern that the removal of the prerogative might inadvertently disadvantage the States. The NSW Government noted that it relied in part on the Crown prerogative in its waiver in relation to judgments and other legal materials.

9.42 The Committee considered whether the argument that a power whose limits are vaguely defined and infrequently used might be useful at some time in some unspecified way was sufficiently persuasive to justify its retention. Frequency of use of a prerogative power is not in itself a reliable measure of its value (a notable example being the writ of habeus corpus). However, coupled with uncertainty over its scope, the low level of reported use of the prerogative in relation to copyright may indicate that the power would be better incorporated in legislation for the sake of certainty.

9.43 As outlined above, the Committee recommends that there be no copyright in legislative, judicial and certain executive materials. If this recommendation is adopted, there would be no need to replace the Crown prerogative with statutory provisions: instead, section 8A and section 182A should be repealed.

9.44 As discussed in Chapter 6, several constitutional issues were considered in relation to the prerogative in right of the States. While the Committee is not in a position to state unequivocally that the Commonwealth has the power to legislate to remove the Crown prerogative in the nature of copyright, the Committee notes there is significant support for the argument that it may validly do so.

9.45 Whether the Commonwealth would need to provide 'just terms' for the acquisition of State property was also raised. The Committee is inclined to the

view expressed by Chief Justice Black of the Federal Court, who considered that the better view may be that there would be an extinguishment of property rather than an acquisition of property. If the prerogative in right of the States is abolished prospectively rather than retrospectively, the Committee considers that the action will not present difficulties.

**Recommendation 6: The Committee recommends that prerogative rights in the nature of copyright in the right of the Commonwealth and of the States be abolished by amendment to the *Copyright Act 1968*. That abolition should be prospective.**

9.46 The Committee notes that several States either oppose the abolition of the prerogative or have reserved the right to consider the ramifications of this course of action. If contrary to the Committee's recommendation the Commonwealth Government should decide that copyright in primary legal materials such as Acts should be preserved, the Committee nevertheless considers that the prerogative should be replaced by statutory provisions for the sake of clarity. If this approach is pursued, the Committee considers that there should be a statutory waiver of copyright in such materials because of the interest in their broad public dissemination.

**Recommendation 7: The Committee recommends that if, contrary to its recommendation, the Commonwealth Government decides that the Crown should continue to own copyright in primary legal materials, copyright in the materials currently covered by the prerogative be covered by statutory provisions and there be a statutory waiver of copyright in them.**

## Exceptions to copyright infringement

9.47 In 1976 the Franki Committee stated:

There is, we believe, particularly in Australia, a very considerable public interest in ensuring a free flow of information in education and research, and the interests of individual copyright owners must be balanced against this element of the public interest.<sup>29</sup>

9.48 The Committee agrees with the Franki Committee’s statement and considers that the public interest would be best served if copyright did not continue to subsist in legislative, judicial and some executive material, as outlined above.

9.49 The Committee received compelling evidence to suggest that, if copyright were to subsist in such material, amendment to section 182A would be required so as to ensure proper access. As discussed in Chapter 7, some suggested that multiple copies should be allowed. Others argued that copying by means other than by reprographic reproduction should be permitted, while still more suggested that the category of prescribed works in subsection 182A(3) should be expanded. In addition, Ricketson and Creswell pointed to problems with the terminology used to refer to judgments and orders of courts and tribunals. The Committee found many of these arguments persuasive.

9.50 If, however, the Committee’s recommendation is followed, copyright will not subsist in the prescribed works detailed in subsection 182A(3). Consequently section 182A will have no practical effect and should be repealed.

**Recommendation 8: The Committee recommends that section 182A be repealed.**

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<sup>29</sup> Copyright Law Committee on Reprographic Reproduction, *op cit*, p. 9.

## **Defining whether an entity is the ‘Commonwealth’ or ‘State’**

9.51 If the Committee’s recommendations about the abolition of the special Crown copyright ownership provisions in Part VII Division 1 are accepted, there are some remaining difficulties that point to the need to define what is meant by ‘Commonwealth’ and ‘State’ for the purposes of copyright ownership. First, the Part VII Division 1 provisions will continue to apply to those works created or published prior to their repeal. Secondly, there are various Crown copyright management issues addressed in more detail in Chapter 11. In order to promote best practice in Crown copyright ownership and management, it is necessary to be clear about which entities fall within Crown responsibility.

9.52 The Committee notes evidence from several State governments that there has been an increasing tendency in enacting legislation for government entities to state expressly whether or not an entity is part of the Crown. The Committee considers this to be a useful practice that would remove much uncertainty in the case of bodies that are set up in the future.

9.53 In relation to existing bodies where there is no express statutory provision, it is clear that much uncertainty remains, particularly when the entity is not a core government agency. The Committee notes that while it is useful to examine the main factors courts have considered in determining whether a body is the Crown, the increasingly diverse circumstances of entities have restricted the development of clear and universally applicable factors.

9.54 The Committee is not persuaded of the benefits of including in the Copyright Act a list of factors which the courts would be required to consider. Such matters are already considered by the courts and the Committee considers that codifying these factors will not assist in clarifying matters for entities or those dealing with them.

9.55 The Committee considered the merits of having the Commonwealth Attorney-General declare the governmental status of entities and has concluded that in light of the issues raised during public consultations, that would not be the best solution. The Committee considers that a non-exhaustive list of Crown entities will provide greater clarity and certainty for a wider group of

stakeholders and will be less burdensome on those responsible for its maintenance.

9.56 The introduction of a list of entities that are included as part of the government for the purposes of copyright, similar to the Crown bodies list in the UK, will provide certainty and clarity. Some submissions expressed concern that ensuring the list was current and meeting the costs associated with its management would impose an undue administrative burden on governments. However, the Committee considers that information from the HMSO dispels these concerns. While there will be some effort in setting up the list, its maintenance should not present an excessive workload.

9.57 As Australia does not have the equivalent of the HMSO and its federal system presents additional complexities, the Committee considers that each jurisdiction should create a non-exhaustive list. The Committee considers that at present the most relevant organisation to compile and maintain the Commonwealth's list would be the CCA. Which agency is best suited to create and maintain a non-exhaustive State and Territory list is a decision for each State and Territory government.

9.58 While not a final determination in that such a list would not be exhaustive and would not preclude parties from seeking a final determination in court, the Committee considers that it would have significant educative value. It would provide some clarity for government entities and those contracting with them, not all of whom can afford legal representation.

9.59 The Committee considers that, provided the lists are administrative in nature, updating the list to reflect any change in status will not present undue difficulties, particularly if the load is shared between the Commonwealth and the States. The CCA could check on the status of an entity under procedures similar to those adopted by the HMSO, that is, by checking with the entity and its internal legal representatives, the Australian Government Solicitor and/or the Attorney-General's Department.

9.60 ALIA argued that to be included in a list an entity would inevitably have to satisfy a list of non-exhaustive factors, and suggested that these should be

made publicly available.<sup>30</sup> The Committee agrees with this suggestion and recommends that guidelines be published by the CCA in consultation with the Australian Government Solicitor and the Attorney-General's Department, listing the factors that may be considered when determining the governmental status of an entity. The guidelines would need to be non-exhaustive to allow for the changing role of government and should reflect the factors that courts have developed over time.

9.61 The introduction of a non-exhaustive list of entities included as part of the Commonwealth and or a State will provide greater clarity on status of those included on the list.

**Recommendation 9: The Committee recommends that a non-exhaustive list of entities included as part of the 'Commonwealth and or a State' be created by the Commonwealth for Commonwealth entities and by the individual States/Territories for State/Territory entities.**

**Recommendation 10: The Committee recommends that to increase public awareness of the factors to be considered in determining whether an entity should be listed, the CCA in consultation with the Australian Government Solicitor and the Attorney-General's Department should develop and publish guidelines.**

### **Who owns copyright: the entity or the executive government?**

9.62 A final issue is the matter of who owns or should own the copyright where an entity has a separate legal personality distinct from that of the Commonwealth. The Committee notes that there are several possible interpretations as to how the Copyright Act operates in relation to those bodies which may nevertheless for some purposes be treated as an agent or emanation of the Commonwealth.

9.63 There are several possible interpretations of how copyright will vest under the current Crown ownership provisions. The traditional view is that copyright vests in the Commonwealth as a legal person, irrespective of the fact

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<sup>30</sup> CLRC Public forum, Sydney, 27 July 2004.

that the entity which has produced the material is an emanation of the Commonwealth. Another interpretation posits that such an entity owns the copyright in work it creates. A further interpretation is that even though copyright vests in the Commonwealth as a legal person, it is exercisable by the relevant entity. These interpretations have not been tested in a court and it is not settled which interpretation would prevail. The Committee notes that if its recommendations are followed, the special Crown copyright ownership provisions will be repealed. However, the issue may still arise under the general ownership provisions of the Copyright Act.

9.64 The Committee considers that governments should consider as a matter of course assigning or licensing copyright to the relevant entity, in order that the ownership and entitlement to manage copyright is clear. This may be achieved either through specific provision in the entity’s enacting legislation or by written agreement between government and the entity. For example, the Australian Institute of Criminology (AIC) has an agreement with the Commonwealth Government whereby all existing and future copyright in material produced by the AIC is assigned to it.<sup>31</sup> This would appear to be sensible practice.

9.65 Even where the entity is independent of government but receives government funding, it may be appropriate for government to assign copyright to it by agreement. Film Australia, a government-owned production and distribution company which has a significant archive of audio-visual materials, receives Commonwealth government funding but operates independently of government. Its current funding agreement specifies that if the Commonwealth becomes the owner of copyright in any work produced in the course of Film Australia’s activities because of the operation of section 178, the Commonwealth will assign all copyright to Film Australia.<sup>32</sup>

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<sup>31</sup> AIC Submission 4, p. 2, referring to the ‘Agreement between the Commonwealth of Australia and the Australian Institute of Criminology in relation to Copyright Ownership’, 20 September 1994.

<sup>32</sup> Submission 15, p. 3.

