

*The Copyright Law Review Committee is a specialist advisory body established in 1983 to inquire into and report to Government on specific copyright law issues.*

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ISBN 0 642 21134 5

Note: The law as contained in this report is stated as at January 2005.

# CROWN COPYRIGHT

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## **Membership of the Committee**

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Ms Susan Bridge, Chief Executive, Australian Publishers Association

Associate Professor Allan Brown, Griffith Business School, Griffith University

Mr John Gilchrist, Senior Lecturer in Law, University of Canberra

Mr Nigel Hardiman, Convenor of the States and Territories Copyright Use Group and Senior Project Officer of the ACT Department of Urban Services

Professor Michael Pendleton, School of Law, Murdoch University

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## **Secretariat**

Ms Louise Gell, Director (June 2004 – January 2005)

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## Terms of reference

Ownership of copyright by the Commonwealth, States and Territories ('the Government') is dealt with in Part VII of the *Copyright Act 1968* (Cth).

Under this Part, the Government is the owner of copyright in any work, film or sound recording made by, or under the direction or control of, the Government. The Government is also the owner of copyright in any work first published by, or under the direction or control of, the Government. In addition, copyright subsists in material which would not otherwise be copyright by virtue of it being made by, or under the direction or control of, the Government. These provisions are subject to any agreement with the author or maker of the copyright material otherwise assigning copyright.

The Government also has a prerogative right in the nature of copyright, which is preserved under s 8A of the Act and is not affected by other provisions of the Act.

Other countries take widely differing approaches to protection of material produced by governments. Within Australia there is a variety of States' practices in relation to management and control of copyright material.

In 2000 the Review of Intellectual Property Legislation under the Competition Principles Agreement (the Ergas Committee) recommended that s 176 of the Copyright Act be amended to ensure that the Government is not provided with preferential treatment compared with other parties.<sup>1</sup> The Government's response to this recommendation supported the objective of eliminating unjustified preferential treatment, but opted to develop best practice policy guidelines rather than amend the Act. In addition, calls have been made for the amendment of s 177 of the Act. This section vests copyright ownership in the Government if it is the first to publish, or if first publication occurs under the direction or control of the Government.

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<sup>1</sup> Intellectual Property and Competition Review Committee, Review of Intellectual Property Legislation under the Competition Principles Agreement, September 2000, p. 114.

1. Against that background, the Copyright Law Review Committee (the Committee) is to inquire into and report on the appropriateness of the law in Australia in relation to government ownership of copyright material, with particular regard to:
  - (a) the appropriate scope and definition of ‘the Commonwealth or a State’ and whether statutory bodies established indirectly under the legislation of the Commonwealth, States and Territories that have legal capacity to acquire, hold and dispose of real or personal property should be treated differently to those that do not, for the purposes of copyright ownership,
  - (b) the extent to which statutory bodies that are emanations or agencies of government have entered into agreements with the government for assignment to them of copyright in existing and future materials produced by them,
  - (c) whether the Copyright Act should make express provision vesting copyright in materials made by, or under the direction or control of, the Parliament of the Commonwealth, a State or Territory in that Parliament,
  - (d) whether the prerogative rights in the nature of copyright subsisting in legislation should be clarified or replaced by legislation defining the nature of copyright in such materials and vesting it in the Government, and
  - (e) whether the licence in s 182A to reproduce legislative materials and the decisions of courts and tribunals should be expanded to allow multiple reproduction.
2. In doing so the Committee will consider:
  - (a) the extent and appropriateness of reliance by government on copyright to control access to, and/ or use of, information,
  - (b) the underlying social and economic problems government ownership of copyright seeks to address,

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- (c) the social and economic objectives of government ownership of copyright material,
  - (d) the implications of privatisation of government bodies/agencies, and outsourcing of government functions, for ownership and public right of access to copyright material produced as part of a government function,
  - (e) international comparisons,
  - (f) the effect of new technologies,
  - (g) constitutional issues, if any,
  - (h) legislative and non-legislative options for reform,
  - (i) the costs and benefits of the options for reform on the different groups affected,
  - (j) a preferred arrangement for government ownership of copyright material, if any, in light of the objectives set out in (c),
  - (k) a strategy to implement and review the Committee's preferred option, and
  - (l) any other incidental matters which are able to be addressed within the time frame for the reference.
3. In undertaking the inquiry the Committee will have regard to:
- (a) any amendments to the Copyright Act that are introduced into Parliament, or which the Commonwealth announces are proposed to be introduced or are being considered,
  - (b) the recommendations and findings of relevant Government reviews or inquiries and any reports by or views of relevant expert advisory bodies and other interests,
  - (c) Australia's relevant international obligations, including those in treaties and other agreements to which Australia is considering becoming a party,

- (d) the role and nature of government and the need for government to be able to be accountable and fulfil its responsibilities efficiently and effectively,
  - (e) the approach of each Australian government to ownership of copyright material,
  - (f) the role of councils of law reporting in the exercise of copyright in judgments and decisions of courts and tribunals,
  - (g) the need to analyse and, as far as practicable, quantify the benefits, costs and overall effects of the options identified by the Committee in light of the principle that legislation which restricts competition should be retained or enacted only if the benefits to the community as a whole outweigh the costs, and if the objectives of the legislation can be achieved only by restricting competition,
  - (h) the effect on the operation and complexity of any future copyright legislation, including any transitional provisions, and
  - (i) the policy that the compliance cost and paperwork burden on small business should be reduced where feasible.
4. In undertaking the review, the Committee is to advertise widely and consult with key interest groups and affected parties.
5. In undertaking the review and preparing its report and associated recommendations, the Committee is to report to the Attorney-General by 4 December 2004.

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## Abbreviations

1911 UK Act	<i>Copyright Act 1911</i> (Imperial)
1956 UK Act	<i>Copyright Act 1956</i> (UK)
ABC	Australian Broadcasting Corporation
ACC	Australian Copyright Council
ADA	Australian Digital Alliance
ARC	Administrative Review Council
AFC	Australian Film Commission
AIC	Australian Institute of Criminology
AIIA	Australian Information Industry Association
Arts Law	Arts Law Centre of Australia
ALCC	Australian Libraries' Copyright Committee
ALIA	Australian Library and Information Association
ALRC	Australian Law Reform Commission
AMCOS	Australasian Mechanical Copyright Owners Society
ANAO	Australian National Audit Office
ANZLIC	ANZLIC – the Spatial Information Council
APLA	Association of Parliamentary Libraries of Australasia
APRA	Australasian Performing Right Association
AustLII	Australasian Legal Information Institute
AVCC	Australian Vice-Chancellors' Committee
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i> (Cth)
CAL	Copyright Agency Limited
CASL	Council of Australian State Libraries
CAUL	Council of Australian University Librarians
CCA	Commonwealth Copyright Administration
CCH	CCH Australia Limited

CLRC	Copyright Law Review Committee
Copyright Act	<i>Copyright Act 1968 (Cth)</i>
DCITA	Department of Communications, Information Technology and the Arts
DEST	Department of Education, Science and Training
DEWR	Department of Employment and Workplace Relations
DOFA	Department of Finance and Administration
DOI	Digital Object Identifier
Ergas Committee	Intellectual Property and Competition Review Committee, 2000
FACS	Department of Family and Community Services
FLAG	Flexible Learning Advisory Group
FMA Act	<i>Financial Management and Accountability Act 1997 (Cth)</i>
FOI	freedom of information
FOI Act	<i>Freedom of Information Act 1982 (Cth)</i>
Franki Committee	Copyright Law Committee on Reprographic Reproduction, 1976
GPO	Government Printing Office
Gregory Committee	Copyright Committee (UK), 1952
HMSO	Her Majesty's Stationery Office
IAR	Information Assets Register
ICT	information communications technology
IP	intellectual property
IT	information technology
LexisNexis	LexisNexis Australia
MCEETYA	Ministerial Council on Education, Employment, Training and Youth Affairs Schools Resourcing Taskforce
National Archives	National Archives of Australia
NAVA	National Association for the Visual Arts Ltd
NOIE	National Office of the Information Economy

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NZ	New Zealand
OQPC	Office of the Queensland Parliamentary Counsel
RAIA	The Royal Australian Institute of Architects
Spicer Committee	Committee appointed by the Attorney-General to consider what alterations are desirable in the copyright law of the Commonwealth, 1959
Thomson	Thomson Legal & Regulatory Limited
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
US	United States of America
US FTA Act	<i>US Free Trade Agreement Implementation Act 2004</i>
Whitford Committee	Committee to consider the law on copyright and designs (UK), 1977



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## Executive Summary

In the Copyright Law Review Committee's examination of Crown ownership of copyright, two important themes emerged and have formed the basis for the Committee's recommendations: ensuring that, as far as possible, government is on the same footing as other parties, and promoting the widest possible access to government-owned materials.

An important impetus for this inquiry was the Ergas Committee's<sup>1</sup> comments on section 176 of the *Copyright Act 1968* (the Copyright Act), which gives the Commonwealth and States ownership of copyright in works made by them or under their direction or control. The Ergas Committee argued that this provision places government in a privileged position compared with other contractors or employers, and that this situation was inconsistent with the principle of competitive neutrality.

Special statutory provisions applying to Crown copyright were first enacted in the Imperial *Copyright Act 1911*. At that time, the range of government functions was quite limited and the international copyright system was governed almost exclusively by the Berne Convention. The current Australian provisions are based on similar provisions in the *Copyright Act 1956* (UK), which was the first modern revision of the 1911 UK Act and marked the end of the Imperial law. The provisions of the 1956 UK Act formed, in turn, the framework for the copyright laws of many countries within the old British copyright system such as New Zealand, Ireland and Canada. But these laws, as in the UK, have either been significantly modified or will shortly be reviewed. The Committee was concerned to examine whether the policy justifications for those provisions applied with equal force today. In particular, the Committee considered the much broader scope of modern government functions, the wide range of government and semi-government agencies from traditional core government departments to commercially oriented bodies such as government business enterprises, and the more extensive range and scale of material produced by or on behalf of modern governments.

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<sup>1</sup> Intellectual Property and Competition Review Committee, Review of Intellectual Property Legislation under the Competition Principles Agreement, (Chairman Mr Henry Ergas), September 2000.

The Committee also considered the competing policy objectives that copyright law seeks to protect and promote. Copyright law is traditionally described as striking a balance between encouraging competition through rewarding effort and investment, and ensuring access to information. While the need to provide incentive does not apply to many works which governments are bound to produce, such as legislation, other justifications are often advanced for government copyright. They include allowing the integrity and accuracy of official documents to be protected and assisting in cost-effective administration by giving governments the capacity to recoup costs. Some also argued that governments must be able to own copyright to ensure that they have control over the reproduction, modification, adaptation and publication of works, and to ensure that the use of material is consistent with government policy. Weighed against these rationales is the importance of facilitating access to government material, as is discussed in more detail below.

This inquiry attracted significant interest from a wide range of those affected by Crown copyright ownership, including authors, publishers, libraries, law societies, judges, parliamentary departments, statutory agencies and State governments. Some concern was expressed about the possibility of recommendations that would remove the right of governments to own copyright in any circumstances. This concern appeared to lead some submissions to oppose strongly any amendment to the current law. However, the Committee reiterates that one of its main aims was to examine whether government should be in a privileged position compared with other owners of copyright. Consequently the opposition of some parties to legislative reform must be viewed in that context.

In conducting this inquiry, the Committee was particularly mindful of the experiences of other countries, particularly those that, like Australia, have their origins in English law. Although Australia's federal system raises some particular issues in terms of Crown copyright ownership and management, the Committee considered the experience of those countries and of general international trends to be very relevant.

## **Special Crown ownership provisions in the Copyright Act**

Key recommendations of the Committee relate to the special Crown copyright subsistence and ownership provisions in Part VII Division 1 of the Copyright Act (sections 176–9). Those provisions give the Commonwealth, States and Territories ownership of copyright in literary, dramatic, musical and artistic works, sound recordings and films made or first published by them or under their ‘direction or control’, unless a contrary written agreement applies. Subsections 176(1) and 178(1) also provide that where copyright would not otherwise subsist in works, sound recordings and films, copyright subsists by virtue of the sections.

The Committee has concluded that the special Crown subsistence and ownership provisions should be repealed for several reasons. First, the subsistence provisions are not clearly drafted and it is difficult to envisage situations where they would be relied upon today. Second, the ambit of the ownership provisions is uncertain and the Committee considers there is no justification for government to have a privileged position compared with other copyright owners. In particular, the Committee considers that the term ‘direction or control’ is potentially far too broad. Ownership of copyright in works commissioned by government from independent parties should not be determined by default provisions that alter the usual copyright ownership rules. Not only do these provisions give government a negotiating advantage, but the Committee also heard evidence that many creators have been unaware that in the absence of a written contractual provision with government, they have lost copyright in their creations.

The Committee is emphatic that the ‘first publication’ provision in section 177 should be repealed (that is, the provision whereby ownership of copyright vests in the Crown by virtue of the Crown being first to publish the material). During this inquiry, one submitter expressly withheld consent for the Committee to publish her submission on this basis, but others may have been unaware of the consequences of failing to do so. 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.

If the special Crown subsistence and ownership provisions in Part VII are repealed, government will still be able to claim copyright ownership under the general provisions of the Act. Repeal of these provisions would have the added benefit of removing doubt about the interaction of those provisions with the rest of the Act, a matter that is currently only partly 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. (paragraph 9.09)**

## Duration of Crown copyright

The Committee considered whether its proposed reforms should allow 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. However, the Committee concluded that while the scale of 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 Act concerning joint authors should apply where work is produced by government.

The Committee did, however, consider that the likelihood of numerous authors should be taken into account in continuing to apply to government copyright material a defined statutory term of protection that is not determined by reference to the life of an author.

While a general review of the rules relating to copyright duration is beyond the Committee's terms of reference, the Committee recognises the benefit of fixed terms of copyright protection for government works in avoiding the difficulties of having to locate numerous authors in order to calculate the term. The Committee considers there is also a strong public interest in government materials being in the public domain. The public's right to have earlier access to government material is consistent with the Committee's views on access to particular categories of material such as primary legal materials, as outlined below. This approach also provides certainty for users, who would otherwise

need to expend time and resources in locating authors, and simplifies the administration of copyright. The Committee supports a term which is the same as that currently applying under the Part VII provisions (sections 180–2).

**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. (paragraph 9.18)

## Employees' works

If the Part VII provisions are repealed, governments will rely heavily on subsection 35(6), the general provision that gives employers ownership of copyright in their employees' works.

In considering whether that provision is sufficiently broad to meet the legitimate needs of government, the Committee considered alternative overseas models. 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>2</sup> Ireland has a similar provision.<sup>3</sup> New Zealand, on the other hand, has extended Crown copyright ownership to works 'made by a person employed or engaged by the Crown under a contract of service, a contract of apprenticeship, or a

<sup>2</sup> *Copyright, Designs and Patents Act 1988* (UK), section 163.

<sup>3</sup> *Copyright and Related Rights Act 2000* (Ireland), section 191.

contract for services’, a definition which includes commissioned works.<sup>4</sup> The Committee prefers the narrower UK definition.

Ownership of copyright in films and sound recordings is covered by Part IV of the Act. Because those provisions<sup>5</sup> 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>6</sup>), the Committee does not consider that specific amendments to those provisions are necessary.

**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. (paragraph 9.26)**

## Public policy considerations

An argument often advanced in support of Crown copyright ownership is that it helps to promote the accuracy and integrity of official government publications. This was part of the original rationale for government ownership of copyright material, and it was restated in many of the submissions received. Reviews in other common law countries have also referred to this rationale in relation to their government materials, but often without exploring the validity of that view.

The Committee does not find those arguments persuasive in relation to materials such as statutes, judgments and official government reports. In particular, the Committee considers it unlikely that re-publishers of primary legal source materials would either deliberately or negligently disseminate inaccurate copies, as a lack of integrity, authority and accuracy in the materials would considerably affect the publisher’s reputation.

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<sup>4</sup> *Copyright Act 1994* (NZ), section 26.

<sup>5</sup> Subsections 97(2) and 98(2) respectively.

<sup>6</sup> Subsections 22(3) and (4) respectively.

Instead, the Committee considers that the strong public interest in making information accessible to the public carries more weight. Open access to government information is an essential characteristic of modern democracy, as has been increasingly recognised through a range of reforms, such as the introduction of freedom of information legislation throughout Australia in the past two decades. Technological advances in the electronic storage and dissemination of information have also had an impact on access to government material, with governments using the Internet and electronic databases to facilitate cheaper and more efficient access to information. There has been a growth in availability of legal information through a network of legal information institutes that provide free online access.

While new technology has improved the accessibility of information for many people, it has also allowed the development of new protection measures which can restrict that access. Internationally there have been increased efforts to ensure public access to government copyright material, including the United Nations' world summit on the information society in late 2003<sup>7</sup> and a 2003 European Commission Directive to facilitate the re-use of public sector information.<sup>8</sup> In the last few years, there have also been increasing calls for open access to research studies, particularly in science, and a dramatic increase in the number of open-access journals.

While some argued that copyright should not be used by governments to restrict access to their material, it is clear that governments have on occasion done so, as evidenced in *Commonwealth v Fairfax*<sup>9</sup> where the High Court granted an interim injunction on the basis of copyright to restrain the publication of certain government documents. This action did not protect the information, with much of the content of the documents being subsequently published in summary form. More recently, copyright is also reported to have been asserted in attempting to address the unauthorised release of a police video of the Port Arthur massacre.<sup>10</sup> The Committee considers that there are other more appropriate ways to address the adverse consequences of unauthorised release

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<sup>7</sup> United Nations, 'Draft Declaration of Principles', World Summit on the Information Society, Geneva 2003.

<sup>8</sup> Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information.

<sup>9</sup> (1980) 147 CLR 39.

<sup>10</sup> R Wade, 'Police probe on for video truth', *The Mercury*, 2 September 2004, p.11.

of information held by government. There is great danger in the possibility of government using copyright as an instrument of censorship.

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

The Committee heard conflicting views on how access to certain government information may be ensured where there is a strong public interest in making it widely available. While some suggested retaining Crown copyright and introducing statutory exceptions or blanket licences, the Committee favours the view expressed in many submissions that called for the abolition of copyright in legislation and other primary legal materials, noting that in many countries there is no copyright in such works. Some suggested that certain executive materials should be treated in the same way, and the Committee considers that appropriate.

**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. (paragraph 9.38)**

## **Duty to disseminate**

In view of the public interest in promoting the widest possible public access to the laws applying in Australia, the Committee also considers that, while there is

some evidence of a common law duty, 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.

**Recommendation 5: The Committee recommends that the Commonwealth, States and Territories be under a statutory duty to disseminate legislation and judgments. (paragraph 9.39)**

## Prerogative rights

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

While the Committee cannot state unequivocally that the Commonwealth has the legislative power under the Constitution to remove the Crown prerogative in the nature of copyright in right of the States, the Committee notes there is significant support for the contention that it may validly do so. That abolition should be prospective.

**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. (paragraph 9.45)**

## Exceptions to copyright infringement

If contrary to the Committee's recommendation the Commonwealth Government should decide that copyright in primary legal materials should be preserved, the Committee considers that the prerogative should be replaced by statutory provisions for the sake of certainty. If such a course is followed, 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. (paragraph 9.46)**

The Copyright Act permits various uses of copyright material for such purposes as research or study, review, news reporting and judicial proceedings. In addition, section 182A specifically permits a single reprographic reproduction of prescribed primary legal materials such as Acts and judgments.

The Committee received compelling evidence to suggest that amendments to section 182A were necessary to ensure proper access, particularly given technological developments since the provision was enacted in 1976. Some submissions suggested that multiple copies should be allowed, while others argued that copying by means other than by reprographic reproduction should be permitted. Still more suggested that the category of prescribed works in subsection 182A(3) should be expanded. Problems were also identified in the terminology used to refer to judgments and orders of courts and tribunals. The Committee found many of these arguments persuasive. If, however, its recommendation is followed, copyright will not subsist in the prescribed works covered by the provision and consequently it will have no practical effect.

**Recommendation 8: The Committee recommends that section 182A be repealed. (paragraph 9.50)**

## **Whether an entity is part of the ‘Commonwealth’ or ‘State’**

The Committee notes that there is evidence of an increasing tendency, in legislation establishing government entities, to state expressly whether the

entity is part of the Crown. The Committee encourages this as a useful practice that would remove much uncertainty in relation to the status of future bodies.

However, in the absence of such express provisions, it is evident that much uncertainty about the status of various entities remains, particularly where they are not core government agencies. While the courts have referred to certain factors that may provide guidance as to whether an entity should be considered to be part of the Crown, the increasingly diverse range of entities created by government has meant that there is no universally applicable test.

After considering several options, the Committee has concluded that the compilation of a non-exhaustive list of Crown entities, similar to the Crown bodies list maintained by Her Majesty's Stationery Office (HMSO) in the United Kingdom, will provide greater clarity and certainty. While some concern was expressed about the possible administrative burden on government, the Committee considers that information about the United Kingdom experience dispels these concerns. Because of Australia's federal system, the Committee considers each jurisdiction should have responsibility for creating its own non-exhaustive list of government bodies for the purposes of the Copyright Act. At present the most relevant organisation to compile and maintain the Commonwealth's list would be the Commonwealth Copyright Administration (CCA). Which agency is best suited to create and maintain a non-exhaustive State and Territory list should be a decision for each State and Territory government.

While such a list would not be exhaustive and would not preclude a final determination of an entity's status in the courts, the Committee considers that it would have significant educative value, providing a very useful starting point for government entities and those contracting with them as to which entities are the Crown for the purposes of copyright.

**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. (paragraph 9.61)**

The Committee also recommends that guidelines be developed and 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.

**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. (paragraph 9.61)**

## **Moral rights**

Consistent with its view that government should be treated no differently from any other employer or contracting party, the Committee considers that there should be no change to the current moral rights provisions insofar as they relate to government. This view accords with most of those in submissions. In addition, the Committee considers that the factors set out in sections 195AR and 195AS, provisions which allow exceptions to infringement where reasonable, provide sufficient safeguards for government.

**Recommendation 11: The Committee recommends that there be no change to the current moral rights provisions in Part IX of the *Copyright Act 1968* insofar as they relate to government. (paragraph 10.16)**

## **Crown copyright management**

Proposed legislative reforms are only part of the solution to the problems the Committee has identified during its inquiry. The Committee has made a series of recommendations aimed at promoting consistent copyright management practices in government agencies and increasing the awareness of relevant issues amongst public service employees and those with whom they interact.

Management practices are not uniform between, and often within, Australian jurisdictions. At the Commonwealth level alone, the Auditor-General recently found diverse approaches in intellectual property management.<sup>11</sup> Poor management of Crown copyright can result in unnecessary restrictions to access to government copyright material and less cost-effective management. In particular, governments may not need to own copyright in material commissioned from third parties – a licence to use material may be sufficient to achieve their aims.

Most submissions supported the goal of uniform management of government copyright material by governments throughout Australia. Most States supported the principle of uniformity in approach, while wishing to retain some flexibility to suit particular circumstances. Because the implications of a uniform approach are potentially wide-reaching, the Committee considers that the matter should be referred to the Standing Committee of Attorneys-General, in order that it may be explored in more depth.

**Recommendation 12: The Committee recommends that uniformity in the management of Crown copyright across State and Territory Governments be referred to the Standing Committee of Attorneys-General for consideration. (paragraph 11.100)**

The Committee considers that a coordinated approach to common issues both ensures consistency and allows users to have access to information about copyright issues more easily. Uniformity is particularly important where agencies change their name or responsibilities. Consequently the Committee encourages those States and Territories that have not already done so to consider allocating responsibility for general copyright administration to a central agency, similar to the CCA.

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<sup>11</sup> Australian National Audit Office, Intellectual property policies and practices in Commonwealth agencies, 2003–04, ANAO.

**Recommendation 13: The Committee recommends that each State and Territory Government that has not already done so consider giving a central agency responsibility for managing Crown copyright, similar to the Commonwealth CCA model. (paragraph 11.102)**

The Committee considers that the same arguments supporting uniformity in copyright administration for literary and other works should also apply to film and sound recordings. A central agency should administer Commonwealth copyright in these materials, with the CCA's existing framework making it a sensible choice.

**Recommendation 14: The Committee recommends that the CCA be given responsibility for managing copyright in film and sound recordings where copyright is owned by the Commonwealth. (paragraph 11.103)**

The Committee notes that the CCA's website contains only limited information to provide guidance on copyright in material owned by government. This compares unfavourably with the United Kingdom, where the HMSO's website provides guidance notes on a range of topics, such as copyright in public records. The Committee considers that the CCA should produce more information to provide guidance for Commonwealth agencies and users. Expanding the CCA's role to allow it to be more proactive would provide a clear and consistent approach to the management of Crown copyright and decrease the uncertainty about copyright issues that has featured so strongly in this inquiry.

**Recommendation 15: The Committee recommends that the CCA's role be expanded to provide advice and guidance on Commonwealth Crown copyright, and that further material be disseminated on its website. (paragraph 11.106)**

The Committee considers that governments must increase their efforts to educate government employees on copyright ownership and moral rights issues, both by the creation of guidelines and by specific training.

If the Part VII provisions are repealed as the Committee has recommended, governments will rely more heavily on contract to own copyright where work is commissioned. The Committee was unable during this inquiry to examine in detail the practices of different agencies at Commonwealth, State and Territory level. Some large agencies which are well-practised in negotiating large contracts with significant intellectual property implications will no doubt be proficient. Smaller agencies may well benefit greatly from the provision of standard contracts and education in their legal and financial management responsibilities.

The ANAO found there was a need for broader guidance and support for agencies on the management of intellectual property and recommended a whole-of-government approach and guidance for the Commonwealth.<sup>12</sup> The Committee endorses this recommendation and urges the Commonwealth Government to develop and implement comprehensive guidelines and policies as soon as possible. The Committee also urges State and Territory governments to follow this approach if they have not already done so.

**Recommendation 16: The Committee recommends that the Commonwealth Government develop and implement comprehensive intellectual property management guidelines to promote best practice and assist agencies to meet their responsibilities. Education and training of government employees must also be a high priority. The Committee urges State and Territory Governments which have not already taken such steps to do so. (paragraph 11.113)**

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<sup>12</sup> ANAO, op cit, p. 22.



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# Chapter 1

## Background to the inquiry

1.01 In December 2003, the Attorney-General asked the Committee to conduct an inquiry into Crown ownership of copyright in accordance with the terms of reference on pages xi to xiv.

1.02 Amongst other matters, the Committee was asked to consider the extent and appropriateness of government reliance on copyright to control access to, and/or use of, information; the social and economic objectives of government copyright ownership; the implications of privatisation of government agencies and outsourcing of government functions for public access to material; the effect of new technologies; and international comparisons. The Committee was also asked to consider both legislative and non-legislative options for reform.

### Key factors leading to the inquiry

1.03 In part, this reference came about because of concerns relating to the interaction between government ownership of copyright and competition policy.

1.04 The terms of reference specifically mention the *Review of Intellectual Property Legislation under the Competition Principles Agreement* (the report of the Ergas Committee).<sup>1</sup> The Ergas Committee noted that by virtue of section 176 of the *Copyright Act 1968* (the Copyright Act), the government is in a more favourable position than other contractors or employers.<sup>2</sup> The Ergas Committee considered this situation to be inconsistent with the principle of competitive neutrality set out in section 3(1) of the Competition Principles

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<sup>1</sup> Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement*, Chairman Mr Henry Ergas, IP Australia, Canberra, 2000.

<sup>2</sup> *ibid*, p. 114. Section 176 is discussed in more detail in Chapter 4.

Agreement<sup>3</sup> and recommended that government should not be given preferential treatment under the Copyright Act.<sup>4</sup> Accordingly, the Ergas Committee recommended that section 176 be amended. The Government's response to this recommendation supported the objective of eliminating unjustified preferential treatment, but opted to develop 'best practice' policy guidelines rather than amend the Copyright Act.<sup>5</sup>

1.05 The Committee's terms of reference also note that calls have been made for amendment of section 177 of the Copyright Act. That section, discussed in more detail in Chapter 5, gives the Crown ownership of copyright in material that the Crown is first to publish.

1.06 The Committee notes that equivalent provisions in other common law countries have been reviewed in recent years and their scope restricted.

## **Conduct of the inquiry**

1.07 As the first step in this inquiry, the Committee released an Issues Paper in February 2004 and invited submissions from interested organisations and individuals by 26 March. In July 2004, the Committee released a Discussion Paper for the purpose of a public forum held in Sydney on 27 July 2004. The Issues Paper, Discussion Paper and public submissions were made available on the Committee's website at <[www.ag.gov.au/clrc](http://www.ag.gov.au/clrc)>. A list of submissions is at Appendix 1.

1.08 More than sixty people representing a range of stakeholder interests attended the Sydney forum. Following that forum, the Committee held further

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<sup>3</sup> Section 3(1) of the Competition Principles Agreement provides: 'The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles apply only to the business activities of publicly owned entities, not to the non-business, non-profit activities of those entities.' See National Competition Council, *Compendium of National Competition Policy Agreements*, 2<sup>nd</sup> ed, June 1998, p.17.

<sup>4</sup> Intellectual Property and Competition Review Committee, *op cit*, p. 114.

<sup>5</sup> Government Response to Intellectual Property and Competition Review Committee Recommendations, 28 August 2001.

consultations in Perth and Melbourne with State governments and other interested parties. Attendees at the various meetings are listed at Appendix 2.

1.09 The level of interest in the inquiry was higher than the Committee had expected. In order to consider the concerns expressed on a wide range of issues as fully as possible and to consult further with State governments, the Committee sought an extension for the inquiry. The Attorney-General, the Hon Philip Ruddock MP, subsequently extended the reporting date to 4 March 2005.

1.10 The Committee thanks all those individuals and organisational representatives who made submissions and attended the public forum and other consultations. The Committee found their contributions very valuable input to its consideration of the issues.

### **Scope of this report**

1.11 Chapter 2 outlines what is meant by ‘Crown copyright’ and briefly discusses the scope of material in which government may own copyright. Chapter 3 discusses the current law in Australia and gives a brief history of the development of Crown copyright in the United Kingdom and Australia.

1.12 Chapter 4 discusses relevant public policy issues, including the Ergas Committee’s recommendation. Chapter 5 looks in detail at the provisions of Part VII Division 1 of the Copyright Act and similar provisions in other common law countries, while Chapter 6 discusses the prerogative right in the nature of copyright.

1.13 Chapter 7 discusses exceptions to infringement of copyright owned by government. Chapter 8 discusses the range of entities which may be considered to be the ‘Commonwealth’ and the ‘State’ for the purposes of copyright ownership. Chapter 9 presents the Committee’s conclusions and recommendations on the issues examined in Chapters 4 to 8.

1.14 Chapter 10 discusses moral rights insofar as they relate to Crown copyright. Finally, Chapter 11 considers management of Crown copyright material.

### **Terminology used in this report**

1.15 The terms ‘Crown copyright’ and ‘government copyright’ are often used interchangeably. There are also references in different parts of the Copyright Act to ownership of copyright by ‘the Crown’, ‘government’ and ‘the Commonwealth or a State’. A brief discussion of what is meant by those terms is included in the next chapter. In this report, general references to ‘government’ include the governments in all Australian jurisdictions, unless otherwise indicated.

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## Chapter 2

### The scope of Crown copyright

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

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

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

#### **‘Crown copyright’**

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

#### **What is meant by ‘the Crown’**

2.03 The Copyright Act contains various references to ‘the Crown’. The Act is expressly stated to bind the Crown subject to Part VII.<sup>2</sup> The heading to Part VII Division 1 (which gives special copyright ownership rights to the

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<sup>1</sup> ACC, *Submission 27*, p. 3.

<sup>2</sup> Section 7.

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

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

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

2.06 However, when referred to in legislation, ‘the Crown’ is usually understood only to refer to the executive arm of government.<sup>8</sup> In that context, the Crown is understood to include a complex system of individuals and

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

<sup>4</sup> Sections 8A, 182A.

<sup>5</sup> Section 16 of the *Acts Interpretation Act 1901* (Cth) states that references to the Crown ‘shall unless the contrary intention appears be construed as references to the Sovereign for the time being’.

<sup>6</sup> Chapter I of the Commonwealth Constitution deals with the Parliament, Chapter II with the Executive Government and Chapter III with the Judicature.

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

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

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

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

### **‘Crown in right of the Commonwealth or State’**

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

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

### **‘Commonwealth’ and ‘State’**

2.10 Apart from the references in the Copyright Act to ‘the Crown’ as set out above, the Part VII provisions relating to Crown ownership of copyright refer to ownership by the ‘Commonwealth or a State’.<sup>11</sup> This phrase includes the Territories.<sup>12</sup>

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

<sup>10</sup> *ibid.*

<sup>11</sup> See for example sections 176–81.

<sup>12</sup> Territories are included in the phrase ‘Commonwealth or State’ by virtue of paragraph 10(3)(e) and the definitions of ‘the Crown’ and ‘the Commonwealth’ in subsection 10(1) of the Copyright Act.

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

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

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

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

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

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

<sup>15</sup> NSW Cabinet Office *Submission 57*, pp. 5–6; NSW Attorney-General’s Department *Submission 57*, p. 3.

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

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

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

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

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

<sup>18</sup> *Submission 52*, p. 7.

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

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

<sup>21</sup> *ibid*, p. 313.

ownership of copyright in parliamentary material, particularly *Hansard*.<sup>22</sup> It was for this reason that a separate system of parliamentary copyright was established.<sup>23</sup>

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

### **The scope of material in which government owns copyright**

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

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

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

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

**Table 1. Types of material produced by or for government**

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

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

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

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

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

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<sup>24</sup> *Submission 65*, p. 6.

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## Chapter 3

### Crown ownership of copyright

3.01 As a background to the Committee's discussion of policy issues and possible options for reform, this chapter outlines:

- the current position in Australian law in relation to Crown copyright;
- the history of the Crown copyright provisions, including a brief examination of copyright law in the United Kingdom and the development of Crown copyright provisions in Australia; and
- reviews of Crown copyright provisions in other common law countries.

#### **The current law in Australia**

3.02 Australian law in relation to government ownership of copyright is briefly discussed below in relation to: the legislative powers of the Commonwealth and the States; Australia's international obligations; and the Copyright Act.

#### **Legislative power with respect to copyright**

3.03 Under section 51(xviii) of the Commonwealth Constitution, the Commonwealth has power to legislate with respect to 'copyrights, patents of inventions and designs, and trade marks'.<sup>1</sup> While there is nothing in the Constitution to suggest that the powers under section 51 are exclusive to the Commonwealth,<sup>2</sup> Commonwealth law will prevail over any inconsistent State law.<sup>3</sup>

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<sup>1</sup> Section 51 provides that the Commonwealth Parliament 'shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to' the listed matters.

<sup>2</sup> Section 107 of the Commonwealth Constitution preserves the powers of State parliaments unless they have been vested exclusively in the Commonwealth under the Constitution.

<sup>3</sup> Section 109 of the Commonwealth Constitution provides that when a law of a State is inconsistent with a Commonwealth law, the Commonwealth law shall prevail, and the State law shall, to the extent of the inconsistency, be invalid.

3.04 While the Australian colonies prior to federation had enacted some limited laws in relation to copyright (as discussed further below), copyright subsists today only by virtue of the Copyright Act,<sup>4</sup> subject to the preservation of those prerogative rights in the nature of copyright.<sup>5</sup>

### **Australia's international obligations**

3.05 Australia is a signatory to various international conventions relating to copyright, including the Berne Convention for the Protection of Literary and Artistic Works,<sup>6</sup> the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations,<sup>7</sup> and the TRIPS Agreement.<sup>8</sup>

3.06 However, these conventions do not impose any obligations in relation to government ownership of copyright. The Berne Convention specifically provides that it is a matter for legislation in each member state to determine the protection to be granted to 'official texts of a legislative, administrative and legal nature, and to official translations of such texts'.<sup>9</sup> Members also have the discretion as to whether they, by legislation, exclude wholly or in part 'political speeches and speeches delivered in the course of legal proceedings'.<sup>10</sup>

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<sup>4</sup> Section 8.

<sup>5</sup> Section 8A.

<sup>6</sup> (1886), as revised.

<sup>7</sup> (1961).

<sup>8</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, which is a key multilateral treaty on the range of intellectual property rights. TRIPS came into force on 1 January 1995 and links intellectual property rights to rights and obligations under the General Agreement on Tariffs and Trade (GATT) or the World Trade Organisation.

<sup>9</sup> Art 2(4). The Committee notes that the Commission of the European Communities has issued guidelines stating that the public sector should 'to the highest extent possible' make use of the discretion to exempt such texts (Commission of the European Communities Guidelines for improving the synergy between the public and private sectors in the information market, Directorate-General for Telecommunications, Information Industries and Innovation, 1989).

<sup>10</sup> Art 2bis(1).

## The Copyright Act 1968

3.07 There are three possible sources of government ownership of copyright under the Copyright Act:

- the general ownership provisions, particularly those which vest copyright in employees' work in their employer;
- the Crown prerogative in the nature of copyright; and
- the special Crown ownership provisions in Part VII of the Act.

3.08 These categories are not necessarily mutually exclusive: there is authority to suggest that a government may own copyright in a work under either the general provisions of the Act or under the Part VII provisions.<sup>11</sup>

### **General copyright ownership**

3.09 Under Parts III and IV of the Copyright Act, copyright subsists in literary, dramatic, musical and artistic works ('works'),<sup>12</sup> sound recordings, cinematograph films, television and sound broadcasts, and published editions of works ('subject matter other than works').<sup>13</sup>

3.10 Copyright in works is generally owned by the author, who must be a natural person.<sup>14</sup> However, this general rule is subject to several exceptions, one of which concerns works made during the course of employment. Section 35(6) of the Copyright Act provides that, subject to Part VII, copyright in literary, dramatic, musical and artistic works created pursuant to terms of employment under a contract of service or apprenticeship is owned by the employer (subject

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<sup>11</sup> For example, *Director-General of Education v Public Service Association of New South Wales* (1985) 4 IPR 552. In continuing an interlocutory injunction to restrain copying or communicating the contents of a departmental committee report, McLelland J of the Supreme Court of New South Wales stated that the State of New South Wales owned copyright in the report under either subsection 35(6) or section 176 of the Copyright Act.

<sup>12</sup> Section 32 of the Copyright Act.

<sup>13</sup> Sections 89–92 of the Copyright Act.

<sup>14</sup> Part III, section 35. Section 32(4) defines a qualified person as an Australian citizen, Australian protected person or Australian resident. The Copyright (International Protection) Regulations extend these provisions to citizens, nationals and residents of Berne Convention countries, World Trade Organization countries and other countries that are parties to the Universal Copyright Convention 1952.

to any contrary agreement<sup>15</sup> and subject also to certain exceptions set out in subsections 35(4) and 35(5)<sup>16</sup>).

3.11 Ownership of copyright in subject matter other than works is dealt with in Part IV of the Act. The owner of copyright in relation to sound recordings and films is generally the maker.<sup>17</sup> The owner of copyright in television broadcasts and sound broadcasts is the maker<sup>18</sup> and in published editions of works is the publisher.<sup>19</sup> Unlike the Part III provisions relating to works, it is not necessary for makers and publishers to be natural persons for copyright to subsist, and in most cases they are corporate entities.

### ***Crown prerogative***

3.12 The Crown prerogative in the nature of copyright, discussed in more detail in Chapter 6, is recognised by section 8A of the Act. Its exact scope is unclear but it is generally considered to apply to certain primary legal materials such as statutes.

### ***Part VII of the Act***

3.13 Division 1 of Part VII of the Act is headed ‘Crown copyright’. Under subsection 176(2), the Commonwealth or State is the owner of the copyright in an original literary, dramatic, musical or artistic work ‘made by, or under the direction or control of’, the Commonwealth or the State. Subsection 178(2) contains a similar provision in relation to sound recordings and cinematograph films. Subsections 176(1) and 178(1) provide for subsistence of copyright in such materials.

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<sup>15</sup> Section 35(3) of the Copyright Act.

<sup>16</sup> Subsection 35(4) concerns work done by employees of a newspaper, magazine or similar periodical. Subsection 35(5) concerns contracts for portraits, photographs for private or domestic purposes and engravings.

<sup>17</sup> In the case of commissioned films and sound recordings, the commissioning party generally owns copyright (sections 97–8 of the Copyright Act).

<sup>18</sup> Section 99 of the Copyright Act.

<sup>19</sup> Section 100 of the Copyright Act.

3.14 Crown ownership of copyright may also be acquired through the first publication of a work in Australia. Section 177 vests in the Commonwealth or State ownership of copyright of original literary, dramatic, musical or artistic works first published in Australia by, or under the direction or control of, the Commonwealth or the State. The operation of sections 176, 177 and 178 may be modified by agreement with the author of the work.<sup>20</sup> The Part VII provisions are discussed in more detail in Chapter 5.

### ***Duration of copyright in government works***

3.15 The duration of government ownership of copyright varies according to which of the statutory provisions or the prerogative right in the nature of copyright applies. Under the general provisions of the Copyright Act, the duration of copyright in published literary, dramatic, musical and artistic works is the life of the author plus 70 years<sup>21</sup> (recently extended from life plus 50 years by the *US Free Trade Agreement Implementation Act 2004* (the US FTA Act)).<sup>22</sup> Copyright in a work that is unpublished at the author's death continues to subsist until 70 years after the end of the year of first publication.<sup>23</sup>

3.16 By comparison, copyright in a literary, dramatic or musical work under the Part VII provisions subsists as long as a work remains unpublished, and where the work is published, for 50 years after the end of the year of first publication.<sup>24</sup> In the case of an artistic work, the duration of copyright is fifty years after the end of the year when the work is made,<sup>25</sup> and for engravings and photographs, it is 50 years after the end of the year of first publication.<sup>26</sup> Duration of Crown copyright in sound recordings and films is 50 years after the end of the year of first publication.<sup>27</sup> The duration under the Part VII provisions

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<sup>20</sup> Section 179.

<sup>21</sup> Subsection 33(2).

<sup>22</sup> The Act commenced on 1 January 2005.

<sup>23</sup> Subsection 33(3). The provision applies where the work had not been published, performed in public or broadcast and records of the work had not been offered or exposed for sale to the public.

<sup>24</sup> Subsection 180(1). This provision was not altered by the US FTA Act, as the US federal government does not have an equivalent to the Crown copyright provisions: see Chapter 5 for further details.

<sup>25</sup> Subsection 180(2).

<sup>26</sup> Subsection 180(3).

<sup>27</sup> Section 181.

is the same whether the government actually owns copyright or would, but for a contrary agreement under section 179, own copyright.<sup>28</sup> Works protected by the Crown prerogative, by contrast, are subject to perpetual copyright. A comparison is provided in the table below:

**Table 2: Comparison of terms of copyright protection under the *Copyright Act 1968*<sup>1</sup>**

Type of work	Prior to 1 Jan 2005 under the general provisions of Copyright Act	By virtue of US FTA Act (commenced 1 Jan 2005)	Part VII provisions <sup>2</sup>	Prerogative
Literary, dramatic and musical works	Published works: life of author plus 50 years s33(2). <sup>3</sup> Anonymous works: 50 years after publication s34 <sup>4</sup>	Extended to life plus 70 years. Anonymous works: 70 years after publication	50 years after publication s180(1)	Perpetual (applies only to certain legal works) <sup>5</sup>
Artistic works (not including photographs or engravings)	Life of author plus 50 years s32 Anonymous works: 50 years after publication s34	Extended to life plus 70 years. Anonymous: 70 years after publication (includes photographs)	50 years after the end of the year when work is made s180(2)	-
Photographs	Photographs: 50 years after publication s33(6)	s33(6) repealed – duration for photographs to be same as for other artistic works.	50 years after publication s180(3)	-
Engravings	Life of author plus 50 years. If unpublished when author dies, 50 years after publication s33(5)	If unpublished when author dies, 70 years after publication	50 years after publication s180(3)	

<sup>28</sup> Subsections 180(1)-180(3).

Type of work	Prior to 1 Jan 2005 under the general provisions of Copyright Act	By virtue of US FTA Act (commenced 1 Jan 2005)	Part VII provisions <sup>2</sup>	Prerogative
Sound recordings & films	50 years after publication ss 93–4	70 years after publication	50 years after publication s181	-
Broadcasts	50 years after the end of the year of making s95	unchanged	-	-
Published editions	25 years after publication s96	unchanged	-	-

#### Notes to Table 2

- References to ‘after publication’ mean after the end of the year of publication
- Includes not only material in which the Crown owns copyright, but material in which the Crown would own copyright but for a contrary agreement under section 179.
- Where the author of a literary work (other than a computer program), a dramatic or musical work dies before publication, copyright in the work continues to subsist until 50 years after the end of the year of publication (section 33(3)).
- Section 34 also applies to pseudonymous works. The section does not apply where the author’s identity is generally known or can be ascertained by reasonable inquiry.
- As discussed in Chapter 6.

## History of Crown copyright

3.17 Australian copyright law has its origins in English law, with the current Copyright Act being heavily based on the *Copyright Act 1956* (UK). Consequently the Committee considered it useful to examine the origins and development of copyright law and policy in England and Australia, as part of considering whether the provisions are appropriate today.

### A brief history of copyright law in England

3.18 Concern about the copying of written works first became significant in England in the late 15<sup>th</sup> century with the introduction of the printing press.<sup>29</sup> The Crown recognised the importance of the new technology and maintained a close interest in it from its beginnings. While foreign printers and booksellers were initially encouraged to come to England, by the first part of the 16<sup>th</sup> century there was growing resentment at foreign competition. Statutes against foreign competition in 1523 and 1529 included printers and booksellers, and in 1533 the importation and retailing of foreign books was banned.

3.19 During this time, the Crown's interest in printing moved from trade issues to censorship of material, particularly in relation to issues of religion. Under a proclamation by Henry VIII in 1538, the printing of any English book was banned unless it had been examined and licensed by the King and Privy Council. Later a charter was granted to the Stationers' Company, a group of letter writers, illuminators, bookbinders and booksellers. Star Chamber Decrees in 1566 and 1586 gave the Stationers' Company more specific powers in relation to censorship, including requiring registration of and limitations on the number of printing presses.

3.20 From the beginning of printing in England, the Crown granted privileges (that is, exclusive rights to print and publish books), its power to do so being based on the royal prerogative. These Crown grants, and the system of control

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<sup>29</sup> For a more detailed discussion of the development of copyright law, see S Ricketson & C Creswell, *The law of intellectual property: copyright, designs and confidential information*, paras 3.40–365; J Lahore & W Rothnie, *Copyright and Designs*, Butterworths, paras 4041–220.

exercised by the Stationers' Company, were at the basis of a recognition of property rights in books. By the beginning of the 18<sup>th</sup> century, censorship ceased to be a significant factor in the development of copyright law, and its focus became the recognition of property in printed works.

3.21 The first modern copyright law was the Statute of Anne in 1709, which granted authors of books a limited copyright of 28 years,<sup>30</sup> consisting of the exclusive right to print and publish them in England. The preamble to that Act described it as 'an act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies'.<sup>31</sup>

3.22 The Statute of Anne did not specifically refer to the Crown, but the Crown was entitled to own copyright material under general copyright principles.

3.23 Crown copyright became a focus of increased interest or debate in the 1880s.<sup>32</sup> At this time a few private sector publishers began to realise the commercial potential of some of the titles of more general interest being issued by Her Majesty's Stationery Office (HMSO) and made reproductions of this material.<sup>33</sup> On advice from the Crown's law officers, the Treasury published a notice in the London Gazette of 23 November 1886:

Printers and Publishers are reminded that anyone reprinting without due authority matter which has appeared in any Government publication renders himself liable to the same penalties as those he might under like circumstances have incurred had the copyright been in private hands.<sup>34</sup>

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<sup>30</sup> That is, an initial term of 14 years with an additional term of the same length. Works already published when the Statute of Anne was enacted were given a term of 21 years.

<sup>31</sup> The preamble continues: 'Whereas Printers, Booksellers and other Persons have of late frequently taken the Liberty of printing, reprinting and publishing, or causing to be printed, reprinted and published, Books and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For preventing therefore such Practices for the future, and for the Encouragement of learned Men to compose and write Books.' See Ricketson & Creswell, *op cit*, para 3.125.

<sup>32</sup> G Robbie, 'Crown copyright – bete noire or white knight?', 2 *Journal of Information Law and Technology*, 1996, p. 1.

<sup>33</sup> *ibid.*

<sup>34</sup> *ibid.*

3.24 The Lords of the Treasury later remarked:

My Lords see no reason why such works – often produced at considerable cost – should be reproduced by private enterprise for the benefit of individual publishers.<sup>35</sup>

3.25 These quotes illustrate that the fiscal value of government information, which had been recognised early in the development of the prerogative right, became the focus of greater attention around that time.<sup>36</sup>

3.26 Copyright protection was successively extended by statute in relation to new types of subject matter during the 18th, 19th and 20th centuries, often in response to direct lobbying from interested groups such as record manufacturers and broadcasters.<sup>37</sup> As a result, English copyright law was described in 1977 as:

... a modest Queen Anne house to which there have since been Georgian, Victorian, Edwardian and finally Elizabethan additions, each adding embellishments in the style of the times.<sup>38</sup>

## Copyright law in Australia

3.27 Prior to federation, the colonies of Victoria, New South Wales, South Australia and Western Australia passed copyright Acts during the late 1800s. These Acts were supplementary to the Imperial Acts that were in force and only applied to works created in the colonies. In 1905 the first Commonwealth copyright law was passed, but it was short-lived and made no provision for Crown copyright.

3.28 In 1911 the UK enacted new copyright legislation, which brought together for the first time its piecemeal legislation on copyright for different

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<sup>35</sup> *ibid.*

<sup>36</sup> See also J Gilchrist, ‘The Office of King’s Printer and the commercial dissemination of government information’, *Canberra Law Review* vol 7, 2003, pp. 145–79, at 155–60.

<sup>37</sup> Lahore & Rothnie, *op cit*, paras 4090–135; Ricketson & Creswell, *op cit*, paras 3.230–285.

<sup>38</sup> Committee to consider the law on copyright and designs (Whitford Committee), *Copyright and designs law: Report of the Committee to consider the law on copyright and designs*, Chairman the Hon Mr Justice Whitford, Cmnd 6732, HMSO, London, 1977, p. 3.

types of work. The enactment of the new legislation was also prompted by the UK's earlier accession to the Berne Convention, which required changes to its domestic laws. For the first time, statutory provisions specific to Crown copyright were included.

3.29 Shortly after the enactment of the 1911 UK Act, the Commonwealth passed the *Copyright Act 1912*, which repealed the 1905 Act and applied the 1911 UK Act in Australia from 1 July 1912.

### ***Crown ownership under the 1911 UK Act***

3.30 Section 18 of the 1911 UK Act provided that, without prejudice to any rights or privileges of the Crown, copyright in an original literary, dramatic, musical or artistic work prepared or published by or under the direction or control of 'His Majesty' or any government department belonged to His Majesty, subject to any agreement with the author, and would continue for fifty years from first publication.

### ***The 1956 UK Act***

3.31 Following a review in 1952 by the Gregory Committee,<sup>39</sup> the UK enacted new copyright legislation in 1956.<sup>40</sup> The provisions in relation to Crown copyright were expanded, with a major change being provision for the subsistence of Crown copyright in an unpublished work where the author was not a qualified person. Subsection 39(1) of the Act provided:

In the case of every original literary, dramatic, musical or artistic work made by or under the direction or control of Her Majesty or a Government department:

- (a) if apart from this section copyright would not subsist in the work, copyright shall subsist therein by virtue of this subsection, and

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<sup>39</sup> Copyright Committee *Report of the Copyright Committee*, Cmnd 8662, (Chairman H S Gregory), Board of Trade, 1952. While the report made recommendations on Crown use of copyright material, it did not address Crown ownership of copyright.

<sup>40</sup> *Copyright Act 1956* (UK).

(b) in any case, Her Majesty shall, subject to the provisions of this Part of the Act, be entitled to the copyright in the work.

3.32 The Act made similar provision for sound recordings and commercial films.<sup>41</sup> In addition, where a literary, dramatic, musical or artistic work was first published in the United Kingdom or in another country to which the Act extended, copyright vested in the Crown.<sup>42</sup> These provisions had effect subject to any contrary agreement between the Crown and the author.<sup>43</sup> Copyright continued to subsist in unpublished work until it was published and, in relation to published work, the term of the copyright was 50 years from the end of the year of publication.<sup>44</sup>

### ***The Copyright Act 1968 (Cth)***

3.33 Following the UK amendments in 1956, a committee chaired by Sir John Spicer examined Australian copyright law in 1958–9. The Spicer Committee briefly discussed section 39, noting:

The effect of this provision is that the Crown has copyright in works and articles made under its direction or control without regard to the nationality or residence of the ‘author’ or the place of first publication.<sup>45</sup>

3.34 The Spicer Committee recommended the enactment of a provision similar to section 39, to apply to the Crown in right of the Commonwealth and the States.<sup>46</sup>

3.35 The Attorney-General’s Second Reading Speech for the subsequent bill introduced in 1967 noted that the bill was based on the Spicer Committee’s

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<sup>41</sup> Subsection 39(4).

<sup>42</sup> Subsection 39(2).

<sup>43</sup> Subsection 39(6).

<sup>44</sup> Subsection 39(3).

<sup>45</sup> Committee to consider what alterations are desirable in the copyright law of the Commonwealth (Spicer Committee), *Report of the Committee appointed by the Attorney-General to consider what alterations are desirable in the copyright law of the Commonwealth*, Chairman Sir John Spicer, AGPS, Canberra, 1959, para 402.

<sup>46</sup> *ibid*, para 403.

recommendations. No specific comment on the Crown copyright provisions was made, other than the statement:

The position of the Crown is more clearly defined under the Bill than under the present law. The Crown will continue to have copyright in respect of works produced or published by it.<sup>47</sup>

3.36 The provisions in Part VII (Division 1) headed ‘Crown copyright’ are clearly closely modelled on section 39 of the 1956 UK Act.<sup>48</sup> This matter is discussed in more detail in Chapter 5.

### **Reviews of Crown copyright in other common law countries**

3.37 The Crown copyright provisions in Australia have not been reviewed since their passage in 1968. By contrast, such provisions have been reviewed and significantly modified in other common law countries such as the UK, Ireland and New Zealand. A review is also planned in Canada.

3.38 The law and practice in these countries is briefly outlined below.

#### ***United Kingdom***

3.39 In 1977 a committee chaired by Justice Whitford reviewed and recommended extensive changes to copyright and designs law.<sup>49</sup> Amongst other things, the Whitford Committee recommended the abolition of the special Crown copyright ownership provisions, particularly the ‘first publication’ provision.<sup>50</sup>

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<sup>47</sup> Hon Nigel Bowen QC MP, Attorney-General, ‘Copyright Bill 1967: Second Reading Speech’, *House of Representatives Hansard*, vol 55, 1967, p. 2334.

<sup>48</sup> See *Commonwealth of Australia v Oceantalk Australia* [1998] 34 FCA (Burchett J), discussed in more detail in Chapter 5.

<sup>49</sup> Whitford Committee, op cit.

<sup>50</sup> *ibid*, p. 155. The report also considered that the extent of what it termed ‘Bible rights’ (that is, the right in the UK to print the Authorised Version of the Bible and the Book of Common Prayer) might warrant further inquiry (p. 167).

3.40 In 1988 new legislation was finally passed. Under the *Copyright, Designs and Patents Act 1988* (UK), provision was still made for Crown ownership of copyright but its ambit was narrowed. The phrase ‘by or under the direction or control’ in the 1956 Act was replaced with a reference to works ‘by an officer or servant of the Crown in the course of his duties’.<sup>51</sup> A separate system of Parliamentary copyright was established<sup>52</sup> and copyright in Acts of Parliament and Measures of the General Synod of the Church of England was vested in the Crown.<sup>53</sup> Crown copyright arising from first publication was abolished.

3.41 During the 1990s the UK also reviewed the management of Crown copyright, releasing a Green Paper which posed various options including the abolition of Crown copyright in all or some of the material originated by government.<sup>54</sup> The subsequent White Paper<sup>55</sup> noted that while there was support for abolition of all Crown copyright and placing material in the public domain, there was strong opposition to this option. The paper referred to a ‘recognised’ need to ‘preserve the integrity and official status of government material’,<sup>56</sup> but did not explain the basis of that view.<sup>57</sup> Ultimately the Government determined to retain Crown copyright and provide for waivers for certain categories of information within a ‘light touch’ management regime.<sup>58</sup>

3.42 The White Paper concluded that, ‘subject to the copyright safeguard being in place to prevent misuse and to preserve the integrity of Crown material’, formal and specific licensing should not be necessary for certain categories of material. Those categories included primary and secondary legislation;

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<sup>51</sup> Section 163. Crown copyright subsists for a term of 125 years from the end of the calendar year in which it was made or, where the work is published commercially within 75 years from which it was made, for a term of 50 years from the end of the calendar year in which it was published.

<sup>52</sup> Sections 165 and 166. It includes copyright in works by employees of the Parliament and in bills.

<sup>53</sup> Section 164. Copyright subsists from Royal Assent for a period of 50 years. Subsection 164(4) specifically excludes prerogative rights from subsisting in Acts of Parliament or Measures.

<sup>54</sup> Minister for the Cabinet Office, *Green Paper: Crown copyright in the information age*, HMSO, London, 1998.

<sup>55</sup> Minister for the Cabinet Office, *The future management of Crown copyright*, Cm 4300, HMSO, 1999.

<sup>56</sup> Para 5.1.

<sup>57</sup> The White Paper also referred to the general perception that Crown copyright ‘operates as a brand or kitemark of quality indicating the status and authority of much of the material produced by government’ (ibid, para 5.1).

<sup>58</sup> Para 5.1.

government forms; government consultative mechanisms; published papers of a scientific, technical or medical nature; unpublished records which are available to the public; and the text of ministerial speeches and articles.<sup>59</sup>

### **Other common law countries**

3.43 Ireland has very similar legislative provisions to the UK in relation to government ownership of copyright in material made by officers in the course of their duties, and separate parliamentary copyright.<sup>60</sup>

3.44 In New Zealand,<sup>61</sup> the Crown owns copyright in works ‘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).<sup>62</sup> Copyright does not subsist in various legal, parliamentary and other materials: Bills, legislation, regulations, bylaws, parliamentary debates, reports of select committees, judgments of any court or tribunal, and reports of commissions or inquiries.<sup>63</sup> These works are in the public domain.

3.45 The New Zealand Government has a statutory duty to make legislation available to the public under section 4 of the *Acts and Regulations Publication Act 1989* (NZ). The Chief Parliamentary Counsel is responsible for arranging the printing and publication of copies of Acts and regulations, copies of reprints of Acts and regulations and reprints of Imperial Acts that have effect as part of the laws of New Zealand. A common law duty to make legislation available to the public was also referred to in *VUWSA v Government Printer* [1973] 2 NZLR 21, at 23, where Wild CJ stated, ‘I think it can be accepted that the Crown is broadly responsible for making the text of enactments of the

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<sup>59</sup> Paras 5.1 – 5.13.

<sup>60</sup> *Copyright and Related Rights Act 2000* (Ireland), Chapter 19, discussed further in Chapter 5. The provisions replace section 51 of the former *Copyright Act 1963* (Ireland) which contained the ‘direction or control’ test.

<sup>61</sup> *Copyright Act 1994* (NZ).

<sup>62</sup> Section 26. Copyright subsists for 25 years in the case of typographical arrangements of a published edition and 100 years from the end of the calendar year in which it was made in the case of all other works.

<sup>63</sup> Section 27. This provision was drafted so that the material listed would be brought into force by Order in Council at an appropriate date.

Legislature available for public information. People must be told what Parliament is doing and must be able to read the letter of the law.’

3.46 The New Zealand Parliamentary Counsel Office has established a Public Access to Legislation Project which is designed to improve the public’s access to New Zealand legislation. The object of the project is to provide access to current official legislation in both printed and electronic form. The electronic forms are to be available free from the Internet, while printed copies will still be available for purchase.<sup>64</sup> The implementation of the project has been delayed and thus it is difficult to determine the full impact of this project.

3.47 In Canada, review of the Crown copyright provisions is envisaged within the next few years as part of a broad review of copyright law.<sup>65</sup> The current legislation is very similar to the former UK provisions, whereby ‘Her Majesty’ owns copyright in any work prepared or published by or under the direction or control of Her Majesty or any government department (subject to contrary agreement with the author), for a term of 50 years from first publication.<sup>66</sup>

3.48 A previous Canadian review in 1995 by the Information Highway Advisory Council<sup>67</sup> recommended that while Crown copyright should be retained, a ‘more liberal approach’ should be taken to making Crown works available to the public.<sup>68</sup> In particular, the review recommended that:

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<sup>64</sup> See <http://www.pco.parliament.govt.nz/pal/>.

<sup>65</sup> In October 2002, in accordance with a statutory requirement to report to Parliament on the operation of and recommended reforms to the Copyright Act, the Canadian Minister of Industry tabled *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act*. The report identified and prioritised issues that have remained outstanding since 1997, as well as new issues. Crown copyright was listed as a medium term issue for review within 2 to 4 years, but as at September 2004 was not considered a priority (correspondence from M. Jean-Paul Boulay, Copyright Policy Branch, Canadian Heritage, dated 29 September 2004). The reform process is also subject to review by a federal parliamentary committee.

<sup>66</sup> *Copyright Act 1985 C-42* (Can), section 12. Section 12 is expressed to be ‘without prejudice to any rights or privileges of the Crown’.

<sup>67</sup> Information Highway Advisory Council, *The challenge of the information highway*, Industry Canada, Ottawa, 1995. The review considered whether Crown copyright was appropriate in light of the principle of ensuring that the Internet provides universal and easy access to information (p. 37).

<sup>68</sup> *ibid.*, p.116.

- the Crown in right of Canada should, as a rule, place federal government information and data in the public domain,<sup>69</sup> and
- where Crown copyright is asserted to generate revenue, licensing should be based on the principles of non-exclusivity and the recovery of no more than the marginal costs of reproducing the information or data.<sup>70</sup>

3.49 In relation to legislative and judicial materials in Canada, a Federal Law Order issued in 1997 provides that anyone may reproduce federal legislative and judicial materials, provided that ‘due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version’.<sup>71</sup>

### The United States of America

3.50 The United States of America (US) is in a different position from other common law countries in that copyright protection is ‘not available for any work of the United States Government’.<sup>72</sup> The phrase ‘work of the United States Government’ is defined as ‘a work prepared by an officer or employee of the United States Government as part of that person’s official duties’.<sup>73</sup> With limited exception,<sup>74</sup> neither the federal US government, nor the government employee creator, can own copyright in work created by the government or the employee. However, the United States Government may receive or hold copyright ‘transferred to it by assignment, bequest, or otherwise’.<sup>75</sup>

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<sup>69</sup> *ibid.*, Recommendation 6.7(b).

<sup>70</sup> *ibid.*, Recommendation 6.7(c).

<sup>71</sup> Canada Federal Law Order SI/97-5, 8 January 1997.

<sup>72</sup> Section 105 of the US Copyright Act.

<sup>73</sup> Section 101.

<sup>74</sup> Section 105 does not apply to works of the United States Postal Service: see US House of Representatives Committee on the Judiciary, *Legislative history for Copyright Act of 1976: Notes of the Committee on the Judiciary*, House Report No 94-1476 (1994).

<sup>75</sup> Section 105. Whether copyright subsists in works prepared under government grant or contract is to be determined in particular circumstances by specific legislation, agency regulations or contractual restrictions (see US House of Representatives Committee on the Judiciary, *op cit*).

3.51 In addition, the United States Supreme Court has held that copyright does not subsist in primary legal materials. In *Banks v Manchester*<sup>76</sup>, for example, the court held that copyright does not subsist in judgments as they are ‘the authentic exposition and interpretation of the law’. The court held that given that the law is binding on citizens, and that citizens are presumed to know the law, everyone should have free access to the law.

3.52 The US Copyright Act does not apply to US State governments and the scope of copyright protection for government works can vary greatly between States. For example, many States protect copyright in compilations of statutes, while others claim copyright in statutory codes. The State of Virginia expressly claims copyright in statutes, whereas the State of Illinois has placed statutes in the public domain.<sup>77</sup> There is inconsistency between the common law denial of copyright protection of basic legal texts and some State legislation claiming copyright in that material.

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<sup>76</sup> 128 US 244 (1888).

<sup>77</sup> See I Dmitrieva, ‘State ownership of copyrights in primary law materials’, *Hastings Communications and Entertainment Law Journal*, vol. 23, 2000, p. 81.

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## Chapter 4

### Public policy issues

4.01 The terms of reference require the Committee to consider, amongst other things, the social and economic objectives of government ownership of copyright material. This chapter examines a range of relevant public policy issues:

- competition policy;
- the copyright balance;
- other policy issues, including providing an incentive to create, ensuring access to government material, protecting its integrity and allowing its cost-effective management; and
- consideration of whether government needs to own copyright in commissioned works to achieve its aims.

#### **Competition policy – the Ergas Committee’s report**

4.02 As noted in Chapter 1, a key factor for this inquiry was concern about the interaction between government ownership of copyright and competition policy. As outlined in Chapter 3, there were no specific Crown copyright provisions until the 1911 UK Act. Apart from the prerogative right, the Crown held the same rights as any other copyright owner.

4.03 In 2000 the *Review of Intellectual Property Legislation under the Competition Principles Agreement* (the Ergas Committee) examined the effect of government ownership of copyright in light of principles of competitive neutrality. The Competition Principles Agreement was signed by all Australian governments in 1995 and the objective of competitive neutrality is set out in subclause 3(1):

The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net *competitive* advantage simply as a result of their public sector ownership. These

principles apply only to the business activities of publicly owned entities, not to the non-business, non-profit activities of those entities.

4.04 Clause 3 allows governments discretion to determine their respective competitive neutrality policies.<sup>1</sup> The Queensland Government stated:

In essence, how competitive neutrality is applied is up to each government and its application varies widely across jurisdictions. Competitive neutrality does not apply to all government businesses – only to those where governments elect to do so.<sup>2</sup>

4.05 The Ergas Committee in applying competitive neutrality principles to government ownership of copyright stated that section 176 (which gives the government ownership of copyright in material made under its direction or control):

...places government in a more favourable position than other contractors or employers who only become copyright owners under an assignment in writing, or subject to the terms of a contract of employment (implied or otherwise).<sup>3</sup>

4.06 Accordingly the Ergas Committee recommended that section 176 be amended to place the government in the same position as any other contracting party. The Commonwealth Government's response stated that while it accepted that government should not benefit from unjustified preferential treatment, it would first look at developing best practice policy guidelines for Crown ownership of copyright rather than change the legislation, on the basis that this measure 'could be more immediately effective and serve as a model for other jurisdictions'.<sup>4</sup> During this inquiry, this view was supported by the Bureau of Meteorology, which opposed any legislative change on the basis that policy could be adapted more quickly than legislation to suit a changing environment.<sup>5</sup>

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<sup>1</sup> National Competition Council, *Competitive Neutrality: Scope for Improvement*, June 2002, p. 5.

<sup>2</sup> Submission 71, p. 8.

<sup>3</sup> Ergas Committee, op cit, p. 113.

<sup>4</sup> See: [www.ipaustralia.gov.au/pdfs/general/response1.PDF](http://www.ipaustralia.gov.au/pdfs/general/response1.PDF).

<sup>5</sup> Submission 18, p. 1.

### **Evidence to the Committee on the Ergas recommendation**

4.07 Several submissions to the Committee, particularly those from State governments, argued that the Ergas Committee did not explore the issue of Crown copyright in depth and that its recommendation should not apply across the board to all government activities.

4.08 For example, the Queensland Department of Natural Resources, Mines and Energy argued that the Ergas Committee's consideration of section 176 did not go beyond the situation where government commissions the production of copyright material by an independent contractor, such as an architect or artist. The Department argued that section 176 applies in a much broader range of circumstances and that different policy considerations may arise depending on how and why materials are produced by or for government:

The competition considerations arising in the circumstances on which the [Ergas Committee] based its recommendation cannot be assumed to be of equal relevance or significance – if indeed they are relevant or significant at all – across the wide range of circumstances in which governments may be vested with first ownership of copyright by virtue of s 176.<sup>6</sup>

4.09 The NSW Attorney General's Department noted that the Competition Principles Agreement refers only to 'government businesses' and 'government business enterprises', and argued that, depending on how those terms are construed:

... the observations of the Ergas Committee may apply not to the government-as-a-whole but only to discrete portions of government.<sup>7</sup>

4.10 On a separate point, the Queensland Government argued that the effect of the first ownership provisions 'in practice ... would be negligible and would not be sufficient to warrant repeal or amendment of those sections'.<sup>8</sup> The NSW Attorney General's Department also questioned whether government benefited under section 176 from a net competitive advantage:

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<sup>6</sup> Submission 65, p. 3.

<sup>7</sup> Submission 57, p. 10.

<sup>8</sup> Submission 71, p. 9.

The government is not competing in a market with private owners of copyright. While the government's ownership of copyright in material made under its 'direction or control' is automatic under s.176, it is open to debate that s.176 thereby confers a 'net competitive advantage' on the government.<sup>9</sup>

4.11 However, the NSW Government did concede that there may be situations where the Crown copyright provisions should not apply:

One such area may be in relation to government business enterprises which are removed from the 'core' functions of government where competitive neutrality issues might come into play. Many of the businesses may not have the benefit of the Crown copyright as they no longer represent the Crown, for example, State Owned Corporations, or because copyright issues would be dealt with through commercial negotiations.<sup>10</sup>

4.12 While the Ergas Committee recommendations may provide reasons for abolishing or amending the Part VII provisions, the Committee considers there are other policy considerations that justify the same conclusion.

### **The copyright balance**

4.13 Copyright law has long been considered to be a balance of competing policy objectives. There have been various expressions of what an appropriate balance should be. The preamble to the *World Intellectual Property Organisation (WIPO) Copyright Treaty* recognises a need to balance the following interests:

... the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.<sup>11</sup>

4.14 There have been similar formulations by copyright law reform bodies in Australia. The Spicer Committee in 1959 described copyright law as a balance

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<sup>9</sup> Submission 57, p. 11.

<sup>10</sup> Submission 56, p. 5.

<sup>11</sup> Preamble, WIPO Copyright Treaty (WCT) 1996.

between providing rewards and incentives for creators, and ensuring that monopoly rights are not abused and that research and education are not restricted.<sup>12</sup> In 1976 the Copyright Law Committee on Reprographic Reproduction (the Franki Committee) acknowledged the Spicer Committee's formulation and considered that the development of reprographic reproduction had affected that balance:

A tension has therefore developed between the expectations of many copyright owners that they should benefit from the greater availability of their works, on the one hand, and the needs of the community, on the other, for ready access to information and knowledge.<sup>13</sup>

4.15 The Copyright Law Review Committee in 2002 described the copyright balance as one between encouraging competition and providing incentives to innovation and creativity on the one hand, and ensuring access to information on the other,<sup>14</sup> and this Committee agrees with that description. The Committee also acknowledges that the development of digital technology has led to debate over what the appropriate balance is, in light of new means of access which may allow unauthorised high quality reproductions but also allow access to be restricted.<sup>15</sup>

## Policy issues

4.16 As noted in the previous chapter, most submissions were in favour of government owning copyright in all works and subject matter covered by the Copyright Act. In particular, most government departments and agencies supported government ownership of copyright material produced by all three arms of government: the executive, legislature and judiciary. As the Committee noted in its Discussion Paper,<sup>16</sup> reasons advanced in support of this position include the following:

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<sup>12</sup> Spicer Committee, para 13.

<sup>13</sup> Copyright Law Committee on Reprographic Reproduction (the Franki Committee), *Report of the Copyright Law Committee on Reprographic Reproduction*, Chairman the Hon Justice Franki, AGPS, Canberra, 1976, p. 10.

<sup>14</sup> Copyright Law Review Committee *Copyright and contract*, CLRC, Canberra, 2002, p. 13.

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.*, para 11.

- government ownership of copyright is the best way of ensuring the integrity of government material;
- it also ensures public access regardless of commercial considerations;
- abolishing government ownership of copyright will increase costs;
- governments should be able to control the dissemination of material they produce;
- copyright royalties provide an additional means of funding government functions;
- Crown copyright supports industry development; and
- Crown copyright fosters a competitive market for information.

4.17 Others disagreed with some or all of those justifications. They are discussed in more detail below.

### **The range of material may affect policy considerations**

4.18 Integral to the Committee's examination of public policy considerations in government copyright is the scope of material in which copyright is owned. As noted in Chapter 2, given the extensive range of modern government functions, copyright can subsist in a broad range of government material to which different policy considerations may apply. As the Australian Information Industry Association (AIIA) stated:

The government has an obligation to make the most effective use of its copyright material. In some cases, this may require strict controls to protect the value of the material. In other cases, this may require widespread availability to the community whose taxes have paid for its creation or acquisition.<sup>17</sup>

4.19 Different categories of material can be distinguished on the basis of the public interest in their dissemination:<sup>18</sup>

- material where there is a clear public interest in providing the widest possible dissemination, including primary legal materials (the focus of

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<sup>17</sup> Submission 21, p. 12.

<sup>18</sup> See J Gilchrist, 'The role of government as proprietor and disseminator of information' *Australian Journal of Corporate Law*, 1996, vol 7, 62–79, at 63–4.

much comment in submissions). Many other government materials are produced to encourage public discussion and education, promote community standards and facilitate public access to government services;

- other material, such as historical material, where the public interest in dissemination is not as strong; and
- unpublished material, such as submissions to ministers and particular databases. Access to unpublished material is governed to some extent by freedom of information and privacy laws, as well as archives legislation.

4.20 Not all parties agreed with this breakdown. For example, during consultations with State governments, a suggested alternative analysis was to consider the type of government agency which was involved, ranging from core government departments to those which have a commercial focus, such as government trading enterprises. Others argued that all materials were created for government purposes, with commercial exploitation of materials being an offshoot of their creation rather than their purpose.

4.21 These different perspectives underline the difficulty of making policy determinations across the board without considering the implications for different types of material and different government functions. The Committee considers that they also raise questions about the desirability of maintaining a favoured position for government in all circumstances currently covered by the special Crown ownership provisions in Part VII of the Copyright Act.

4.22 Key policy issues are explored in more depth below:

- providing an incentive to create;
- ensuring access to government copyright material, including the relationship between copyright and freedom of information (FOI) and archives legislation;
- ensuring the integrity of government information;
- allowing cost-effective management of government material; and
- whether government needs to own copyright to achieve any or all of these aims.

### **Providing an incentive to create**

4.23 The Committee considers that the traditional balance between rewarding creators and protecting the rights of users is not necessarily relevant to all government copyright material. The Committee noted in its Issues Paper that it is difficult to see how copyright provides an incentive for government to create in many cases, given that government is bound to carry out its functions.<sup>19</sup> In 1992 the Prices Surveillance Authority recommended that Crown copyright in legislation and related materials be abolished, one of its key reasons being that:

Copyright monopoly rights are not necessary to ensure incentive for adequate development of such information. It is information produced using public money to facilitate government. Such information should be freely available.<sup>20</sup>

4.24 However, some submissions argued that this reasoning may not apply equally to all material in which the government claims copyright. The NSW Government stated that financial reward may be relevant to government:

While government material is produced using public money, without copyright protection there is a risk that some of this material will no longer be produced. In some cases government will be exposed to risk in developing certain material (required by the public) because it might be unable to recoup any costs incurred.<sup>21</sup>

4.25 The Western Australian Department of Industry and Resources argued:

... if governments generate copyright material the rights afforded as a reward for creativity can be utilised or commercialised for the benefit of the people ... [T]o remove copyright protection from government generated materials or to provide a lesser level of copyright protection ... would destroy or seriously damage a potentially valuable driver of economic development in Australia.<sup>22</sup>

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<sup>19</sup> Para 77. The Committee also noted that this argument may equally apply to non-government authors.

<sup>20</sup> Prices Surveillance Authority, *Inquiry into the publications pricing policy of the Australian Government Publishing Service*, 1992, p. 92.

<sup>21</sup> *Submission 56*, p. 10.

<sup>22</sup> *Submission 35*, p. 2.

4.26 During the Committee's consultations representatives of the Victorian Government noted that production costs can be offset by money recouped through copyright, enabling enhancements to formatting or upgrading of websites. If production costs were too high and government was unable to recover any funds, the quality of publication might be reduced, although representatives stated that it would be rare that government would decide not to publish at all.<sup>23</sup>

### **Ensuring access to government copyright material**

4.27 An essential characteristic of modern democracy is open access to government information. This has been increasingly recognised through a range of reforms such as the introduction of freedom of information (FOI) legislation throughout Australia in the past two decades.<sup>24</sup>

4.28 A generally accepted principle of copyright law is that copyright does not protect information but only the particular form in which information is expressed: that is, there is a clear division between ideas and their expression. However, this categorisation has been subject to criticism.<sup>25</sup> Ms Judith Bannister, lecturer in law at Flinders University, submitted that the idea/expression dichotomy did not always operate well in practice in relation to government copyright and that, on occasion, open access to government information requires the work itself to be reproduced.<sup>26</sup>

4.29 Other submissions, including the Administrative Review Council (ARC),<sup>27</sup> argued that governments should not use copyright to restrict access to government documents. However, it is clear that copyright has been used in this

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<sup>23</sup> CLRC Consultation, Melbourne, 24 August 2004.

<sup>24</sup> See Australian Law Reform Commission *Open government: A review of the federal Freedom of Information Act 1982*, ALRC, 1995, chapter 2. The 1982 federal legislation was the first national freedom of information legislation in a country with a Westminster style of responsible government (para 2.1).

<sup>25</sup> For example, Ricketson & Creswell *op cit*, para 4.65; Lahore & Rothnie *op cit*, para 6030. See also *Desktop Marketing Systems v Telstra* (2002) 55 IPR 1 in relation to copyright protection available for databases.

<sup>26</sup> *Submission 58* (unpublished).

<sup>27</sup> *Submission 69*, p. 2.

way. In *Commonwealth v Fairfax*,<sup>28</sup> the High Court granted an interim injunction to restrain the publication of certain documents produced by the Department of Defence and Department of Foreign Affairs on the basis that publication would be a breach of copyright.<sup>29</sup> The case has been criticised as a ‘poor exercise of government copyright’:

... because it was essentially used for an ulterior purpose, that of preserving the confidentiality of documents. In the governmental sphere this is more appropriately dealt with by specific laws dealing with disclosure ...<sup>30</sup>

4.30 Moreover, as the Australian Law Reform Commission (ALRC) noted in its recent report on protecting classified and sensitive information,<sup>31</sup> this action did not protect the information, with much of the content of the documents being subsequently published in summary form.<sup>32</sup> More recently, copyright is also reported to have been asserted in attempting to address the unauthorised release of a police video of the Port Arthur massacre.<sup>33</sup>

4.31 Submissions varied on how access to government information may be ensured where there is an identifiable public interest in making that information widely available.<sup>34</sup> Some submissions suggested retaining Crown copyright but introducing statutory exceptions or blanket licences. Others suggested abolishing copyright in certain material, particularly primary legal material

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<sup>28</sup> (1980) 147 CLR 39.

<sup>29</sup> The Commonwealth argued for an interim injunction on three grounds: that it was the owner of the copyright in most of the documents in the book; that publication should be restrained on the basis that the documents contained confidential information whose disclosure would prejudice Australia’s relations with other countries; and that disclosure would involve an offence against section 79 of the *Crimes Act 1914* (Cth). Mason J declined to grant an injunction on the last two grounds, but granted it on the basis of copyright.

<sup>30</sup> J Gilchrist, ‘The role of government as proprietor and disseminator of information’ op cit, p. 62.

<sup>31</sup> ALRC *Keeping secrets: the protection of classified and security sensitive information*, Report 98, ALRC, 2004, para 5.7.

<sup>32</sup> *ibid*, citing R Walsh & G Munster, *State secrets: a detailed assessment of the book they banned, Documents on Australian Defence and Foreign Policy 1968–75*, 1982.

<sup>33</sup> R Wade, ‘Police probe on for video truth’, *The Mercury*, 2 September 2004, p.11, where it was reported that a person was threatened with prosecution under the Copyright Act for making and distributing unauthorised copies of the tape.

<sup>34</sup> For example, during the Committee’s public forum in Sydney on 27 July 2004, representatives of CAL argued that copyright does not necessarily restrict access but rather is a means to manage access, and that the relevant question to consider is how access should be managed.

where there is a strong public interest in wide dissemination. However, some expressed concern that removing copyright protection from government material would increase private ownership of copyright in published editions of works. This in turn may hinder access to that material. Consequently it has been argued that retaining copyright protection for all government material but providing exceptions or broad licences would be a preferable way of ensuring access.<sup>35</sup>

### ***The impact of new technologies on access***

4.32 Technological advances in the electronic storage and dissemination of information have had an impact upon access to government material in Australia and elsewhere. Governments have used the Internet and electronic databases to facilitate cheaper and more efficient access to government information. For example, the Commonwealth Government has developed *Scaleplus* to provide access to Commonwealth and Territory legislation.

4.33 The former National Office of the Information Economy (NOIE) developed an ‘e-government’ strategy for Commonwealth agencies. The strategy is designed to achieve the ‘era of fully-fledged e-government – in which the application of new technologies to government services, information and administration demonstrates sustained benefits to citizens, business and government itself.’<sup>36</sup> The strategy has six key objectives:

- achieve greater efficiency and a return on investments;
- ensure convenient access to government services and information;
- deliver services that are responsive to client needs;
- integrate related services;
- build user trust and confidence; and
- enhance closer citizen engagement.

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<sup>35</sup> For example, Professor Brian Fitzgerald, *Submission 17*, p. 2; ACC, *Submission 27*, p. 6. See also J Gilchrist, ‘The role of government as proprietor and disseminator of information’ op cit, p. 78.

<sup>36</sup> National Office of the Information Economy, *Better services, better government: The Federal Government’s e-Government strategy*, Canberra, 2002. The office was replaced in April 2004 by the Australian Government Information Management Office and in October 2004 that office was incorporated into the Department of Finance and Administration.

4.34 While new means of access facilitate the free flow of information, they also provide more scope for unauthorised reproduction and use. As the ALRC and AIIA noted, a balance must be found between the two interests.<sup>37</sup>

### ***International moves to improve access to government material***

4.35 While new technology has improved the accessibility of information for many people, it has also allowed the development of new protection measures that can restrict that access. Internationally there have been increased efforts to ensure public access to government copyright material. For example, the 1998 UK review of Crown copyright stated that the review was to facilitate ‘the growth of new information services in printed and electronic formats, in line with the Government’s policy of maximising public access to official information, and subject to the continuing need to protect the taxpayers’ interest and the integrity of Crown copyright materials.’<sup>38</sup>

4.36 In December 2003 the United Nations (UN) convened a world summit on the information society in Geneva.<sup>39</sup> At the Summit it was agreed that all stakeholders should work together to improve access to information and knowledge. This commitment by the UN and participating countries (including Australia) to build an information society with greater access to a rich public domain is particularly relevant.<sup>40</sup>

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<sup>37</sup> ALRC *Submission 3*, p. 3; AIIA *Submission 21*, p. 12.

<sup>38</sup> Minister for the Cabinet Office, *Green Paper*, op cit, p. 1.

<sup>39</sup> United Nations, ‘Draft Declaration of Principles’, *World Summit on the Information Society*, Geneva 2003.

<sup>40</sup> Hon D Williams MP (Minister for Department of Communications, Information Technology and the Arts), ‘Australia endorses global ICT action plan’, *Media release*, Canberra, 15 December 2003; National Office of the Information Economy, *World Summit on the Information Society*, accessed in March 2004 at <[www.noie.gov.au/projects/access/connecting\\_communities/wsis.htm](http://www.noie.gov.au/projects/access/connecting_communities/wsis.htm)>. Australia was represented at the summit by a delegation of government and community representatives, who highlighted the Australian Government’s programs to provide greater internet access in developing countries and regional communities. However, the Australian delegation did not address the possible effect of government ownership of copyright material on the dissemination of, and access to, information. The Australian Government has endorsed the Declaration of Principles.

4.37 In May 2001 the European Council and Commission adopted a Regulation on public access to European Parliament, Council and Commission documents.<sup>41</sup> The introduction of the Regulation indicated a growing awareness of the importance of promoting transparency and improving public access to institutions' documents.<sup>42</sup> In 2003 the European Commission passed a Directive to facilitate the re-use of public sector information held by public sector bodies of Member States.<sup>43</sup> The Directive is expressed not to affect the intellectual property rights of public sector bodies.<sup>44</sup>

4.38 In the last few years, there have also been increasing calls for open access to research studies, particularly scientific studies. The number of open-access journals has risen dramatically,<sup>45</sup> with open-access publishers charging authors a printing fee and making materials available on-line for free. According to an article published in late August 2004, Nobel Prize-winning scientists have asked the US government to make all taxpayer-funded research papers freely available.<sup>46</sup> The US Federal Government is reported to fund about 59 per cent of academic research and development.<sup>47</sup> The US House Appropriations Committee has reportedly issued a directive to make National Institute of Health-funded research available for free within six months of publication, beginning in 2005.<sup>48</sup>

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<sup>41</sup> Regulation (EC) 1049/2001 of 30 May 2001.

<sup>42</sup> At the time of introduction it was also expected that the Regulation would encourage citizens to participate in the decision-making process, thus ensuring greater legitimacy and accountability. One practical effect of the Regulation has been a lifting of fees charged for documents obtained from the Eur-Lex website, a single point of access to all the European Union's legislative instruments.

<sup>43</sup> Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (the Directive). The Directive is a response to the lack of uniformity regarding re-use of public information across Europe. Some countries have a policy of making all documents freely available while others are more restrictive in their approach.

<sup>44</sup> Recital 22 of the Directive. Member States must implement the Directive by 1 July 2005.

<sup>45</sup> Said to have increased from 5 in 1992 to 1200 in 2004 (D Vergano 'Scientists want research papers freely available', *USA Today*, 29 August 2004, at [http://www.usatoday.com/news/science/2004-08-29-free-research\\_x.htm](http://www.usatoday.com/news/science/2004-08-29-free-research_x.htm), accessed on 1 September 2004).

<sup>46</sup> In a letter to Congress and the National Institute of Health, the researchers object to barriers that hinder the spread of scientific knowledge supported by federal tax dollars. See D Vergano, *op cit*.

<sup>47</sup> *ibid*, citing the National Research Council. Universities are said to fund 20 per cent and state and local government 7.1 per cent.

<sup>48</sup> *ibid*. Some publishers are said to strongly disagree with the plan.

4.39 Some submissions raised the issue of open access, including the Council of Australian State Libraries (CASL),<sup>49</sup> Queensland University of Technology law Professor Brian Fitzgerald<sup>50</sup> and the Australian Digital Alliance/Australian Libraries' Copyright Committee (ADA/ALCC).<sup>51</sup> Professor Fitzgerald argued that open access did not require the abolition of Crown copyright:

Ten years ago the question would have simply been whether the Crown should or should not have copyright? Many advocating for no Crown copyright would have been seeking open access to information.

Today ... [i]t is arguable that a broader and more robust information commons can be developed by leveraging off your copyright rather than merely “giving away” material.<sup>52</sup>

4.40 Professor Fitzgerald supported the retention of Crown copyright in order ‘to strategically manage Crown copyright either in a closed manner for maximum economic reward or in an open fashion for maximum public access’:

The copyright becomes the key tool in managing downstream usage – open or closed. A proposal that the Crown does not have any rights to copyright material would in effect reduce the ability of the Crown to structure user rights and otherwise manage information.<sup>53</sup>

4.41 Professor Fitzgerald conceded that for an open licensing system to be effective, government policy and information management systems would need to be ‘clearly articulated ... and where necessary legislatively reinforced’.<sup>54</sup>

### ***Materials which should be freely accessible***

4.42 A substantial number of submissions argued that copyright in legislation and other primary legal materials should be abolished, with some suggesting

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<sup>49</sup> *Submission 30.*

<sup>50</sup> *Submission 17.*

<sup>51</sup> *Submission 19.*

<sup>52</sup> *Submission 17*, p. 1.

<sup>53</sup> *Submission 17*, p. 2.

<sup>54</sup> *ibid.*

that certain executive materials should be treated in the same way. There has been a growth in availability of legal information through a network of legal information institutes that provide free online access.<sup>55</sup> The legal information institutes argue that maximising public access to this information promotes justice and the rule of law, and that public legal information is digital common property which should be accessible to all on a non-profit basis and free of charge.<sup>56</sup>

4.43 Submissions that supported the placement of certain material in the public domain referred in particular to legal material. For example, the Australasian Legal Information Institute, AustLII, identified a class of ‘public legal material’ (legislation, judicial decisions, law reform and Royal Commission reports) that it considered should be in the public domain.<sup>57</sup> The Law Council of Australia submitted that copyright should not subsist in materials created by the judicial, legislative and at least certain parts of the executive arms of government.<sup>58</sup> Similarly, the ABC submitted that ‘[m]aterial directly relevant to the Government’s public functions, such as parliamentary documents and court judgments’ should not be subject to copyright.<sup>59</sup> The Flexible Learning Advisory Group (FLAG) also argued that the principle that legal materials should be freely available was ‘most fully reflected in a regime which treats such documents as copyright free’, while noting its view that the effect of such a change would be more symbolic than practical.<sup>60</sup>

4.44 Former Chief Justice of the Supreme Court of New South Wales Sir Laurence Street expressed concern in 1982 about the implications of having copyright in judgments:

On the technical question of whether judgments are the subject of copyright I offer no opinion. They may be; they may not be. But I am clear that they *ought*

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<sup>55</sup> Such as the Australasian Legal Information Institute, AustLII, a joint facility of the University of Technology Sydney and University of New South Wales Faculties of Law with private and public funding.

<sup>56</sup> ‘Declaration on free access to law’, Law via the Internet Conference, Montreal, October 2002, as amended in November 2003, available at <http://www.worldlii.org/worldlii/declaration>.

<sup>57</sup> Submission 25, p. 1.

<sup>58</sup> Submission 33, p. 1–2.

<sup>59</sup> Submission 54, p. 1.

<sup>60</sup> Submission 46, p. 4.

*to be regarded as *publici juris* - available to all without restraint to be read, criticised, studied and understood. ... To my mind it is unthinkable that a judge who delivers a judgment should have power to order that it be not reproduced in the press or elsewhere. It is equally unthinkable that the Crown should have the power to suppress or forbid reproduction or quotation of a judgment in the press, in universities and elsewhere. The spectre of political censorship lurks not far behind assertions of copyright in judgments.*<sup>61</sup>

4.45 The Law Council of Australia and AustLII favoured amendment of the Copyright Act along the lines of the New Zealand legislation. As noted in Chapter 3, copyright does not subsist in New Zealand in bills, legislation, regulations, by-laws, parliamentary debates, reports of select committees, judgments, and reports of commissions or inquiries.<sup>62</sup> Other submissions such as the ACC<sup>63</sup> and the University of Melbourne<sup>64</sup> supported the principle that such materials should be freely available but argued that copyright in them did not necessarily need to be abolished.

4.46 However, AustLII argued that providing general licences for reproduction were not enough to promote greater access to legal information:

Without effective access to electronic data streams, no publisher today has any effective right to publish, as the cost and delay of conversion from paper copies precludes this alternative. Even if governments provide free access to law through government-run websites, we argue that this is not sufficient to protect the public interest – unless this also provides effective free access to the data for republication by other publishers.<sup>65</sup>

4.47 The Committee received submissions from some members of the judiciary about copyright in judgments. Chief Justice Black of the Federal Court of Australia submitted that copyright should not subsist in judgments,

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<sup>61</sup> Sir Laurence Street, Speech at the Opening of the Law Term Dinner, Sydney, 2 February 1982, quoted in Australian Law Journal, 'The Crown and copyright in publicly delivered judgments', editorial, Australian Law Journal, vol. 56, 1982, 327–8.

<sup>62</sup> Section 27 of the *Copyright Act 1994* (NZ).

<sup>63</sup> *Submission 27*, p. 6.

<sup>64</sup> *Submission 5*, p. 1.

<sup>65</sup> *Submission 25*, p. 6.

court rules, practice notes and notices to practitioners.<sup>66</sup> His Honour considered that because in a common law system part of the law is in judgments, they should be freely available, and stated that there is little chance of inaccurate reproduction in this electronic age. Alternatively, His Honour submitted that the Copyright Act should be amended to make it clear that copyright vests in the judges as authors of judgments, and to introduce a statutory licence for the reproduction of judgments without charge. In His Honour's view, a unilateral waiver by government 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>67</sup>

4.48 During the Committee's public forum in Sydney, the President of the Copyright Tribunal and judge of the Federal Court, Justice Lindgren, reinforced Chief Justice Black's view. His Honour noted that he did not consider that integrity of material was a reason to retain copyright in judgments, since Federal Court judgments were posted onto the Internet soon after delivery, and also because judgments were 'misused and misinterpreted every day'.<sup>68</sup> His Honour also queried the appropriateness of the Commonwealth Government having copyright in court publications, given the relationship between the judicial and the executive arms of government. Chief Justice Black's views were also supported by the President of the Australian Industrial Relations Commission<sup>69</sup> and the Hon Paul Seaman QC.<sup>70</sup>

4.49 However, these views were not universally shared by members of the judiciary. Chief Justice Doyle of the Supreme Court of South Australia thought it appropriate that copyright in materials produced by the judiciary be vested in the Crown. However, His Honour considered that the right should not be used to place inappropriate restrictions on the publication and dissemination of judgments. They should be able to be reproduced relatively freely, but it was

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<sup>66</sup> *Submission 61*, p. 2.

<sup>67</sup> *ibid.*

<sup>68</sup> CLRC Public forum, Sydney, 27 July 2004.

<sup>69</sup> Department of Employment and Workplace Relations (DEWR), *Submission 74*, p. 3.

<sup>70</sup> CLRC consultations, Perth, 20 August 2004. The Hon Paul Seaman QC is a retired judge of the Supreme Court of Western Australia.

not unreasonable to seek a return from those who publish for commercial gain.<sup>71</sup>

4.50 His Honour Judge McGill from the District Court of Queensland argued that there was ‘no obvious practical advantage’ in abolishing copyright in judicial materials, since judgments were currently widely disseminated. However, there could be unforeseen disadvantages:

Having ownership of judicial materials ... does not have to be inconsistent with having them readily available, but would be useful in discouraging inappropriate use of them.<sup>72</sup>

4.51 In addition to proposing that copyright in primary legal materials should be abolished, the Law Council of Australia submitted that copyright should not subsist in ‘at least certain parts of the executive arms of government’.<sup>73</sup> The Law Council of Australia proposed that copyright should be abolished in:

- 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>74</sup>

4.52 While the Department of Veterans’ Affairs stated that there were good public policy reasons for all executive material to be freely accessible to members of the Australian community, it noted that it had used copyright in relation to ‘some unfortunate experiences with the overseas use of material’. International agreements had allowed the Department to rely on copyright ownership to resolve the dispute.<sup>75</sup>

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<sup>71</sup> *Submission 39*, p. 1.

<sup>72</sup> *Submission 70*, p. 2.

<sup>73</sup> *Submission 33*, p. 1.

<sup>74</sup> *Ibid*, p. 3.

<sup>75</sup> *Submission 55*, p. 9.

### ***Relationship between copyright and FOI, privacy and archives legislation***

4.53 During its inquiry, the Committee sought views on the relationship between copyright law and other legislation that deals with access to information held by government, namely, FOI, archives and privacy legislation.

4.54 The ALRC noted that while FOI and privacy laws provide a means of regulating access to information held by government, ‘in practice this relates only to material not already in the public domain’. Consequently those laws have very limited impact on the use of material that is published or otherwise released to the public.<sup>76</sup> For unpublished government material in which there is an identifiable public interest in access, FOI law is more appropriate to regulate access.<sup>77</sup>

4.55 The Committee considers that the nexus between privacy law and copyright law is very limited, given that the purpose of the *Privacy Act 1988* (Cth) is to protect personal information about an individual against misuse.<sup>78</sup> Very few comments on privacy laws were received during this inquiry.

4.56 However, copyright law interacts to a limited extent with FOI and archives legislation in relation to the form of access to certain material in the possession of government. The extent of that interaction is discussed briefly below.

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<sup>76</sup> Submission 3, p. 3.

<sup>77</sup> Ms Judith Bannister, Submission 58 (unpublished).

<sup>78</sup> For example, Information Privacy Principles provide that government agencies shall not disclose a record containing personal information unless certain circumstances exist (such as the individual’s consent), and that personal information should not be used or disclosed for a purpose which is secondary to the primary purpose of collection unless certain circumstances exist: see section 14 of the *Privacy Act 1988* (Cth).

### ***Freedom of information***

4.57 The object of the *Freedom of Information Act 1982* (Cth) (the FOI Act) is to extend as far as possible the right of the Australian community to have access to information in the possession of the Commonwealth.<sup>79</sup> It does so by requiring Commonwealth agencies:

- to publish information about their operations, their powers affecting members of the public and their decision-making processes; and
- to provide access to documents in their possession unless the documents are within a specified exception or exemption. Exemptions are provided where necessary to protect essential public interests or the private or business affairs of others, including documents affecting national security, defence or international relations,<sup>80</sup> those containing material obtained in confidence<sup>81</sup> and those affecting personal privacy.<sup>82</sup>

4.58 Copyright law interacts with FOI law in a limited way, in that the *form* of access to material in the government's possession may be restricted if another party owns copyright.<sup>83</sup> The practical effect of this provision is, for example, that a document in which another party owns copyright may be made available by government for viewing, but not for copying.<sup>84</sup> Where access is provided by making a copy of the document, the requester may not deal with the work in a manner that would infringe the owner's copyright, whether the owner is government or another person.<sup>85</sup>

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<sup>79</sup> Freedom of Information Act 1982 (Cth), section 3.

<sup>80</sup> Freedom of Information Act 1982 (Cth), section 33.

<sup>81</sup> Freedom of Information Act 1982 (Cth), section 45.

<sup>82</sup> Freedom of Information Act 1982 (Cth), section 41.

<sup>83</sup> That party may object to disclosure under some of the exemption provisions, but a decision may still be made to release the material. See *Freedom of Information Act 1982* (Cth) s. 20(3); *Freedom of Information Act 1989* (NSW) s. 27(3); *Freedom of Information Act 1992* (Qld) s. 30(3); *Freedom of Information Act 1989* (ACT) s. 19(3); *Freedom of Information Act 1991* (SA) s. 22(2); *Freedom of Information Act 1982* (Vic) s. 23(3); *Freedom of Information Act 1992* (WA) s. 27(2). The Commonwealth Act, unlike those of the States, provides that this exception does not apply to matter that relates to the affairs of an agency or department.

<sup>84</sup> P J Bayne, *Freedom of information : an analysis of the Freedom of Information Act 1982 (Cth) and a synopsis of the Freedom of Information Act 1982 (Vic)*, Law Book Company, Sydney, 1984, p. 238.

<sup>85</sup> *ibid*, p. 239.

4.59 The FOI Act contains various review mechanisms where government refuses access to any material in its possession, consistent with the object of facilitating the widest possible access to government information.<sup>86</sup> The Committee notes that there are no such rights of review where government refuses access to material under the Copyright Act.

### ***Archives legislation***

4.60 A basic principle of the *Archives Act 1983* (Cth) is that all Commonwealth records should be made publicly available once they are 30 years old, unless they contain exempt information. However, copyright may still be used to restrict the use that may be made of the material.

4.61 The National Archives of Australia noted that access to Commonwealth records more than 30 years of age is regulated only by the access provisions of the *Archives Act 1983* rather than the FOI Act, since the FOI Act applies only to works created after 1977. Where material is released under the *Archives Act 1983*, its use is regulated only through the government's exercise of its rights in copyright. The National Archives could not recall any situation where government had refused permission to use material on the grounds that the use was inappropriate. Consequently:

The Archives considers it unnecessary to retain copyright ownership of records in order to control their use when this power is little used and records are in any case examined before public release to ensure they contain no information of ongoing sensitivity.<sup>87</sup>

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<sup>86</sup> *Freedom of Information Act 1982* (Cth), Part VI.

<sup>87</sup> *Submission 37*, p. 9.

4.62 The National Archives also noted that:

...privately authored material is also part of the records of the Commonwealth and is released under the Archives Act, but the Commonwealth has no power to control the use of that material through copyright ownership.<sup>88</sup>

4.63 Accordingly the National Archives stated:

An argument could therefore be mounted for the Commonwealth to waive its copyright in respect of records over thirty years of age or at least to streamline the avenue of obtaining permissions. The economic argument for retaining copyright in materials over thirty years of age has little force.<sup>89</sup>

4.64 In particular, most works produced by government ‘are not commercially exploitable’ and the National Archives argued that a distinction should be made between material that is commercially valuable and material that is not:

... in the way that government exercises its rights of copyright, so that a regime intended to protect legitimate economic interests is not applied to material of no economic value and in so doing merely act as a hindrance to legitimate public use.<sup>90</sup>

4.65 The Australian Society of Archivists expressed similar views.<sup>91</sup>

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<sup>88</sup> *Submission 37*, p. 9.

<sup>89</sup> *ibid*, p. 9. The National Archives went further in suggesting (at p. 6) that it would be appropriate if copyright in Commonwealth records, both published and unpublished, expired at the same time that they became available for public access under the *Archives Act 1983*, namely, when they were thirty years old.

<sup>90</sup> *ibid*, p. 8.

<sup>91</sup> *Submission 53*, pp. 5–6.

### Protecting the integrity of information

4.66 As discussed in Chapter 6 in relation to prerogative rights, part of the original rationale for government ownership of copyright material was a need to ensure the integrity and authenticity of official government publications. Since that time this rationale has been developed<sup>92</sup> and was restated in many of the submissions received.<sup>93</sup> Reviews in other common law countries have also referred to this rationale in relation to their government materials.<sup>94</sup>

4.67 DCITA argued that government ownership of copyright enables the Commonwealth to impose conditions on the use of material (such as by requiring the inclusion of standard acknowledgments and disclaimers). DCITA submitted that this can help ensure appropriate use of sensitive published materials that are critical to the community, especially where use could imply Government endorsement of a particular political party or a commercial product or service, or where sensitive materials such as immigration forms are used.<sup>95</sup>

4.68 The Victorian Government similarly argued:

In some circumstances it is important for a State body to continue to exercise control over State copyright, to ensure confidentiality or quality or consistency with other Government publications or outputs. The State must ensure the continued integrity and authenticity of official government publications so that

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<sup>92</sup> See for example, Gilchrist, 'The role of government as proprietor and disseminator of information', *op cit*, p. 79: where he argued that integrity and authenticity were ensured by the imposition of appropriate licensing conditions under copyright, so that action can be taken under copyright law for misuse or misrepresentation of material.

<sup>93</sup> For example, Ms Judith Bannister, *Submission 58* (unpublished); ARC *Submission 69*; South Australian Attorney-General, *Submission 52*; Department of Family and Community Services (FACS), *Submission 36*; Victorian Government, *Submission 64*; and Bureau of Meteorology, *Submission 18*.

<sup>94</sup> See Minister for the Cabinet Office, *White Paper: The future management of Crown copyright*, Cmnd 4300, HMSO, 1999, para 5.1; C Tullo 'Crown copyright: the way forward – access to public sector information' *The Law Librarian*, vol 29 no 4, 1998, 200–3, at 200. A Canadian review also stated that government ownership of copyright 'is useful to prevent distortion and misuse', but did not elaborate on its reasons: see A A Keyes and C Brunet, *Copyright in Canada: Proposals for a Revision of the Law*, Department of Consumer and Corporate Affairs, Ottawa, 1977, p. 225.

<sup>95</sup> *Submission 60*, p. 2.

the public can be aware of the status of each publication. Continuing to maintain Crown copyright is essential to achieving these outcomes.<sup>96</sup>

4.69 However, in relation to protecting the integrity of legal materials, Justice Lindgren, President of the Copyright Tribunal and judge of the Federal Court, contended that the issue did not arise in relation to judgments,<sup>97</sup> as discussed earlier in this chapter.

4.70 The Committee considers it unlikely that re-publishers of primary legal source materials would either deliberately or negligently disseminate inaccurate copies, as a lack of integrity, authority and accuracy in the materials would considerably affect the publisher's reputation.

4.71 However, His Honour Judge McGill from the District Court of Queensland argued that abolishing copyright in judgments 'may well be a huge incentive to plagiarism'. On this point, His Honour noted:

Any judge would be pleased to see his exposition of any particular legal point or principle cited by others, but would I think be less pleased to see it claimed by others as their own.<sup>98</sup>

4.72 An important question is whether Crown copyright is the most appropriate means to protect the integrity of government material, with several submissions referring to alternative mechanisms. The National Archives, arguing that copyright did not prevent the distortion of government material, stated:

The way to ensure the accuracy and authenticity of government material is through recordkeeping and custodial regimes which preserve the authenticity and integrity of government material over time and ensure the availability of such material as a check against deliberate distortion.<sup>99</sup>

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<sup>96</sup> *Submission 64*, p. 1.

<sup>97</sup> CLRC public consultation, Sydney, 27 July 2004.

<sup>98</sup> *Submission 70*, p. 2.

<sup>99</sup> *Submission 37*, p. 10.

4.73 The National Archives also stated that in instances where government material has been used, for example, on a website advocating racial violence, or implies government support for an issue, action may be taken under the *Racial Vilification Act 1996* (Cth) to restrict its use.<sup>100</sup>

4.74 AustLII also argued that government may rely on the *Trade Practices Act 1974* (Cth) to control the use of material.<sup>101</sup> Section 52 of that Act allows action against a corporation in trade or commerce for misleading or deceptive conduct or conduct likely to mislead or deceive. While this provision operates in limited circumstances, particularly only in relation to conduct by corporations, AustLII argued:

Given that this issue has not, to our knowledge, proven to be a major problem in the past in Australia, and that jurisdictions such as New Zealand and the USA (at the Federal level) have eschewed Crown copyright, we consider that s52 is likely to provide sufficient protection to the public interest in ‘integrity’.<sup>102</sup>

4.75 The Law Institute of Victoria submitted that government should use technological protection measures to protect material online.<sup>103</sup> The Copyright Agency Limited (CAL) as a Digital Object Identifier (DOI) registration agency submitted:

It is CAL’s view that the use of Digital Object Identifier (DOI) by government would be beneficial to government in a number of ways. These include monitoring the use of government material, ensuring that government material was always accessible to the public, and providing a reliable method of tracking authenticity of government material.<sup>104</sup>

4.76 AIIA noted that it was unlikely that governments would ever be able to fully safeguard against inappropriate use of their material made available through new technologies. While technology could be used to control access

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<sup>100</sup> *Submission 37*, p. 10.

<sup>101</sup> *Submission 25*, p. 3.

<sup>102</sup> *Submission 25*, p. 4.

<sup>103</sup> *Submission 42*, para 3.13.

<sup>104</sup> *Submission 48*, p. 9.

and ensure integrity to some extent, governments needed to weigh the benefits of making material available against the risk of distortion.<sup>105</sup>

4.77 The ARC, while opposing the use of copyright to restrict access to information held by government, stated without elaboration that there may be ‘good arguments’ for the retention of government ownership of copyright ‘based on the need to ensure the integrity and authenticity of government information in the public domain’. The ARC noted, however, the importance of asserting Crown copyright ‘in a manner consistent with the goal of open and accountable government, rather than discouraging citizen involvement in government’.<sup>106</sup>

### **Allowing cost-effective administration of government**

4.78 Another justification for government ownership of copyright relates to the cost-effective administration of government, particularly by providing the capacity to recoup costs. It has been argued that a principal rationale for government copyright is that it minimises the printing and publishing costs borne by the government and the taxpayer.<sup>107</sup> Another argument is that government material that is not protected by copyright may be exploited free of charge by other countries. Government ownership of copyright may also be seen as easing the administrative burden on agencies by reducing the need to make express arrangements for the use of material prepared by third parties.

4.79 DCITA submitted that Crown copyright allows the Commonwealth to charge fees for the commercial use of materials that have been produced and published with public monies. DCITA noted that the Commonwealth Copyright Administration (CCA) generally does not charge a fee for reproduction of published Commonwealth copyright material where the material will be used in a non-commercial context (for example, by educational institutions). Fees are also waived where the proposed use is deemed to be of particular public interest.

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<sup>105</sup> *Submission 21*.

<sup>106</sup> *Submission 69*, p. 2.

<sup>107</sup> Gilchrist, ‘The role of government as proprietor and disseminator of information’, *op cit*, p. 79.

4.80 DCITA further submitted that Crown copyright allows the Commonwealth to protect its commercial interests in materials it creates or publishes if, for example, the Commonwealth divests itself of ownership in agencies that deliver particular assets or services. The purchaser of the rights to the services may reasonably expect to obtain rights to some, if not all, of the essential intellectual property, such as internal records and promotional materials.<sup>108</sup>

4.81 An important influence on policy objectives, as outlined above, is the changing function and role of government and the scope of material that is now produced. In response to this development, copyright is increasingly being viewed as a means of generating revenue from the commercialisation of government material and thus as having important economic benefits.<sup>109</sup> For example, the Western Australian Department of Industry and Resources stated:

Governments across Australia are beginning to appreciate the importance of managing and, where appropriate, commercialising intellectual property assets generated with public funds. The Western Australian Government Intellectual Property Policy approach is to identify that IP assets have the potential to generate economic, social or environmental benefits to Western Australians through the use and commercialisation of those assets.<sup>110</sup>

4.82 Similarly, the Bureau of Meteorology argued:

... as a research and scientific organization, [the Bureau] needs to be able to compete and collaborate with other such organizations in producing innovative meteorological software and other products. Being able to own its copyright enables the Bureau to perform effectively within this environment. Certain copyright material can also be manufactured to the Bureau's specifications at a lower cost than would otherwise be the case and this has a public benefit. Secondly copyright is essential to meet cost recovery requirements.<sup>111</sup>

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<sup>108</sup> *Submission 60*.

<sup>109</sup> Minister for the Cabinet Office, *White Paper*, op cit.

<sup>110</sup> *Submission 35*, p. 1.

<sup>111</sup> *Submission 18*, p. 1.

4.83 The Royal Australian Mint stressed in relation to coins, medallions and other works it produces that copyright is used ‘to protect public investment in copyright materials having commercial value’.<sup>112</sup>

Although the *Crimes (Currency) Act 1981* would operate so as to prevent counterfeits, entry of coin designs and other artistic works into the public domain would allow other businesses to appropriate freely and exploit commercially the government’s investment in intellectual property. It would allow commercial enterprises to produce a range of articles using this intellectual property without authorisation, the payment of royalties, or control by the Mint. It would place the Mint at a disadvantage compared to its domestic and international competitors.<sup>113</sup>

4.84 One issue on which opinions differed markedly during this inquiry is whether governments should be able to generate revenue from the reproduction and sale of legal materials. The Western Australian Department of the Premier and Cabinet noted:

Changes to the current scheme of Crown copyright ownership would have budget and funding implications in those states including Western Australia where charges are made for the sale or licensing of legislative materials in particular situations.<sup>114</sup>

4.85 Government ownership of copyright in official information may also prevent official texts being exploited by commercial interests, on the basis that the production of official texts is funded by taxpayers and should not be exploited for profit. However, it has also been argued that the existence of copyright reinforces the tendency for official information to be treated as a scarce and expensive commodity.<sup>115</sup>

4.86 Not all States share the Western Australian Government’s view in relation to exploitation of legal information. For example, the NSW Government and

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<sup>112</sup> *Submission 2*, p. 1.

<sup>113</sup> *Submission 2*, Attachment A.

<sup>114</sup> *Submission 29*, p. 3.

<sup>115</sup> S Picciotto, ‘Towards Open Access to British Official Documents’, 2 *Journal of Information Law and Technology*, 1996, p. 3.

the Northern Territory Government have issued express waivers over copyright in legislative materials and judicial decisions, acknowledging the public benefit in encouraging access to government information.<sup>116</sup>

### **Other public policy reasons for government ownership**

4.87 The Australian Library and Information Association (ALIA)<sup>117</sup> and the Law Institute of Victoria<sup>118</sup> argued that governments must have the ability to acquire copyright to ensure that they have control over the reproduction, modification, adaptation and publication of works.

4.88 The Royal Australian Mint also argued that copyright can be used ‘to ensure that the use of material is consistent with government policy’:

Removing this ownership would remove the ability of the government to ensure that the designs are used in good taste and that any use is compatible with the public expectations.<sup>119</sup>

4.89 DCITA also referred to circumstances where permission to reproduce copyright material may be denied on the grounds that it may allow a commercial/supply relationship with the Commonwealth to be wrongly implied or inferred.<sup>120</sup> While acknowledging that trade practices legislation and the tort of passing off may possibly apply in such circumstances, DCITA saw copyright as a ‘more immediate and effective tool’, although it did not elaborate on its reasons.

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<sup>116</sup> *Submission 56, Submission 72.*

<sup>117</sup> *Submission 32.*

<sup>118</sup> *Submission 64.*

<sup>119</sup> *Submission 2.*

<sup>120</sup> *Submission 60*, p. 3, referring to the Department of Defence’s position on the use of photographs from the Defence image gallery.

### **Is copyright ownership of commissioned material necessary?**

4.90 As outlined above, there is clearly debate over the justifications for Crown copyright ownership, particularly in relation to categories of material where there is a strong public interest in wide dissemination. Whether or not those reasons are accepted in relation to works produced by government or its employees, there is disagreement as to whether governments need to have ownership of copyright in material commissioned from third parties, or whether a licence to use material would be sufficient to achieve their aims. This issue relates in particular to cost-effective management, but also has implications for the capacity to restrict access and to ensure integrity of material.

#### ***The Commonwealth position***

4.91 In relation to commissioning or procuring works from other parties, DCITA argued that Commonwealth government agencies are encouraged to gain the best value for money from their investment (by considering, for example, that a licence to use material may cost less than full copyright ownership). Hence DCITA claimed it is ‘fairly common’ for copyright in some of the content of Commonwealth publications not to belong to the Commonwealth. An ‘ongoing review’ of the CCA indicated that when acquiring rights to third party copyright materials, Australian Government departments usually only acquire the rights they need to achieve their objective (such as a conditional licence to use photographs or extracts in their reports).<sup>121</sup>

4.92 DCITA also stated that the Commonwealth sometimes invests in the development of products or services either fully owned by the Commonwealth or in partnership with third parties.<sup>122</sup> DCITA acknowledged there may be some public benefit in terms of value for public expenditure if the Commonwealth was able to commercialise the product, or the developer or another third party was allowed to own copyright for further development.

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<sup>121</sup> *Submission 60*, p. 3.

<sup>122</sup> *Submission 60*.

4.93 DCITA gave as an example Commonwealth investment in developing information technology (IT) products. DCITA stated that the *Commonwealth IT IP Guidelines*<sup>123</sup> encourage a flexible approach to ownership options for IT products that may have commercial application, and aim to obtain value for money in Government purchasing and to encourage industry development. The Commonwealth may invest in the development of products or services either fully owned by the Commonwealth or in partnership with third parties.

4.94 However, a 2004 report by the Australian National Audit Office (ANAO) on Commonwealth intellectual property practices<sup>124</sup> presented a more critical view of agency practice. After surveying 74 Commonwealth agencies, the ANAO found that just over half (55 per cent) reported that they had mechanisms in place to decide on the appropriate level of ownership of intellectual property.<sup>125</sup> Only 30 per cent of agencies had developed specific policies or procedures for managing intellectual property.<sup>126</sup> The ANAO found that, although the *Commonwealth IT IP Guidelines* provide useful guidance to agencies on managing intellectual property in IT (including consideration of ownership options), there was a need for more general guidance and support.<sup>127</sup>

### ***The States' position***

4.95 The ANAO report noted that in recent years several States had developed guidelines for dealing with intellectual property, particularly in relation to information technology, and that other States were in the process of doing so.<sup>128</sup>

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<sup>123</sup> *Commonwealth IT IP Guidelines: Management and commercialisation of intellectual property in the field of information technology*, DCITA, Canberra, 2000.

<sup>124</sup> ANAO, *Intellectual property policies and practices in Commonwealth agencies*, Audit Report No. 25 2003–04, ANAO, 2004.

<sup>125</sup> *ibid.*, p. 21. The ANAO found that the most common means of agencies obtaining intellectual property were in-house development (24 per cent), consultancy (22 per cent) and licence (18 per cent) (p. 20). It should be noted that the study incorporated other forms of intellectual property besides copyright, namely, trade marks, designs and patents.

<sup>126</sup> *ibid.*, para 26, p. 22.

<sup>127</sup> *ibid.*, para 28, p. 22. Accordingly, the ANAO recommended the development of such an approach and guidance (Recommendation 2). The ANAO noted that the Commonwealth does not have a whole-of-government policy approach, unlike all but one of the States.

<sup>128</sup> *ibid.*, paras 1.53–63, pp. 42–4.

4.96 Most of the State and Territory intellectual property policies have not addressed the issue of whether government needs to own copyright in all situations, as discussed in more detail in Chapter 10. However, Tasmania has produced policy principles for agencies dealing with intellectual property in information technology. The principles recommend agencies only acquire copyright in instances where it is required.<sup>129</sup>

4.97 Other parties argued that it was unnecessary for government to own copyright in certain circumstances. The Royal Australian Institute of Architects (RAIA) argued that there should be no presumption in favour of government ownership of copyright in relation to architects' work:

There is simply no need for ownership of copyright by an architect's client in the vast majority of cases due to the operation of either an express licence in the commissioning agreement, or the implied licence arising from common law, either of which enable a client to have built and to maintain what has been designed by the architect ... To a creative author, the ability to re-use physical expressions of ideas or to further develop them in subsequent works is a valuable aspect of the author's intellectual property.<sup>130</sup>

4.98 The RAIA argued that while it could not point to specific examples, the presumption of government ownership of copyright had the potential to operate 'against full application of effort by a creative author' and thus reduce the value for money that government gets.<sup>131</sup>

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<sup>129</sup> [http://www.go.tas.gov.au/standards/itip\\_policyv1.0sept2001.htm](http://www.go.tas.gov.au/standards/itip_policyv1.0sept2001.htm).

<sup>130</sup> *Submission 75*, p. 7.

<sup>131</sup> *ibid.*

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## Chapter 5

### Special Crown ownership provisions of the Act

5.01 Government may own copyright under the general ownership provisions in Parts III and IV of the Copyright Act and through the prerogative right in the nature of copyright. In addition, government may own copyright under special provisions in Part VII, Division 1 of the Copyright Act.

5.02 Many submissions to the Committee advocated the abolition or restriction of the Part VII provisions. This chapter discusses:

- the scope of the Part VII provisions;
- evidence the Committee received on whether any change should be made; and
- the position in other common law countries.

#### **The scope of the Part VII provisions: ownership of material made under the direction of the Crown**

5.03 Sections 176 and 178 provide as follows:

##### **176 Crown copyright in original works made under direction of Crown**

- (1) Where, apart from this section, copyright would not subsist in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the work by virtue of this subsection.
- (2) The Commonwealth or a State is, subject to this Part and to Part X, the owner of the copyright in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or the State, as the case may be.

**178 Crown copyright in recordings and films made under direction of Crown**

- (1) Where, apart from this section, copyright would not subsist in a sound recording or cinematograph film made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the recording or film by virtue of this subsection.
- (2) The Commonwealth or a State is, subject to this Part and to Part X, the owner of the copyright in a sound recording or cinematograph film made by, or under the direction or control of, the Commonwealth or the State, as the case may be.

5.04 Sections 176 and 178 provide that the government is the owner of copyright in any work, film or sound recording made by, or under the direction or control of, government. Subsections 176(1) and 178(1) deal with the subsistence of copyright, providing that where copyright does not subsist by virtue of the other provisions of the Copyright Act, copyright will subsist under these subsections. Subsections 176(2) and 178(2) deal with government ownership of copyright where the material is created ‘under the direction or control of’ government.

**Possible interpretations of sections 176 and 178**

5.05 The way in which subsections 176(1) and 178(1) relate to subsections 176(2) and 178(2) is not entirely clear. One interpretation is that the opening words of subsections 176(1) and 178(1), ‘Where, apart from this section, copyright would not subsist ...’, reads down the operation of the following subsections, so that subsections 176(2) and 178(2) only apply where copyright does not subsist under the general provisions of the Copyright Act.

5.06 An alternative interpretation, and one that has been more widely accepted,<sup>1</sup> is that subsection 176(2) and 178(2) operate independently of the

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<sup>1</sup> See for example, *RAIA Submission 75*, p. 5, arguing that on the basis of their experience, subsection 176(2) is commonly applied ‘in isolation, such that government asserts the presumption of ownership repeatedly, and that this is the reality in the community’.

preceding subsections. Thus subsections 176(1) and 178(1) exist only to ensure that copyright subsists in all material produced under the direction or control of the government irrespective of other requirements in the Copyright Act; they do not read down the operation of subsections 176(2) and 178(2) respectively.

5.07 This second interpretation was accepted in *Commonwealth of Australia v Oceantalk Australia Pty Ltd*,<sup>2</sup> where Burchett J stated:

If the Commonwealth proves that ‘an original...artistic work’ was ‘made by, or under the direction or control of, the Commonwealth’, it proves ownership of the copyright in that work, subject to the provisions to which s 176 is subject, which include s 180(2). The Commonwealth does not have to negative subsistence of copyright under s 32, or under the prerogative, in order to rely on s 176(2) because, if it proves the ingredients of that provision, it proves facts which must necessarily result in the subsistence of copyright.<sup>3</sup>

### **Similar provisions in the *Copyright Act 1956 (UK)***

5.08 In considering how these provisions should be interpreted, it is useful to consider their genesis. As outlined in Chapter 3, the Spicer Committee in 1959 recommended the enactment of a similar provision to section 39 of the 1956 UK Act, noting:

Section 39 of the 1956 Act in effect provides that copyright in works, cinematograph films or sound recordings made by or under the direction of the Crown shall, subject to agreement to the contrary, subsist in the Crown. The Crown is entitled to copyright in those circumstances even though, apart from that section, copyright would not subsist in the work. The effect of this provision is that the Crown has copyright in works and articles made under its direction or control without regards to the nationality or residence of the ‘author’ or the place of first publication.<sup>4</sup>

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<sup>2</sup> (1998) 39 IPR 520.

<sup>3</sup> *ibid*, p. 524.

<sup>4</sup> Spicer Committee, *op cit*, at 402.

5.09 The Spicer Committee’s recommendations were adopted in the current Act.

5.10 Subsection 39(1) of the 1956 UK Act provided as follows:

In the case of every original literary, dramatic, musical, or artistic work made by or under the direction or control of Her Majesty or a Government department -

(a) if apart from this section copyright would not subsist to the work, copyright shall subsist therein by virtue of this subsection, and

(b) **in any case**, Her Majesty shall, subject to the provisions of this Part of this Act, be entitled to the copyright in the work.

5.11 The words ‘in any case’ made it clear that copyright would vest in the Crown regardless of whether copyright otherwise subsisted.<sup>5</sup> While the Australian provisions are very similar, the words ‘in any case’ in the former UK Act were not included in sections 176 and 178.

### **Arguments for repeal of subsections 176(1) and 178(1)**

5.12 Irrespective of how subsections 176(1) and 178(1) are interpreted, submissions to the Committee argued that these subsections should be repealed on the basis that situations where they would be relied upon today were difficult to envisage. For example, the ACC stated:

Given the various connecting factors for copyright subsistence, and the large number of countries whose nationals are now entitled to national treatment under the Copyright (International Protection) Regulations, and in which first publication is a connecting factor for subsistence, we were unable to find examples of material which would not be protected by copyright but for ss176 to 178.<sup>6</sup>

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<sup>5</sup> An identical provision to the UK’s section 39 existed in the former New Zealand legislation (section 52 of the *Copyright Act 1962* (NZ)) and was considered by the New Zealand Court of Appeal. In *Land Transport Safety Authority of New Zealand v Glogau* [1999] 1 NZLR 261, the court referred to the argument that the Crown would own copyright under paragraph (b) only if copyright came into being under paragraph (a). The court held ‘That interpretation limits ownership by the Crown to a very limited and arcane category indeed, most obviously works outside the Berne Convention. There is no obvious or sensible need for such an ownership restriction’ (at 272 per Gault, Blanchard and McGechan JJ).

<sup>6</sup> *Submission 27*, p. 4.

5.13 The Law Council of Australia made similar comments, noting that while the provisions may have been appropriate at a time when the USA and other significant countries were not members of the Berne Convention, the rationale for their existence has since been ‘substantially superseded’.<sup>7</sup>

5.14 The Committee is unaware of any situations where subsections 176(1) and 178(1) would be relied upon to establish copyright subsistence in any particular work, and notes that no examples were given in submissions or during consultations.

### **The ‘direction or control’ test**

5.15 The term ‘under the direction or control of’ is not defined in the Copyright Act, and as far as the Committee is aware there has been very limited judicial interpretation in the context of copyright. While the term clearly includes works created by government employees in the course of their duties, its exact scope is uncertain. It may include commissioned works and the works of volunteers supervised by government. In one reported case, *Linter Group Ltd (in liq) v Price Waterhouse*,<sup>8</sup> the Supreme Court of Victoria held that the transcript of judicial proceedings produced pursuant to the judge’s direction under the *Evidence Act 1958* (Vic) had been produced under the direction of the State for the purposes of section 176.

5.16 According to the ACC, the words ‘direction’ and ‘control’ in these provisions should be read separately and will include different situations.<sup>9</sup> Whether work has been produced under the ‘control’ of another has been subject to much scrutiny by the courts in the context of employment law. Control over the manner of doing the work is the most commonly applied criterion in finding that a contract of employment exists, as distinct from a contract for services by an independent contractor. Factors that may be considered include whether government can oblige the employee to comply with the government’s instructions, and the ability of the government to dismiss the employee.<sup>10</sup> However, courts have acknowledged that the control test is

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<sup>7</sup> *Submission 33*, p. 5.

<sup>8</sup> (2000) VSC 90, Harper J, para 7.

<sup>9</sup> ACC, *Government and Copyright*, Sydney, 2002, p. 35.

<sup>10</sup> See for example *Performing Right Society v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762.

imprecise and sometimes does not reflect commercial reality, for example, where there are highly skilled technical workers.<sup>11</sup> ‘Direction’ has a broader meaning and may encompass a wide range of situations: it will require government to prove it guided, managed, instructed or ordered the making of the work.<sup>12</sup>

5.17 Several submissions raised concern over the lack of certainty arising from the use of this term in Part VII. Thomson Legal & Regulatory Ltd (Thomson),<sup>13</sup> the Council of Australian University Librarians (CAUL)<sup>14</sup> and the Victorian Government<sup>15</sup> supported restriction of the provision to works made by government officers and employees, citing the UK provisions as a model. As CAUL noted:

[This change] would not preclude government seeking ownership of copyright when negotiating contracts for the creation of material.<sup>16</sup>

5.18 CAL expressed a similar view, arguing that government should be on the same footing as other employers.<sup>17</sup>

5.19 The Queensland Government, on the other hand, argued that the expression ‘direction or control’ should be re-stated to ensure that the meaning was clear, but pressed for a broader scope. In particular, the Queensland Government considered the Copyright Act should expressly state that the Part VII provisions cover material produced:

- by employees, volunteers, students and other unpaid workers, such as those on work experience;
- by independent contractors and consultants; and
- pursuant to a legislative, regulatory or administrative requirement where it is needed for a ‘governmental function’.<sup>18</sup>

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<sup>11</sup> See for example *Queensland Stations Pty Ltd v FCT* (1945) 70 CLR 539; *FCT v Barrett* (1973) 129 CLR 395; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 36–7 per Wilson and Dawson JJ. Where the control test is not appropriate, the courts must consider the totality of the relationship.

<sup>12</sup> ACC, op cit, p. 35.

<sup>13</sup> *Submission 13*, p. 3.

<sup>14</sup> *Submission 7*, p. 2.

<sup>15</sup> *Submission 64*, p. 6.

<sup>16</sup> *ibid.*

<sup>17</sup> *Submission 48*, p. 4.

<sup>18</sup> *Submission 71*, p. 10. The last point is discussed further below in relation to surveyors’ plans.

5.20 Three situations where more clarity appears especially desirable are discussed in more detail below: the judiciary; commissioned works; and surveyors' plans.

### ***The judiciary***

5.21 Of particular concern with the term 'under the direction or control' is its application to the judiciary. There has been debate as to whether judges may be considered to be under the 'direction' of the Commonwealth or a State.

5.22 The Commonwealth Constitution under section 72 provides that the judiciary is independent and separate from the executive. However, it has been argued that factors such as the method of appointment and dismissal of judges (including the judicial oath) and the payment of judicial salaries by the government may mean that the judiciary is under the direction of the Crown.<sup>19</sup>

5.23 This view is not accepted by some writers,<sup>20</sup> or by members of the judiciary. Chief Justice Doyle of the Supreme Court of South Australia noted that vesting copyright in materials produced by the judiciary in the Crown may challenge the independence of the judiciary.<sup>21</sup> The Federal Court submitted that:

...the judiciary does not operate under the direction or control of the Crown (cf ss176–8 of the Act); judgments are not made pursuant to the terms of any 'employment' by the Crown (cf s 35(6) of the Act); and judges are, and will remain, entitled to use judgments in connection with all matters incidental to their exercise of judicial power, including the right to nominate which version of their judgments is the authorised version of the judgment of the court.<sup>22</sup>

5.24 Monotti argues that the term 'direction' should be defined to include the relationship between the Crown and its judges, so government may own

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<sup>19</sup> Monotti, *op cit*, 313.

<sup>20</sup> For example, M Taggart 'Copyright in written reasons for judgment' *Sydney Law Review* vol 10, 1984, pp. 319–29, at 326; C J Bannon 'Copyright in reasons for judgment and law reporting', 56 *Australian Law Journal* 59–60, where he argues that while judges are not employees of the Crown within the meaning of the Copyright Act, the Crown has a prerogative right in judgments because 'the judges sit in the Royal courts, pronouncing judgments in the name of the Monarch' (p. 60).

<sup>21</sup> *Submission 39*.

<sup>22</sup> *Submission 61*, p. 3.

copyright in judgments.<sup>23</sup> Monotti considers that it is undesirable for copyright to vest in a judge as author because the exclusive publishing and reproduction rights will vest in the judge. However, she states a wide interpretation of ‘direction’ to include judges may as a consequence allow government to own copyright in all works requested.<sup>24</sup>

5.25 As discussed in Chapter 6 there is a stronger argument that the prerogative right in the nature of copyright protects judgments. The issue of whether judgments should be protected by copyright and in whom that copyright should vest is discussed in more detail in that chapter.

### ***Commissioned works***

5.26 There is uncertainty over whether works commissioned by government are or should be considered to be created under the ‘direction or control’ of the government. This issue is particularly important where the agreement commissioning the work does not stipulate copyright ownership.

5.27 Some submissions argued that in the absence of any clear intention on copyright ownership, government should not own copyright in a commissioned work by relying on the ‘direction or control’ test. During the public forum in Sydney, a representative of the National Association of the Visual Arts (NAVA) stated that there had been difficulty in maintaining artists’ copyright, particularly where artists answer a government tender to take part in a public art commission.<sup>25</sup>

5.28 However, the NSW Government argued that government should own the copyright in commissioned work where there is no contractual stipulation because of the benefit to the public:

While the Crown copyright protections are of limited relevance in a commercial context, the Crown copyright provisions play an important role in respect of ‘core’ government functions. For example, where a government appoints a person to prepare a report for public discussion, this may not necessarily be

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<sup>23</sup> Monotti, *op cit*, p. 313.

<sup>24</sup> *ibid*, p. 314.

<sup>25</sup> CLRC public forum, Sydney, 27 July 2004.

commissioned through a formal contract. Without the protection provided by Crown copyright, there is a risk that the author of the report may retain ownership of the material and government could lose the right to deal with that report for the benefit of the public.<sup>26</sup>

5.29 As noted above, the Queensland Government also considered that government should own copyright in commissioned works unless otherwise agreed.<sup>27</sup>

### ***Surveyors' reports***

5.30 Ownership of copyright in surveyors' reports prepared by independent parties and lodged with government pursuant to legislation or regulation has been an issue of contention between State governments and relevant parties in recent years.

5.31 A 2004 decision<sup>28</sup> by the Copyright Tribunal outlines the background to such disagreements. The case dealt with an application by Australian Spatial Copyright Collections Ltd for a declaration that it was a collecting society<sup>29</sup> in relation to survey plans, design plans, digital cadastral databases, survey reports and similar materials. Lindgren P, rejecting the application, outlined the history of disagreement between CAL and the States and Territories in relevant negotiations.<sup>30</sup>

5.32 During this inquiry, the Western Australian Department of Premier and Cabinet argued that the ownership of survey maps and plans required to be lodged with government agencies should be clarified, noting that copyright

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<sup>26</sup> *Submission 56*, p. 5.

<sup>27</sup> *Submission 71*, p. 10.

<sup>28</sup> *Reference by Australian Spatial Copyright Collections Ltd* [2004] ACopyT 1 (5 May 2004), Lindgren P. The issue of who owns copyright in survey plans was not decided in that case.

<sup>29</sup> Under section 153F of the *Copyright Act 1968* for the purposes of Division 2 of Part VII (use of copyright material for the Crown).

<sup>30</sup> Australian Spatial Copyright Collections Ltd had submitted that CAL had been 'perfunctory' in enforcing the statutory right of surveyors to equitable remuneration, relying on evidence about negotiations between CAL and the States and Territories in 2002 and 2003 for a new agreement, including discussions as to whether survey maps and plans were covered, and in particular negotiations between CAL and NSW. The judgment referred to a draft agreement prepared by CAL in September 2003 that recognised 'differing views' in relation to the State's use of survey plans and included a specific reference to the absence of any admissions by the State as to subsistence or ownership of copyright in such plans.

claims by other parties should not interfere with the public interest in ensuring that information is publicly available.<sup>31</sup>

5.33 The Queensland Government went further. The Queensland Department of Natural Resources, Mines and Energy expressed similar concerns in relation to mining and petroleum exploration reports lodged pursuant to legislation. The Department suggested that the phrase ‘under the direction or control’ in the Part VII provisions be re-stated to expressly apply to material produced in response to a requirement in legislation or regulations, where those materials are ‘essential for the performance of a key governmental function’.<sup>32</sup> A subsequent submission from the Queensland Government supported that view.<sup>33</sup>

5.34 Other parties expressed strongly opposing views. Mr Ken Michael, a town planner and licensed surveyor, argued:

... any amendment to the Copyright Act that would either remove the personal copyright of reports, plans and similar works held in State archives or transfer those rights to the State, would only encourage the State to use copyright laws

- To restrict the circulation of information and material held in archives, and/or
- Establish State monopolies, and/or
- Encourage the State to use public access to archival material as a source of revenue raising and taxation.<sup>34</sup>

5.35 CAL also objected strongly to the suggestion of the States, arguing that such an interpretation of the Part VII provisions was ‘unfounded and unreasonably broad’.<sup>35</sup> CAL submitted that the use of surveyors’ works by the Crown ‘should be equitably remunerated’ in accordance with the Copyright Act.<sup>36</sup>

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<sup>31</sup> *Submission 29*, p. 2. The WA Department of Land Information expressed a similar view (*Submission 16*).

<sup>32</sup> *Submission 65*, p. 11.

<sup>33</sup> *Submission 71*, p. 10.

<sup>34</sup> *Submission 73 (2)*, p. 4.

<sup>35</sup> *Submission 48(3)*, p. 2.

<sup>36</sup> *ibid.*

5.36 The Committee is aware that proceedings in relation to survey plans are currently under way before the Copyright Tribunal.<sup>37</sup> That process may provide some guidance as to the ambit of the Part VII provisions on these issues.<sup>38</sup>

## **Works first published under the direction of the Crown**

5.37 Under section 177, subject to any agreement to the contrary, the Crown is the owner of copyright in any work first published in Australia by, or under the direction or control of, the Commonwealth or State.

5.38 Section 177 provides:

### **177 Crown copyright in original works first published in Australia under direction of Crown**

Subject to this Part and to Part X, the Commonwealth or a State is the owner of the copyright in an original literary, dramatic, musical or artistic work first published in Australia if first published by, or under the direction or control of, the Commonwealth or the State, as the case may be.

5.39 There is no equivalent of subsections 176(1) and 178(1) relating to subsistence in section 177, as paragraph 32(2)(c) provides that copyright will subsist in the work if it is first published in Australia. Hence it is not a requirement that the author be a qualified person for copyright to subsist.

5.40 The Whitford Committee in considering a similar UK ‘first publication’ provision noted that it was said to be ‘necessary in order to safeguard the right of the Crown to publish, for example, evidence given to committees and

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<sup>37</sup> As at 21 January 2005.

<sup>38</sup> The Committee also notes the 1999 decision of the New Zealand Court of Appeal on the former New Zealand Crown copyright provision that contained the ‘direction or control’ test (*Land Transport Safety Authority of New Zealand v Glogau* (1999) 1 NZLR 261). The respondent had developed taxi log books that were required to be approved by the Secretary of Transport. The court, dismissing an appeal against a finding of breach of his copyright by the government, discussed the origins of the provision and stated its view that the ‘direction or control’ test ‘does not extend much if at all past commission, employment and analogous situations and merely concentrates ownership in the Crown to avoid the need to identify particular authors, employees or contracting parties. We are satisfied it was not intended to capture “approval” situations such as the present ...’ (at 273 per Gault, Blanchard & McGechan JJ).

commissions and the findings of such bodies’.<sup>39</sup> However, the Whitford Committee did not agree with this argument and recommended the provision be abolished:

It is understandable that it may indeed be desirable to safeguard this right, but we do not see that a right arising because of its publication safeguards a right to publish. Further it seems indefensible to provide such a safeguard by a provision enabling the Crown to override an independent copyright in works independently produced.<sup>40</sup>

5.41 The ambit of section 177 is potentially very broad, although there is little case law on its meaning. However, in relation to the former UK provision, it was held that copyright in a patent specification (a description of an invention for which a patent is sought) prepared by the inventor or his patent agent vested in the Patent Office which published it.<sup>41</sup> Similarly, designs for decimal coinage were Crown copyright, having been first published under the direction and control of a government department.<sup>42</sup>

5.42 Section 177 has also been the subject of debate as to whether it should be read subject to subsection 29(6). Such an interpretation would greatly reduce its operation. This issue is discussed later in this chapter.

## **Who is the ‘Commonwealth’ in Part VII?**

5.43 Another concern about the way in which sections 176–8 operate relates to uncertainty as to who is the ‘Commonwealth’ and in whom copyright will vest. One interpretation is that copyright under sections 176–8 vests in the Commonwealth as a legal person, irrespective of whether an emanation of the Commonwealth created or first published the work. This is the interpretation under which the Commonwealth operates, as evidenced by CCA being responsible for granting permission to reproduce published Commonwealth material. The Committee is aware that this interpretation has been queried on the basis that it requires interpreting the ‘Commonwealth’ where it is first used in subsections 176(2), 178(2) and section 177 as the Commonwealth as a legal

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<sup>39</sup> Whitford Committee, *op cit*, para 599.

<sup>40</sup> *ibid*, para 599.

<sup>41</sup> *Catnic Components Lt v Hill & Smith Ltd* [1978] FSR 405.

<sup>42</sup> *Ironside v H.M Attorney-General* [1988] RPC 197.

person. Where ‘Commonwealth’ is used in the second instance in those same provisions, it includes any agent or emanation of the Commonwealth.

5.44 The second interpretation is that an entity that is included as the Commonwealth under the ‘shield of the Crown’ test will own copyright itself under sections 176–8. A third interpretation is that copyright vests in the Commonwealth as a legal person but is exercisable by the relevant entity.

5.45 These interpretations have not been considered by the courts, but the three possible interpretations illustrate the potential difficulty with sections 176–8. These issues are discussed more fully in Chapter 8.

### **Relationship between Part VII and the rest of the Act**

5.46 A further concern about the Part VII provisions is that the relationship between those provisions and the rest of the Copyright Act is not entirely clear. Provisions in various Parts of the Copyright Act make certain provisions ‘subject to Part VII’.<sup>43</sup> Section 182 in Part VII also provides that Parts III and IV (other than the provisions relating to subsistence, duration or ownership of copyright) apply in relation to copyright subsisting by virtue of Part VII in the same way as they apply to copyright subsisting by virtue of those Parts. Various provisions of Part VII also express them to be subject to Part X, which contains miscellaneous provisions, some of which may apply to government. For example, subsection 196(3) requires assignments to be in writing.

5.47 The WA Attorney-General submitted that:

‘...clarification should occur of the relationship between Parts III and IV and Part VII of the *Copyright Act*, and between Parts III, IV, VII and Part X. Do the numerous references to ‘subject to...Part X’ really only mean that agreements altering copyright ownership must all be in writing?’

5.48 The WA Attorney-General also noted that the relevant provisions dealing with ownership of copyright in television broadcasts, sound broadcasts and published editions (sections 99 and 100 respectively in Part IV) make those provisions ‘subject to Part VII’, but that the Crown ownership provisions in Part VII do not deal with such subject matter. Submissions from FACS and the

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<sup>43</sup> For example, sections 7, 35, 99 and 100.

Western Australian Department of Premier and Cabinet supported the WA Attorney-General's view that there should be specific provisions in Part VII dealing with Crown ownership of copyright in television and sound broadcasts and published editions of works.

### **Section 177 and subsection 29(6)**

5.49 A key issue on which there has been some disagreement is whether the operation of section 177 should be read down by subsection 29(6). Subsection 29(6) states that, in determining 'for the purposes of any provision of this Act' whether a work has been published or whether a publication was the first publication, any 'unauthorised publication' should be disregarded. Subsection 29(7) defines unauthorised publication as publication without the owner's licence where copyright subsisted in the work, or where copyright did not subsist, without the licence of the author. Following this reasoning, it can be argued that section 177 should only operate to vest copyright in the Crown where the author of the unpublished work has agreed.

5.50 Monotti<sup>44</sup> argues that section 177 should be read subject to subsection 29(6) for various reasons: first, that the subsection 'does not appear to be subject' to Part VII and subsection 29(8) specifically excludes Part IX; second, that the two provisions are not inconsistent if first publication arises only after the author's permission has been granted; third, that other sections specifically provide that they are to be subject to Part VII; and fourth, that section 177 would need to be read down to avoid the constitutional limitation of acquisition on just terms (discussed below). She notes, however, that section 7 provides generally that the Copyright Act binds the Crown 'subject to Part VII'.<sup>45</sup>

5.51 In support of her argument, Monotti also cites a comment by the Whitford Committee that 'it is indefensible to enable 'the Crown to override an independent copyright in works independently produced''.<sup>46</sup> However, the Committee notes that this remark was the Whitford Committee's comment on

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<sup>44</sup> Monotti, *op cit*.

<sup>45</sup> See also Gilchrist, 'Crown copyright: An analysis of rights vesting in the Crown under statute and common law and their interrelationship', *op cit*, p. 111. He argues that for this reason, section 177 should not be read subject to subsection 29(6).

<sup>46</sup> Monotti, *op cit*, p. 314, citing the Whitford Committee, *op cit*, p. 599.

the provision, rather than an interpretation of how it operated, and led to its conclusion that the special Crown copyright provisions should be abolished.

5.52 The Committee heard conflicting views in submissions on this issue. The WA Attorney-General supported Monotti's view that section 177 operated subject to subsection 29(6), and referred also to subsection 183(8) in support of this view.<sup>47</sup>

5.53 The ALRC had a different view, noting its concerns about the breadth of operation of section 177:

[Section 177] clearly erodes the rights of the author of the work where the creator is not under the direction or control of the government. While it is possible to make an agreement with the author to alter this arrangement (s 179), this is not always possible nor practicable. Without clear agreements with each contributing author, the copyright in all articles published in the ALRC journal *Reform* vests in the Commonwealth. The [ALRC's] Issues Paper highlights another area that may be of future concern to the ALRC: the publication of submissions to an inquiry on the ALRC's website. While it would not be the intention of the ALRC to usurp copyright from the author, unless agreements were made with each submission-maker prior to the time of publication, copyright would vest in the Commonwealth.<sup>48</sup>

5.54 The ACC appeared to take a similar broad view of the application of section 177, as noted above. The Department of Employment and Workplace Relations (DEWR) also supported the broader interpretation, stating that it relied on section 177 to claim copyright in certified agreements.<sup>49</sup> DEWR publishes those agreements on the WageNet website and allows users to download, display, print and reproduce material in unaltered form for non-commercial use. DEWR contended that owning copyright in certified agreements allows the department to make these materials widely and freely available, in accordance with the objects of the *Workplace Relations Act 1996* (Cth):

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<sup>47</sup> *Submission 34*, p. 3. Subsection 183(8) provides that use of copyright material by government does not constitute publication.

<sup>48</sup> *Submission 3*, p. 4.

<sup>49</sup> *Submission 74*.

Without s. 177, or some other mechanism giving the Commonwealth the power to deal with agreements in this way ... the Commonwealth would need to negotiate with authors before it could publish agreements. Because of the way in which agreements are created, identifying and locating authors would be extremely difficult. Dozens of people may be in a position to assert ownership in any individual certified agreement ... [T]here are thousands of agreements.<sup>50</sup>

5.55 DEWR stated that if government did not have copyright:

...consultants who draft some or all of an agreement for a client, or draft a template[s] for use in agreement making, may assert rights which would deny the public the ability to use agreements...<sup>51</sup>

5.56 However, the ALRC suggested that it may be more appropriate to give government 'limited rights to control dissemination of the particular publication, rather than to usurp copyright in the work as a whole'.<sup>52</sup>

5.57 There are also constitutional considerations insofar as the Commonwealth is concerned. It has been argued that because section 177 may effect an involuntary transfer of copyright from the owner to government (if it is not read subject to subsection 29(6)), it would be invalid under section 51 (xxxii) of the Constitution which requires payment of just terms for the Commonwealth's acquisition of property from an individual or State.<sup>53</sup>

## **Criticism of the Part VII provisions**

5.58 While the Part VII ownership provisions may be overridden by agreement between the parties, the Committee received evidence suggesting that the effect of the provisions is not widely known. Copyright owner interests generally argued that governments should not have a privileged position in relation to copyright ownership compared with other parties. The Australasian Performing Right Association/Australasian Mechanical Copyright Owners Society

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<sup>50</sup> *ibid.*

<sup>51</sup> *Submission 74*, p. 4.

<sup>52</sup> *Submission 3*, p. 4.

<sup>53</sup> Monotti, *op cit* p. 314; Gilchrist, 'Crown copyright: An analysis of rights vesting in the Crown under statute and common law and their interrelationship', *op cit*, p. 111; and Ricketson & Creswell, *op cit*, para 14.185.

(APRA/AMCOS), CAL, Screenrights, the Law Society of Western Australia, ALCC, ADA/ALCC, NAVA, Vi\$copy, AIIA, Thomson, RAIA and the ABC considered that sections 176–8 should be abolished.

5.59 The ACC also argued that these provisions should be repealed for a range of reasons, including the following:

- the range of materials covered by the provisions is vastly broader than originally envisaged;
- the entities covered by the provisions now include a large range of statutory bodies and agencies in addition to the government departments originally envisaged;
- the unreasonable lack of certainty about the application of the first ownership provisions results in expense to the parties involved; and
- a lack of awareness of the provisions can result in unintended consequences: for example, it [is] not widely known that a licence to a government entity to first publish results in a transfer of copyright to that government.<sup>54</sup>

5.60 Vi\$copy argued in relation to artistic works:

For instance, if the Crown commissions a portrait of the Prime Minister, the artist does not have to be paid reproduction royalties, although the collection often will sell reproductions of the work on cards, in books catalogues etc.

If a private commercial gallery were to commission the same work, those reproduction royalties would have to be paid. Many of our members have works impacted in this way.<sup>55</sup>

5.61 AIIA argued in relation to information communications technology (ICT) that, although such issues are usually dealt with in contracts, the removal of section 176 ‘would support a more flexible and informed approach to copyright ownership’:

... the benefits to government, industry and the Australian community generally could be significant –

- lower tendering and negotiation costs to government and industry;

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<sup>54</sup> *Submission 27*, p. 3.

<sup>55</sup> *Submission 24*, p. 4.

- increased choice and competition of ICT solutions for government;
- government benefits from ongoing innovations made;
- software related investment in Australia;
- potentially lower acquisition costs for government;
- commercialization opportunity for industry; and
- community benefits from lower government spending, increased productivity and ICT industry development.<sup>56</sup>

5.62 In addition to these arguments, it was suggested that governments may use sections 176–8 as ‘fallback provisions’ to influence negotiations. During consultations, a representative of the Communications Law Centre stated that the Centre has provided broad advice on the first ownership provisions, since many people could not afford to obtain legal advice when contracting with the government. The Centre noted that government had demanded copyright ownership ‘a surprising number of times’ from creators, and that it was very difficult for creators to negotiate from that position. A consequence of creators not being able to afford legal advice was that they risked entering into a situation where government would own copyright in their work, without being aware that they had done so.<sup>57</sup>

5.63 The RAIA raised similar concerns to those of the Communications Law Centre in relation to the weaker bargaining position of architects who contract with government.<sup>58</sup> The RAIA claimed there was no incentive for government to agree to reverse the presumption of government ownership of copyright from a stronger bargaining position.

5.64 However, during consultations, representatives of the Victorian Government stated that they had never known sections 176–8 to be used as fallback provisions in negotiations and that there was no suggestion that they were used as any means of ‘undue influence’ over other parties in that process.<sup>59</sup>

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<sup>56</sup> *Submission 21*, pp. 13–14.

<sup>57</sup> CLRC consultation, Melbourne, 24 August 2004.

<sup>58</sup> *Submission 75*, p. 6.

<sup>59</sup> CLRC consultation, Melbourne, 24 August 2004.

## Support for the Part VII provisions

5.65 Government agencies generally expressed satisfaction with the current legislative scheme under Part VII. Some government submissions indicated that they generally relied on contract rather than sections 176–8 when dealing with third parties. DCITA stated:

Of 43 agencies surveyed by the CCA in late 2002, most stated that they did not rely on the default provisions under section 176 of the Copyright Act, but rather generally relied on the inclusion of specific intellectual property clauses in procurement contracts.<sup>60</sup>

5.66 Some government submissions were concerned that any alteration to sections 176–9 would have a detrimental economic impact on government. The Department of Finance and Administration (DOFA) expressed concern that government might pay for the production of intellectual property more than once if the default position were changed. The NSW Attorney General's Department stated that the absence of Crown copyright could lead to the public paying for the production of information by government and then its secondary sale by private vendors. The WA Department of Industry and Resources argued that changes would impede economic development.

5.67 The Department of Family and Community Services (FACS) argued that while large contracts tend to address copyright ownership, smaller contracts or agreements covering temporary staff may not. FACS argued that uncertainty over ownership of copyright in such circumstances could lead to a failure to exploit material fully and thus be a waste of taxpayers' funds. The National Archives opposed amendment of the existing scheme, claiming it was a matter for government policy to determine whether to claim copyright in material created under its direction or control. The Department of Foreign Affairs and Trade (DFAT) submitted that the provisions were appropriate and adequate, and should not be amended.

5.68 While sympathetic to the Ergas Committee's views on the government's privileged position under Part VII, the ALRC expressed concerns about the

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<sup>60</sup> *Submission 60*, p. 3.

implications of abolishing section 176 in terms of requiring detailed intellectual property provisions in contracts:

As a small government agency without extensive infrastructure, the cost of making agreements with service providers would increase greatly if s 176 were to be altered. If such changes were to be introduced, the ALRC – and no doubt a host of similarly placed agencies – would benefit from whole-of-government best practice guidelines for incorporating appropriate copyright provisions in service contracts.<sup>61</sup>

## The position in other common law countries

5.69 By way of comparison, specific Crown ownership provisions in the United Kingdom, Ireland, New Zealand and Canada are outlined below.

### United Kingdom

5.70 As noted in Chapter 3, legislation enacted in 1988 significantly altered the Crown ownership provisions by removing the phrase ‘by or under the direction or control’ and abolishing rights based on first publication.

5.71 Section 163 of the *Copyright, Designs and Patents Act 1988* (UK) 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’. Copyright in these works subsists for 125 years from the end of the calendar year in which it was made or, where the work is published commercially within 75 years, for a term of 50 years from the end of the year of publication.<sup>62</sup> In parliamentary debates on the bill, the UK Government gave two reasons for the term of 125 years. First, it was considered that a term of life of the author plus 50 years was impractical since ‘it would require a large bureaucracy to keep records of the date of death of all the authors of Crown copyright works’.<sup>63</sup> Second, as official documents in the UK are not in the public domain for 30 years (100 years in the

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<sup>61</sup> *Submission 3*, p. 4.

<sup>62</sup> The term of protection for Crown copyright and Parliamentary copyright was not affected by the *Duration of copyright and rights in performances regulations* (UK) 1995/3927, which extended the term of copyright protection generally. This means that the term of protection for Crown copyright and Parliamentary copyright is generally shorter than that for other copyright.

<sup>63</sup> Skone James et al, *op cit*, 14<sup>th</sup> edition, p. 577, para 10–13, citing *Hansard*, HL, vol 491, col 559.

case of Royal documents), the term would provide ‘a reasonable period of protection’ once they were in the public domain.<sup>64</sup>

5.72 Section 164 entitles Her Majesty to copyright in every Act of Parliament or Measure of the General Synod of the Church of England for 50 years from the end of the calendar year in which Royal Assent was given. Prerogative rights are specifically excluded from subsisting in Acts of Parliament or Measures.<sup>65</sup>

5.73 The ‘direction or control’ test has been retained in relation to the separate system of parliamentary copyright established under the Act.<sup>66</sup> Works made by or under the direction or control of the House of Commons or the House of Lords include any work made by an officer or employee of that House in the course of his duties or any sound recording, film, live broadcast or live cable programme of proceedings. Works commissioned by or on behalf of a House of Parliament are not included by reason only of that commission.<sup>67</sup> Parliamentary copyright vests in the relevant House or both Houses jointly, and subsists for a period of 50 years from the end of the calendar year in which the work was made.

5.74 Parliament also has copyright in bills.<sup>68</sup> Copyright can vest in either House or both Houses jointly, depending on where it was introduced and by whom. Copyright ceases on Royal Assent or on the withdrawal or rejection of the Bill (unless, after rejection, it remains possible for the bill to be re-presented in that session). Any other copyright or right in the nature of copyright is specifically excluded from subsisting in bills.<sup>69</sup>

5.75 Before abolishing the ‘first publication’ provision on the grounds that it was unfair to extinguish the rights of authors of unpublished work, the UK Government was concerned to ensure that the Crown could continue, where

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<sup>64</sup> *ibid.*

<sup>65</sup> Subsection 164(4)

<sup>66</sup> Section 165. Subsection 165(7) provides that section 165 applies equally to any other legislative body of a country to which the Part extends (subject to an Order in Council providing otherwise). The Scottish Parliament and the Northern Ireland Assembly also have copyright in their bills (sections 166A and 166B respectively).

<sup>67</sup> Subsection 165(4).

<sup>68</sup> Section 166.

<sup>69</sup> Subsection 166(7).

appropriate, to publish and reproduce material ‘lawfully acquired in the course of Crown business’.<sup>70</sup> Such material included evidence given to committees and commissions, and statistical or industrial information provided to government departments. The UK Government decided accordingly to replace the ‘first publication’ provision with a provision allowing the Crown to publish such material without infringing copyright, subject to any express agreement to the contrary.<sup>71</sup> Section 48 of the UK Act allows the Crown, for the purpose for which a work was communicated to it in the course of public business by or with the licence of the copyright owner, or any related purpose which the owner could reasonably have anticipated, to copy the work and issue copies to the public without infringing copyright.

### **Ireland**

5.76 Like the United Kingdom, Ireland has more restrictive provisions relating to government copyright than Australia and has provided for separate parliamentary copyright. In the *Copyright and Related Rights Act 2000* (Ire), government copyright is restricted to work made by an officer or employee of the Government or the State in the course of his or her duties, and expires 50 years from the end of the year in which it was made.<sup>72</sup>

5.77 The Irish legislation also provides for parliamentary (Oireachtas) copyright in any bill or enactment for a term of 50 years from the first time the work is lawfully made available to the public.<sup>73</sup> The Act provides for the first ownership by either or both of the Houses of works made by or under the direction or control of either or both Houses, specifically including sound recordings, films and live broadcasts, and works made by officers or employees in the course of their duties.<sup>74</sup>

### **New Zealand**

5.78 Section 26 of the *Copyright Act 1994* (NZ) provides that the Crown owns copyright in a work ‘made by a person employed or engaged by the Crown

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<sup>70</sup> Department of Trade and Industry *Intellectual property and innovation*, Cmnd 9712, London, 1986, para 16.8.

<sup>71</sup> *ibid.*

<sup>72</sup> Section 191.

<sup>73</sup> Section 192.

<sup>74</sup> Section 193.

under a contract of service, a contract of apprenticeship, or a contract for services' (subject to any contrary agreement). Copyright under this section subsists for a period of 25 years in the case of typographical arrangements of a published edition, and 100 years for all other works.

5.79 As noted in Chapter 3, copyright does not subsist in Bills, legislation, regulations, bylaws, parliamentary debates, reports of select committees, judgments of any court or tribunal, and reports of commissions or inquiries.<sup>75</sup>

## Canada

5.80 As noted in Chapter 3, the current Canadian legislation is very similar to the former UK provisions, whereby 'Her Majesty' owns copyright in any work prepared or published by or under the direction or control of 'Her Majesty' or any government department (subject to contrary agreement with the author), for a term of 50 years from first publication.<sup>76</sup> However, a review of the Crown copyright provisions is expected within the next few years as part of a broad review of copyright law.<sup>77</sup>

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<sup>75</sup> Section 27.

<sup>76</sup> *Copyright Act 1985* C-42 (Can), section 12. Section 12 is expressed to be 'without prejudice to any rights or privileges of the Crown'.

<sup>77</sup> Crown copyright was listed as a medium term issue for review within 2 to 4 years, but as at September 2004 was not considered a priority (correspondence from M. Jean-Paul Boulay, Copyright Policy Branch, Canadian Heritage, dated 29 September 2004).



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## Chapter 6

### The Crown prerogative

6.01 Section 8A of the Copyright Act preserves the Crown's prerogative right in the nature of copyright.<sup>1</sup> 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'.<sup>2</sup>

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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<sup>1</sup> 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.

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

revenue,<sup>3</sup> and partly a means of control by the Crown over all forms of publishing in the 16<sup>th</sup> and 17<sup>th</sup> centuries.<sup>4</sup>

6.05 Over time various explanations have been given as to the basis of the prerogative. Monotti<sup>5</sup> notes that explanations include that it was based in property,<sup>6</sup> that it reflected ‘the character of the monarch as the head of the church and the political constitution’,<sup>7</sup> and that it was the monarch’s duty ‘to superintend the publication of and to promulgate certain works’.<sup>8</sup> In the 17<sup>th</sup> century the House of Lords in *Roper v Streater*<sup>9</sup> 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.<sup>10</sup> However, Monotti states that from the late 18<sup>th</sup> 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.<sup>11</sup>

6.06 The leading judgment of the Supreme Court of New South Wales in *Attorney-General (NSW) v Butterworth & Co (Australia) Ltd*<sup>12</sup> 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

<sup>3</sup> Under Queen Elizabeth I in particular, printing patents were abused for mercenary reasons: see Monotti, op cit, p. 306.

<sup>4</sup> Gilchrist, ‘Crown copyright: An analysis of rights vesting in the Crown under statute and common law and their interrelationship’, op cit, p. 6.

<sup>5</sup> Monotti, op cit.

<sup>6</sup> *The Company of Stationers v Seymour* (1677) 1 Mod 256; *Millar v Taylor* (1769) 4 Burr 2303.

<sup>7</sup> *Millar v Taylor* (1769) 4 Burr 2303, Yates J (dissenting).

<sup>8</sup> *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.

<sup>9</sup> (1672) Bac. Abr. 7<sup>th</sup> ed., Vol. VI, 507.

<sup>10</sup> J Gilchrist, ‘Crown copyright: An analysis of rights vesting in the Crown under statute and common law and their interrelationship’, op cit, p. 11.

<sup>11</sup> Monotti, op cit, pp. 306–7, referring to *Roper v Streater* (1672) Bac Abr, volume VI 507.

<sup>12</sup> (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, 13<sup>th</sup> ed, p. 382.

legislature and acts of state of that description, carrying with it a corresponding prerogative'.<sup>13</sup> 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<sup>14</sup> and had not fallen into desuetude. His Honour also categorised the prerogative in relation to copyright as a proprietary right.<sup>15</sup>

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.<sup>16</sup>

### **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.<sup>17</sup> 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'.<sup>18</sup> 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.<sup>19</sup>

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<sup>13</sup> *ibid* at 229.

<sup>14</sup> *ibid* at 245.

<sup>15</sup> *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.)

<sup>16</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> *Submission 57*, p. 7.

<sup>19</sup> *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.<sup>20</sup>

## The scope of the prerogative

6.10 The scope of Crown prerogatives generally is uncertain<sup>21</sup> 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.<sup>22</sup> Some argue that judges have copyright in their own judgments,<sup>23</sup> 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).

<sup>20</sup> 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.

<sup>21</sup> Evatt op cit, pp. 7–9. Evatt was writing in 1924 about Crown prerogatives generally, and cites Dicey (*The law of the Constitution*, 8<sup>th</sup> 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'.

<sup>22</sup> See for example, 'The Crown and copyright in publicly delivered judgments', 56 *Australian Law Journal*, 326–8.

<sup>23</sup> Taggart op cit.

the name of the monarch, the Crown has a prerogative right in those judgments.<sup>24</sup>

6.13 In the 18<sup>th</sup> century, several of the majority in *Millar v Taylor*<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> However, not all commentators agree. Taggart,<sup>28</sup> for example, argues that the 17<sup>th</sup> century cases upholding patents to publish law reports can be 'simply explained by the then extant prerogative control over all printing'.<sup>29</sup> He argues that the prerogative extends only to the duty to publish statutes<sup>30</sup> and that the historical basis for this duty 'is entirely foreign to reasons for judgments and law reports'.<sup>31</sup>

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.<sup>32</sup> 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

<sup>24</sup> Bannon op cit. See further discussion in Chapter 5.

<sup>25</sup> (1769) 4 Burr 2303 at 2329 (Willes J), 2404 (Lord Mansfield CJ).

<sup>26</sup> See Skone James et al, op cit, 14<sup>th</sup> 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).

<sup>27</sup> 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.

<sup>28</sup> See Taggart, op cit. Taggart concludes that individual judges own copyright in their judgments.

<sup>29</sup> *ibid*, p. 320.

<sup>30</sup> *ibid*, pp. 324–5.

<sup>31</sup> *ibid*, p. 325.

<sup>32</sup> *Submission 39*, p. 1.

individual judges and be subject to a broad statutory licence.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

### **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.<sup>37</sup> However, others have doubted that the prerogative extends beyond printing and publishing.<sup>38</sup>

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).<sup>39</sup> 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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<sup>33</sup> *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).

<sup>34</sup> *Submission 70*, p. 2.

<sup>35</sup> *Submission 56*, p. 8.

<sup>36</sup> They argued that natural justice would prevent a judge from adjudicating on this issue.

<sup>37</sup> 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'.

<sup>38</sup> Gilchrist 'The role of government as proprietor and disseminator of information', *op cit*, p. 65.

<sup>39</sup> *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.<sup>40</sup>

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.<sup>41</sup> 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.<sup>42</sup> The WA Attorney-General commented further that perpetual copyright in such materials was appropriate ‘given the long periods for which they are of relevance’.<sup>43</sup> However, the WA Attorney-General

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<sup>40</sup> *Submission 33*, p. 3.

<sup>41</sup> Thomson, Law Council of Australia, ACC, Screenrights, CAL, CAUL, ALIA, AustLII and the Department of Veterans’ Affairs.

<sup>42</sup> *Submission 29*, p. 2.

<sup>43</sup> *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.<sup>44</sup>

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.<sup>45</sup> AIIA supported clarification ‘in principle’ while expressing no view on the scope of the prerogative right.<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> 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’.<sup>49</sup> 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.<sup>50</sup>

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<sup>44</sup> *Submission 51*, p. 2; further correspondence October 2004.

<sup>45</sup> *Submission 59*, p. 4.

<sup>46</sup> *Submission 21*, p. 8.

<sup>47</sup> *Submission 64*, p. 10.

<sup>48</sup> *Submission 57*, p. 7.

<sup>49</sup> *Submission 71*, p. 8.

<sup>50</sup> *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.<sup>51</sup>

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<sup>52</sup> or the Explanatory Memorandum<sup>53</sup> to consideration of the Commonwealth's power to affect the Crown prerogative in right of the States.

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<sup>51</sup> *Submission 27*, p. 5.

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

<sup>53</sup> 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*<sup>54</sup> that Commonwealth legislation can bind the States.<sup>55</sup> 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,<sup>56</sup> or impair a State’s capacity to function.<sup>57</sup> 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.<sup>58</sup>

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

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<sup>54</sup> *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.’

<sup>55</sup> 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.’

<sup>56</sup> *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).

<sup>57</sup> *Melbourne Corporation v. The Commonwealth* (State Banking Case) (1947) 74 CLR 31.

<sup>58</sup> *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.<sup>59</sup>

6.29 While the High Court in the *Engineers' Case* left open the question of the impact of Commonwealth legislation on State prerogatives,<sup>60</sup> 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*,<sup>61</sup> 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.<sup>62</sup>

6.31 This principle was affirmed by members of the High Court in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*<sup>63</sup> and *Commonwealth v Tasmania*<sup>64</sup> (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*<sup>65</sup>:

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

<sup>59</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1 at 139.

<sup>60</sup> *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.

<sup>61</sup> (1940) 63 CLR 271.

<sup>62</sup> *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.'

<sup>63</sup> (1982) 152 CLR 25.

<sup>64</sup> (1983) 158 CLR 1.

<sup>65</sup> (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.

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.<sup>66</sup>

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.<sup>67</sup> The NSW Government's submission noted its 'significant concerns' over possible changes to Crown ownership and referred to this issue.<sup>68</sup>

6.35 The Law Council of Australia disputed that the abolition of the prerogative right would amount to an acquisition of property,<sup>69</sup> referring to

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<sup>66</sup> (1983) 158 CLR 1, at 215–6.

<sup>67</sup> As required by section 51(xxxi) of the Constitution.

<sup>68</sup> *Submission 56*.

<sup>69</sup> *Submission 33*, p. 3.

*Nintendo Co Ltd v Centronics Systems Pty Ltd.*<sup>70</sup> 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.<sup>71</sup>

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.<sup>72</sup>

## 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.<sup>73</sup>

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<sup>70</sup> (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.’

<sup>71</sup> 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.

<sup>72</sup> *Submission 61*, p. 2.

<sup>73</sup> *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.<sup>74</sup> 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,<sup>75</sup> 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’.<sup>76</sup> 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’.<sup>77</sup>

### ***The United Kingdom***

6.40 As outlined in Chapter 2, United Kingdom copyright law was extensively reviewed by the Whitford Committee in 1977.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup>

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<sup>74</sup> Paragraph 225(1)(b).

<sup>75</sup> *Copyright Act 1994 (NZ)*, section 27.

<sup>76</sup> ‘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.

<sup>77</sup> Correspondence to the Committee from the Deputy Chief Parliamentary Counsel for New Zealand, 4 October 2004.

<sup>78</sup> Whitford Report, op cit.

<sup>79</sup> *ibid*, p. 167.

<sup>80</sup> *ibid*, p. 149.

6.41 The UK's current copyright legislation,<sup>81</sup> 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,<sup>82</sup> together with the rights and privileges of Parliament and of any person under an enactment, it is abolished in relation to Acts and measures.<sup>83</sup>

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'.<sup>84</sup> In relation to judgments, a leading copyright text has argued that the 17<sup>th</sup> century cases that upheld patents to print law reports,<sup>85</sup> 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.<sup>86</sup>

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<sup>81</sup> *Copyright, Designs and Patents Act 1988* (c. 48) (UK).

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

<sup>83</sup> 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.

<sup>84</sup> Skone James et al, op cit, 14<sup>th</sup> 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).

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

<sup>86</sup> Skone James et al, op cit, 14<sup>th</sup> 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,<sup>87</sup> 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,<sup>88</sup> 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.<sup>89</sup>

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.

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<sup>87</sup> Subsection 43(1).

<sup>88</sup> Ricketson & Creswell, *op cit*, para 14.200.

<sup>89</sup> 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).

## 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'.

## Chapter 8

### Which government entities should be considered the ‘Commonwealth’ and ‘State’?

8.01 Quite apart from the issue of whether the ‘Commonwealth’ and ‘State’ include not only the executive but also the judicial and legislative arms of government, as discussed in Chapter 2, there is some uncertainty over which entities within the executive government are included within the definition of ‘Commonwealth’ and ‘State’ for the purposes of ownership of copyright.

8.02 For bodies controlled by the government, funded by the government and existing for government purposes, the application of the Crown copyright provisions is reasonably straightforward. However, the extent to which the Copyright Act applies to statutory agencies, government-owned corporations and independent contractors is less clear. This uncertainty is compounded by the increasing tendency of governments to carry out their functions through a range of entities whose status is not defined in legislation.<sup>1</sup>

8.03 A key example examined in more detail below concerns the National Museum of Australia and the National Gallery of Australia. While they are similar bodies performing similar functions, it is likely that one would be considered to be part of the Commonwealth under the Copyright Act, while the other would not.

#### Terms used in the Act

8.04 As discussed in Chapter 5, the heading to Part VII of the Copyright Act refers to ‘the Crown’ while the sections in that Part use the terms ‘Commonwealth’ and ‘State’. Even if it is accepted that those terms refer only to executive government, they do not necessarily extend to all statutory and public bodies.

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<sup>1</sup> ALRC, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, op cit, para 29.2.

8.05 The Copyright Act and the *Acts Interpretation Act 1901* (Cth) offer little assistance in ascertaining what entities should be included as part of the ‘Commonwealth and or a State’. The Copyright Act does not define ‘the Commonwealth’ apart from noting that it includes ‘the Administration of a Territory’. Similarly the terms ‘State’ or ‘Crown’ are not defined.<sup>2</sup> Thus the meaning of the terms must be inferred from the context in which they are used.

### **Types of government entities**

8.06 The uncertainty has been compounded by the proliferation of entities established by governments to carry out many government activities. As the ALRC noted,<sup>3</sup> the types of entities that may attract Commonwealth immunity include:

- employees,
- commissions,
- statutory authorities,
- statutory corporations,
- government business entities,
- government owned corporations, and
- private corporations under contract to the government.

8.07 The ALRC noted that in the first three categories, the status of the entity is often defined in the enacting legislation. Where the status is not specified, it is still often reasonably easy to ascertain in light of the entity’s functions and the degree of control that government exercises.

8.08 However, the ALRC noted that in the last three categories (government business enterprises, government owned corporations and private corporations under contract to the government), the nexus with government is often less clear. It may be difficult to establish the degree and existence of ministerial control, and the entity’s activities are more likely to fluctuate between those that are considered governmental and those that are private in nature.<sup>4</sup> In recent years, for example, there has been an increasing tendency to privatise major

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<sup>2</sup> Subsection 10(1).

<sup>3</sup> ALRC, Review of the Judiciary Act 1903, op cit, para 5.353.

<sup>4</sup> *ibid*, para 5.354.

public utilities and to contract out what were previously considered governmental activities.

8.09 The ALRC concluded that the issue of whether an entity should be included as part of the ‘Commonwealth and or a State’ need not be complicated, and emphasised the value of defining the status in legislation, particularly given the ambiguity of common law tests.<sup>5</sup> During the Committee’s consultations, several State governments indicated that in recent years they have tended to define in enacting legislation whether or not an entity is part of the Crown, at least in relation to government business enterprises.<sup>6</sup>

8.10 However, the Victorian Government, while acknowledging the uncertainties arising in ‘an environment of corporatisation and outsourcing’, opposed legislative measures to resolve the difficulties, giving examples of the different types of classification of public entities under various Victorian Acts.<sup>7</sup> For example, 245 agencies are listed as employing public servants under the *Public Service Management and Employment Act 1998* (Vic). The list does not include central government agencies such as the Victorian Police, the Privacy Commissioner and the Victorian Electoral Commissioner, which employ staff under their own legislation. The Victorian Department of Treasury and Finance, on the other hand, lists approximately 560 bodies in its database of public sector entities. If groups such as schools, municipal councils and land management councils were included, the number would rise to about 3000. Under the *Public Records Act 1973* (Vic), the list of ‘public statutory bodies’ (that is, bodies created by or under statute for a public purpose) includes various charitable organisations of a private nature.

8.11 Thus three different tests give three different results.

## Common law

8.12 There have been few cases that have dealt directly with the issue of which entities should be included as part of the ‘Commonwealth and or a State’ for the purposes of copyright. However, this issue has been considered in other areas of law, particularly in relation to section 75(iii) of the Constitution. That provision gives the High Court original jurisdiction in all matters in which the

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<sup>5</sup> *ibid.*

<sup>6</sup> CLRC consultations 20 August 2004, Perth and 24 August 2004, Melbourne.

<sup>7</sup> Submission 64, p. 7.

Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party.<sup>8</sup>

8.13 Two tests have been applied in deciding whether a body is ‘the Commonwealth’ in constitutional cases: ‘the shield of the Crown’ test and the ‘federal’ test. These two tests are distinct tests based on different principles. However, they require an examination of similar factors, and in particular consider the degree of the government’s control over the entity’s operations. The application of the two tests, however, can lead to different results. In the only case which dealt substantially with this issue in relation to the Copyright Act, no distinction was made between the two tests and neither test was applied.<sup>9</sup>

### **‘Shield of the Crown’ test**

8.14 This test is applied to determine whether a body whose identity is distinct from the Crown is entitled to share the privileges and immunities of the Crown. In *Deputy Commissioner of Taxation v State Bank of NSW*<sup>10</sup> the ‘shield of the Crown’ test was described as:

...a means of ascertaining whether an agency or instrumentality “represents” the Crown for the purpose of determining whether that agency or instrumentality is bound by a statute enacted by the legislature. The doctrine is in essence an aid to the process of statutory interpretation whereby the courts seek to ascertain the legislative intent of Parliament. Hence it has been said that an agency or instrumentality may be endowed with the attributes of the Crown for one purpose but not for others. Indeed, the legislature could explicitly endow a private corporation carrying on business for private purposes with the privileges and immunities of the Crown, yet that private corporation would not answer the description of “a State” for constitutional purposes.<sup>11</sup>

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<sup>8</sup> See: *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1; *State Bank of NSW v Commonwealth Bank of Australia* (1986) 161 CLR 639.

<sup>9</sup> *Re Australasian Performing Right Association and Australian Broadcasting Commission* (1982) 65 FLR 437 per Bowen CJ and Franki J at 441–2, Sheppard J at 452–6.

<sup>10</sup> (1992) 174 CLR 219.

<sup>11</sup> *ibid*, per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, at 233.

8.15 This test depends on the nature and degree of control the Crown exercises over the entity. The courts have generally required a high degree of control to find that an entity is covered by the shield of the Crown.<sup>12</sup> The courts have defined control as the degree of control that the Crown is legally entitled to exercise, not the degree of control that is actually exercised.<sup>13</sup>

### **‘Federal’ test**

8.16 The ‘federal’ test considers whether there is a manifest intention that the Commonwealth should operate in a particular field through an entity created for that purpose or, conversely, that the Commonwealth intends to put an entity into the field to perform its functions independently of the Commonwealth.<sup>14</sup>

8.17 The High Court has adopted the federal test in deciding whether an entity is the ‘Commonwealth and or a State’ for the purposes of the provisions of the Commonwealth Constitution relating to federal jurisdiction.<sup>15</sup> If an entity is the Commonwealth for such purposes, it will not necessarily be the Crown in the right of the ‘Commonwealth and or a State’ for all purposes, including copyright.<sup>16</sup> However, the factors applied in these cases provide a useful starting point.

8.18 The following factors have been considered in applying the ‘federal’ test:

- the extent of the power of the executive government to give directions to the body in relation to the exercise of its powers and the performance of its functions;
- whether the incorporated entity has corporators (that is, members);
- the extent to which the power to appoint or remove directors is vested in the executive government;
- the public character of the functions of the body (including any regulatory role); and
- the financial relationship between the body and the Commonwealth.

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<sup>12</sup> *Townsville Hospitals Board v Council of the City of Townsville* (1982) 149 CLR 282 per Gibbs CJ, at 291.

<sup>13</sup> *Bank Voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584; *Re Hawthorn Pty Ltd & ors v State Bank of South Australia and anor*, (1993) 112 ALR 691.

<sup>14</sup> *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334, per Kitto J, at 338.

<sup>15</sup> Sections 75(iii), 75(iv) and 78 of the Commonwealth of Australia Constitution and related provisions of the Judiciary Act 1903 (Cth).

<sup>16</sup> *Maguire v Simpson* (1977) 139 CLR 362, per Jacobs J, at 406.

8.19 The overriding consideration is the degree to which the body concerned is subject to the Crown's control, similar to the 'shield of the Crown' test. However, courts have been reluctant to apply the test strictly. For example, in *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*<sup>17</sup> Stephen J stated:

I have not expressed these various considerations (the considerations to be taken into account in determining whether a body is the Crown) in terms of specific 'tests' although the precedent authorities provide fertile ground for the development of the concept of such 'tests'. I have, of course, had regard to those authorities, while recognising that the primary task is that of statutory interpretation rather than any mechanical application of supposed tests.<sup>18</sup>

8.20 The difficulty in having such tests is that each case is dependent on its own circumstances.<sup>19</sup> This has resulted in courts placing varying importance on different factors. In determining the status of an entity for the purpose of use of copyright material for the services of the Commonwealth or State under section 183 of the Copyright Act, Sheppard J in *Re Australasian Performing Right Association; Re Australian Broadcasting Commission*<sup>20</sup> cited the reasons given by the Copyright Tribunal:

Matters to be considered include the question whether the corporation fulfils a governmental or non-governmental function; the capacity of the government to control its activities; financial autonomy; the right of appointment and dismissal of the members of the body of its staff by the government; whether it has duties to furnish information or accounts to the government; and its power over assets in its ownership or control.<sup>21</sup>

8.21 Sheppard J considered that the list was exhaustive subject to the addition of one factor, namely whether the entity's property was held for the Commonwealth.<sup>22</sup>

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<sup>17</sup> (1979) 26 ALR 99.

<sup>18</sup> *ibid*, at 110–11.

<sup>19</sup> *Re Australasian Performing Right Association Ltd; Re Australian Broadcasting Commission* (1982) 45 ALR 153, per Sheppard J, at 167.

<sup>20</sup> *ibid*.

<sup>21</sup> *ibid* at 167, quoting *Ex parte Australasian Performing Right Association Ltd; Re Australian Broadcasting Commission* (1982) 42 ALR 58, per Lockhart J at 64.

<sup>22</sup> *ibid*.

8.22 The following example illustrates how difficult it may be for the public to know whether an entity is the ‘Commonwealth or State’ under the Copyright Act, since all those factors may not be apparent.

**Case study: the National Gallery and the National Museum**

The National Gallery of Australia (the Gallery) and the National Museum of Australia (the Museum) are established by legislation as bodies corporate to perform broadly similar functions.

The Gallery is established as a body corporate under the *National Gallery Act 1975* to develop, maintain and exhibit a national collection of works of art. The affairs of the Gallery are conducted by the Council of the National Gallery of Australia. The Council consists of members, including the Director, who are appointed by the Governor-General and may be removed for cause.

The Gallery receives budget appropriations, but there is also a fund to receive gifts and bequests. The Gallery requires the Minister’s approval to enter into major contracts or dispose of or acquire certain art works. The Act does not give the Minister any general power to give directions to the Council or the Gallery, nor does it contain any declaration as to whether or not the Gallery is entitled to the privileges and immunities of the Commonwealth generally.

The Museum is established as a body corporate under the *National Museum of Australia Act 1980*. Its principal functions are to develop, maintain and exhibit a national collection of historical material, and associated activities.

The Museum is governed by a Council, the members of which are appointed by the Governor-General and may be removed for cause. The Council is required to perform its functions and exercise its powers in accordance with such written directions (if any) as are given to it from time to time by the Minister.

Both bodies may acquire, hold and dispose of property and sue or be sued in their corporate names. The Committee understands that it is likely that the Gallery would not be regarded as the ‘Commonwealth’ for the purposes of the Copyright Act, as it is not subject to a general power of direction by the executive government and does not perform any regulatory functions. However, the Museum, while also not performing any regulatory functions, would probably be regarded as part of the ‘Commonwealth’ because of the degree of government control exercisable through the Minister’s power of direction. These factors would not be apparent to the public.

## **A non-exhaustive list of factors to be applied by the courts**

8.23 During this inquiry, the Committee sought views as to what entities should be included in the definition of ‘Commonwealth’ and ‘State’ for the purposes of Crown copyright ownership and how this should be determined.<sup>23</sup> Some submissions, such as the Law Institute of Victoria,<sup>24</sup> recommended the inclusion in the Copyright Act of a list of non-exhaustive factors for courts to consider.

8.24 However, the Victorian Government stated that the matter should not be the subject of legislation ‘given that the courts, over a considerable period of time, have evolved a series of tests which define what or what is not part of the State’.<sup>25</sup> The Victorian Government further argued that attempting to provide an exhaustive list ‘may lead to the loss of statutory protection and prerogative rights in instances where an agency is not properly identified’.<sup>26</sup>

### **The ‘fair dealing’ model**

8.25 Subsection 40(2) of the Copyright Act contains a non-exhaustive list of factors which should be considered in determining whether a dealing is fair for the purpose of research or study. These subsections were based on recommendations of the Franki Committee<sup>27</sup> and were similar to types of factors that had been developed in case law. It has been argued that the factors listed in subsections 40(2) and 40(3) provide insufficient guidance.<sup>28</sup> However, the Franki Committee in making its recommendation viewed this as unavoidable:

... there are so many factors which may have to be considered in deciding whether a particular instance of copying is ‘fair dealing’, that we think it is quite

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<sup>23</sup> Issues Paper (paras 23–27) and Discussion Paper (paras 41–43).

<sup>24</sup> Submission 42.

<sup>25</sup> Submission 64, p. 7, referring in particular to *Townsville Hospital Board v City of Townsville* (1982) 149 CLR 282.

<sup>26</sup> *ibid.*

<sup>27</sup> Copyright Law Committee on Reprographic Reproduction, *op cit*, p. 29–31.

<sup>28</sup> Ricketson & Creswell, *op cit*, para 11.35.

impracticable to attempt to remove entirely from the Court the duty of deciding the question whether or not a particular instance constitutes ‘fair dealing’.<sup>29</sup>

### **Possible factors to include**

8.26 The positive impact of introducing a list of matters to be considered may be minimal, as any determination on the status of an entity would depend on the particular circumstances. However, the Committee considered possible factors for inclusion, some of which have been considered by the courts:

- Parliament’s intent in establishing or incorporating the entity;
- the government’s capacity to control the entity’s operations;
- the entity’s financial autonomy and reporting responsibilities;
- the entity’s capacity to own and dispose of property; and
- the entity’s functions.

8.27 Each of these is discussed in turn below.

### ***Parliament’s intent***

8.28 The instrument establishing the entity may provide a clear indication of the legislature’s intention. Kitto J stated in *Inglis v Commonwealth Trading Bank of Australia*<sup>30</sup>:

The decisive question is not whether the activities and functions with which the respondent is endowed are traditionally governmental in character, though their possession of a traditional or generally accepted governmental character may well help in the ascertainment of the legislative intention. The question is rather what intention appears from the provisions relating to the respondent in the relevant statute: is it, on the one hand, an intention that the Commonwealth shall operate in a particular field through a corporation created for the purpose; or is it, on the other hand, an intention to put into the field a corporation to perform its functions independently of the Commonwealth, that is to say otherwise than as a Commonwealth instrument, so that the concept of a Commonwealth activity cannot realistically be applied to that which the corporation does?

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

<sup>30</sup> (1969) 119 CLR 334, at 337–8.

8.29 The legislature's intention was also considered in *State Electricity Commission of Victoria v City of South Melbourne*<sup>31</sup> where it was stated that:

...no statutory body should be accorded special privileges and immunities unless it clearly appears it was the intention of the legislature to confer them.<sup>32</sup>

### ***The government's capacity to control the entity's operations***

8.30 An important factor, as noted above, is whether government directly or indirectly has power to remove, otherwise than for misconduct or incapacity, those in control of the entity's operations.<sup>33</sup>

8.31 If the entity performs its functions in accordance with directions from the relevant Minister, this will mean that it is under the direction of the Minister and would therefore be included as part of the 'Commonwealth and or a State'.

### ***The entity's financial autonomy and reporting responsibilities***

8.32 The degree of financial autonomy may also be relevant in determining whether an entity is controlled by government.

8.33 The AIC recommended that all entities that are accountable to government under the *Financial Management and Accountability Act 1997* (Cth) (FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (Cth) (CAC Act) be included as part of the 'Commonwealth and or State'.<sup>34</sup> The Department of Veterans' Affairs also submitted that the FMA Act is useful as a starting point, and that if a wider definition were favoured, any entity receiving substantial funding from the Consolidated Revenue Fund should be included.<sup>35</sup> The Committee notes that the entities listed in the FMA Regulations include some courts.

8.34 Being subject to the full application of the CAC Act may indicate that the entity should be included as part of the 'Commonwealth'. However, some CAC

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<sup>31</sup> (1968) 118 CLR 504.

<sup>32</sup> *ibid*, per Barwick CJ, McTiernan, Taylor and Menzies JJ, at 510.

<sup>33</sup> *Re Australasian Performing Right Association and Australian Broadcasting Commission* (1982) 62 FLR 20.

<sup>34</sup> Submission 4, p. 2.

<sup>35</sup> Submission 55.

Act entities are excluded from certain provisions of the CAC Act, such as section 28 which limits the direction or control that can be exerted.

8.35 The Committee notes that the CAC and FMA Acts deal only with Commonwealth entities. In the time available, the Committee has not been able to consider the relevant legislation that applies in each State and Territory, but considers the Commonwealth model is a useful starting point.

### ***The entity’s capacity to own and dispose of property***

8.36 In *Re Australasian Performing Right Association and Australian Broadcasting Commission*,<sup>36</sup> Sheppard J held that if an entity holds property or surplus revenue for the Commonwealth and or a State, that may indicate that it is part of the Crown.

8.37 However, the Flexible Learning Advisory Group (FLAG) argued that no distinction should be made between entities that have capacity to acquire, hold and dispose of real or personal property, and those which do not, on the basis that the policy reasons applying to government copyright apply equally to those bodies that act on behalf of government.<sup>37</sup>

### ***The entity’s functions***

8.38 Whether or not the government is able to control an entity’s functions may not always be a determining factor. Instead, emphasis may be placed on whether the entity is an instrument of the Crown, in the sense that it carries out regulatory public functions.

8.39 It has been noted that this factor may become increasingly less helpful as more functions formerly regarded as matters of private concern are carried out by government instrumentalities. Thus the question of whether the functions are traditionally or peculiarly governmental is becoming less relevant.<sup>38</sup>

8.40 Some submissions supported the inclusion of this factor in determining whether an entity is part of the Commonwealth or State for the purposes of

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<sup>36</sup> (1982) 62 FLR 20.

<sup>37</sup> Submission 46, p. 4.

<sup>38</sup> *Re Australasian Performing Right Association and Australian Broadcasting Commission* (1982) 62 FLR 20.

copyright. The AVCC<sup>39</sup> and CAUL<sup>40</sup> submitted that entities whose functioning is integral to public administration should be included.

### **Other options for reform**

8.41 Apart from a list of factors to be considered by courts, other options may provide some degree of certainty as to which bodies are the Commonwealth or State. Two options are discussed below:

- allowing the Attorney-General to declare the status of an entity; and
- introducing as an administrative measure an inclusive list of entities that are part of the ‘Commonwealth and or a State’.

### **Declaration of entities by the Attorney-General**

8.42 In its Discussion Paper the Committee referred to the option of introducing a system similar to that used to declare collecting societies under Parts VA and VB of the Copyright Act.<sup>41</sup> The Attorney-General upon application could make a determination on whether an entity should be included as part of the ‘Commonwealth and or a State’. The advantage of this proposal is that it allows the status of an entity to be declared without recourse to the courts.

8.43 The Committee received little feedback on this option during its consultations. A representative of the ACC stated that this option in combination with an administrative list of entities would be preferable.<sup>42</sup> However, representatives of the Victorian Government did not favour giving the Commonwealth Attorney-General power to declare State government entities.<sup>43</sup> The length of time that the Commonwealth Attorney-General may take to make a declaration was considered to be a concern.

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<sup>39</sup> Submission 49, p. 3.

<sup>40</sup> Submission 7, p. 3.

<sup>41</sup> Sections 135P and 135ZZB.

<sup>42</sup> CLRC Public forum, Sydney, 27 July 2004.

<sup>43</sup> CLRC consultations, 24 August 2004, Melbourne.

## **Non-exhaustive list of entities**

8.44 The Committee also considered the option of creating a non-exhaustive list of entities that are included as part of the ‘Commonwealth and or a State’ for the purpose of copyright.<sup>44</sup> Many submissions supported the idea of a list similar to the Crown bodies list used in the United Kingdom.<sup>45</sup> However, some submissions opposed such a list, particularly on the basis that it would create an additional administrative burden on government to maintain the list.<sup>46</sup> The Australian Electoral Commission expressed concern that there may be difficulty in removing an entity from a list once it is included.<sup>47</sup>

### ***The UK experience***

8.45 The HMSO, which administers the Crown bodies list in the UK, provided information to the Committee on its experience in creating and maintaining the Crown bodies list. Its list was created and is maintained by the HMSO Licensing team. If the HMSO Licensing team becomes aware that an organisation is changing its status (for instance, if the organisation is privatised), the list is amended. Similarly, if the HMSO receives an application or query about an organisation that is not on the list, its status is checked and the details amended accordingly. The status is checked in a variety of ways:

- by asking the organisation itself: if the organisation has an in-house lawyer this is considered to be usually the best way of obtaining a definitive response;
- by examining the legislation that established the organisation; and
- by checking with legal advisers in the Treasury and the Scottish Executive.

8.46 The HMSO discounted concerns that introducing a list of entities included as part of the ‘Commonwealth and or a State’ would be unduly burdensome on government. The HMSO indicated that while significant effort was required to create the list, there had been little difficulty in maintaining it.

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<sup>44</sup> Issues Paper, para 27.

<sup>45</sup> For example, ACC, Screenrights, CAL, ALRC, Department of Family and Community Services, Thomson, Australian Libraries’ Copyright Committee, Australian Digital Alliance, and CCH.

<sup>46</sup> For example, CASL, Submission 30 and Law Institute of Victoria, Submission 42.

<sup>47</sup> CLRC Public forum, Sydney, 27 July 2004.

8.47 In the HMSO's experience, the Crown bodies list has been helpful to users in providing certainty as to the range of material available under their Click-Use Licences (discussed further in Chapter 11). This has lessened the HMSO's administrative burden by decreasing the need to answer inquiries about the status of a particular entity. The Crown bodies list is also considered to be useful to public bodies in clarifying the status of bodies with which they deal.

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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.



## Chapter 10

### Moral rights

10.01 During this inquiry the Committee considered whether moral rights should apply to works in which government owns copyright.

#### What are moral rights?

10.02 Under Part IX of the Copyright Act, the authors of works and cinematograph films have moral rights in material they create. Moral rights are personal and are distinct from the economic rights granted under the Act. They are:

- the right of attribution of authorship,<sup>1</sup>
- the right not to have authorship falsely attributed,<sup>2</sup> and
- the right of integrity of authorship.<sup>3</sup>

10.03 There are exceptions to the right of attribution of authorship and the right of integrity, based on a standard of reasonableness. A defendant is responsible for establishing that it was reasonable in the circumstances not to identify the author or deal with the work in a derogatory manner.<sup>4</sup> The author may also provide written consent to any or all acts or omissions that would otherwise constitute an infringement of his or her moral rights.<sup>5</sup>

10.04 Moral rights are personal rights, that is, they can only be owned by individuals.<sup>6</sup> They are conferred on authors of copyright material even where the copyright is owned by another, including the government or other employer. This means, for example, that if an employee writes a report for a government department, where reasonable, authorship of the work must be attributed to the

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<sup>1</sup> Section 194.

<sup>2</sup> Section 195AC.

<sup>3</sup> Section 195AI.

<sup>4</sup> Section 195AR and section 195AS.

<sup>5</sup> Section 195AW.

<sup>6</sup> Section 190.

employee and must not be falsely attributed to someone else, and the work must not be subject to derogatory treatment.

## Evidence to the Committee

10.05 Most submissions favoured retaining the current moral rights regime in relation to government. Some noted that the issue of moral rights in relation to government copyright largely affected government employees as authors. The ACC stated that ‘the current regime applies appropriately to material in which copyright may be owned by a government’.<sup>7</sup>

10.06 AIIA was in favour of moral rights applying where works were created for and owned by governments under section 176. While acknowledging that this was often not an issue in the information and communications industry, AIIA reported that some of its members had raised concerns over government demands that they waive their moral rights as developers.<sup>8</sup> Vi\$copy supported special policies in relation to visual artists and argued that the Crown should not require them to waive their moral rights.<sup>9</sup> The Royal Australian Mint expressed concern that if moral rights were diminished, world-class designers might be less inclined to create works for the Mint.<sup>10</sup> However, Chief Justice Black of the Federal Court of Australia suggested that not having moral rights in their judgments ‘would not trouble judges’.<sup>11</sup>

10.07 Some government agencies expressed concern about possible constraints that the existence of moral rights might impose on government action. FACS argued that government may be hindered in its use of the material:

For example, FACS has been approached by an author who sought to prevent FACS modifying material that the author had created for and delivered to FACS (copyright was owned by FACS). As it was necessary for FACS to modify the material and disseminate [it] to the public, FACS was forced to rely on a presumption that its activities were ‘reasonable’.<sup>12</sup>

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<sup>7</sup> Submission 27, p. 7.

<sup>8</sup> Submission 21.

<sup>9</sup> Submission 24.

<sup>10</sup> Submission 2.

<sup>11</sup> Submission 61, p. 2.

<sup>12</sup> Submission 36, pp. 2-3.

10.08 While arguing that moral rights should not apply to copyright material owned by governments for this reason, FACS acknowledged that authors should nevertheless retain the right to request the removal of their name from works if altered by government.<sup>13</sup>

10.09 The WA Attorney-General stated that governments should, as far as possible, comply with moral rights, but considered that government should not be bound by Part IX. His submission expressed concern that identifying and attributing authors in some circumstances is ‘difficult and possibly unreasonable.’<sup>14</sup> The WA Department of Premier and Cabinet expressed a similar view.<sup>15</sup> However, the Committee notes that these submissions did not elaborate on why governments were in a worse position than non-government bodies which must also comply with Part IX of the Copyright Act.

10.10 Not all governments were so concerned. The Victorian Government considered that the State should be subject to the same obligations as other employers. However, it noted that ‘moral rights are not well understood in the context of government copyright’.<sup>16</sup> The Victorian Government supported ‘further investigation into the development of legislation or guidelines clarifying situations where the State is not obliged to attribute the rights associated within any works to the creator(s)’ and further education of government servants and agents in relation to moral rights.<sup>17</sup> The NSW Attorney-General’s Department merely commented that until there was ‘a sustainable policy rationale for excluding government from the operation of Part IX’, there appeared to be no reason to do so.<sup>18</sup> The Queensland Government did not comment.<sup>19</sup>

10.11 While the Copyright Act only provides for moral rights to be held by individuals, some submissions also raised the possibility of governments having moral rights or an equivalent right, linking such rights to a means of protecting the integrity of government copyright material. For example, the ALRC, while

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<sup>13</sup> Submission 36.

<sup>14</sup> Submission 34, p. 2.

<sup>15</sup> Submission 29.

<sup>16</sup> Submission 64, p. 5.

<sup>17</sup> *ibid.*

<sup>18</sup> Submission 57, p. 2.

<sup>19</sup> Submission 71.

supporting moral rights for individual creators where government owned the copyright, also suggested there should be further consideration of providing governments with rights similar to moral rights for this reason.<sup>20</sup> CAUL argued that moral rights should be held by governments rather than individual creators, on the basis that the work is produced in pursuit of their duties as servants or officers of the Crown.<sup>21</sup> However, the Department of Veterans' Affairs argued:

Extending the protection of moral rights to the context of government copyright would move the concept of moral rights away from the unique personal character of [the] right being protected.<sup>22</sup>

## The UK position

10.12 Moral rights under the 1988 Act have limited application in relation to Crown copyright works (including parliamentary copyright works). The right to be identified as author or director of such material does not apply unless the author or director has been identified as such in published copies of the work.<sup>23</sup> Thus it has been argued that 'the Crown will effectively be able to determine whether this right can ever be asserted in relation to a work in which Crown copyright subsists'.<sup>24</sup>

10.13 Similarly, the right to object to derogatory treatment of a work does not apply to anything done by the copyright owner or with the owner's authority, unless the author or director is identified at the time of the relevant act, or has previously been identified in published copies of the work.<sup>25</sup> Even where the right applies, it is not infringed if there is a sufficient disclaimer.<sup>26</sup> This provision applies equally to government and non-government copyright owners, unlike the right to be identified as author, discussed in the previous paragraph.

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<sup>20</sup> Submission 3, p. 4.

<sup>21</sup> Submission 7, p. 2. Presumably CAUL would not extend this reasoning to work performed by independent contractors where copyright ownership is often stipulated in a contract.

<sup>22</sup> Submission 55.

<sup>23</sup> *Copyright, Designs and Patents Act 1988* (UK), para 79(7)(a).

<sup>24</sup> Skone James et al, *op cit*, 14<sup>th</sup> edition, p. 590.

<sup>25</sup> Subsection 82(2).

<sup>26</sup> Subsection 82(2).

## The Committee's view

10.14 The Committee notes that in the UK the moral rights provisions have been modified in relation to government works, at least as far as the right to be identified as the author is concerned.

10.15 However, consistent with its belief that government should be treated no differently from any other employer, the Committee considers that there should be no change to the current moral rights provisions insofar as they relate to government. This view accords with most of those in submissions. In addition, the Committee considers that the factors set out in sections 195AR and 195AS to determine whether it was reasonable not to identify the author or to subject the work to what would otherwise be derogatory treatment are sufficient safeguards. They include such factors as the nature of the work,<sup>27</sup> the purpose for which the work is used<sup>28</sup> and whether the work was made in the course of the author's employment.<sup>29</sup>

10.16 The Committee also considers that this is an area where government employees must be properly trained about their responsibilities, as discussed in the next chapter.

**Recommendation 11: The Committee recommends that there be no change to the current moral rights provisions in Part IX of the Copyright Act insofar as they relate to government.**

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<sup>27</sup> Paragraphs 195 AR(2)(a) and 195AS(2)(a).

<sup>28</sup> Paragraphs 195 AR(2)(b) and 195AS(2)(b).

<sup>29</sup> Paragraphs 195 AR(2)(h) and 195AS(2)(g).



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## Chapter 11

### Management of Crown copyright

Intellectual property management should be regarded as a normal part of executive management. It should be seen as analogous to other corporate and management tasks. ... Intellectual property management allows an agency to fulfil its accountability obligations with respect to intellectual property it holds, and to ensure that agency resources are put to productive and efficient use.<sup>1</sup>

11.01 During this inquiry the Committee sought views on whether governments throughout Australia should be encouraged to adopt uniform management of government copyright material. Management practices are not uniform between, and often within, Australian jurisdictions. At the Commonwealth level alone, the Auditor-General recently found ‘diverse approaches’ in intellectual property management.<sup>2</sup>

11.02 Most submissions supported uniformity in government practice as a desirable goal, particularly in relation to legal materials, although some States expressed reservations. Poor management of Crown copyright results in unnecessary restrictions to access to government copyright material, as some submissions noted in the examples they provided.<sup>3</sup>

11.03 This chapter considers:

- Crown copyright management by the Commonwealth government;
- Crown copyright management by State and Territory governments;
- the specific example of primary legal materials; and
- international developments in management of Crown copyright.

11.04 It then sets out the Committee’s conclusions and recommendations.

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<sup>1</sup> ANAO op cit, p. 102.

<sup>2</sup> *ibid*, p. 97.

<sup>3</sup> LexisNexis, *Submission 11*; Thomson, *Submission 13*; AustLII, *Submission 25*.

## Commonwealth Crown copyright management

11.05 At the Commonwealth level, the CCA, formerly within the Department of Communications, Information Technology and the Arts (DCITA) and now with the Attorney-General's Department, is responsible for managing copyright in published material, including legislation but excluding judgments. The CCA is the primary point of contact for permission to reproduce material published by government, and provides advice to Commonwealth agencies on the administration of copyright.

11.06 The CCA will grant a licence to use material under general conditions, including that all permissions are subject to acknowledgement of Commonwealth copyright.<sup>4</sup> No fees are charged where the use of Commonwealth material is not for profit.

11.07 There are certain materials in respect of which the CCA does not manage copyright. They include unpublished material, for which permission must be sought from the relevant agency that owns copyright, and audiovisual material, which is also managed by the agency that owns copyright. In addition, some individual Commonwealth agencies have negotiated with the Commonwealth to manage their own copyright.

11.08 Where unpublished material has been made available for public use under the *Archives Act 1983* (Cth), the National Archives of Australia has a general responsibility for managing government copyright material. The National Archives noted that it often fields requests to reproduce unpublished material in its collection. Where the Commonwealth Government owns the copyright, the National Archives refer the request to the relevant agency. However, where appropriate the National Archives will grant permission on behalf of an agency that refers the decision back to the National Archives.<sup>5</sup>

11.09 While CCA and the National Archives have some responsibility for granting licences to reproduce government copyright material, the Commonwealth does not have a whole-of-government approach to the

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<sup>4</sup> CCA, 'When do you need permission to use Commonwealth copyright materials?', DCITA, Canberra, 2004.

<sup>5</sup> *Submission 37*, p. 7.

management of intellectual property.<sup>6</sup> At present, it is the responsibility of the relevant agency to develop plans to manage intellectual property.

11.10 Particular attention has been paid to information technology, given that advances in information technology have greatly increased the usefulness and value of information generated by governments.<sup>7</sup> In response to an increasing demand for access to Commonwealth copyright material, DCITA has issued guidelines for the management of Commonwealth intellectual property in the field of information technology.<sup>8</sup> The guidelines provide practical assistance for decision-makers in Commonwealth bodies to allow them to maximise the benefits from such property. Agencies are encouraged to acquire only the intellectual property necessary to fulfil their corporate mission. Given the information technology landscape is in a constant state of change, DCITA has recently undertaken a review of the guidelines, which had not been published at the time of writing this report.

11.11 The Government prior to the October 2004 election indicated in its policy on ‘Strengthening Australian Arts’ that government copyright material should be made available to businesses that have the capacity to use the intellectual property to create employment and commercial opportunities for Australians.<sup>9</sup>

### **The Australian National Audit Office’s report**

11.12 As noted in Chapter 4, the ANAO reviewed intellectual property management in Commonwealth agencies in 2003. The ANAO report noted that its case studies and surveys had revealed a ‘diverse approach to intellectual property management across the Commonwealth.’<sup>10</sup> A survey of 74 Commonwealth agencies found that only 30 per cent had developed specific policies or procedures for managing intellectual property.<sup>11</sup> The ANAO stated:

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<sup>6</sup> ANAO, *op cit*, p. 42.

<sup>7</sup> *ibid*, p. 35.

<sup>8</sup> DCITA, *The Commonwealth IT IP guidelines: Management and commercialisation of Commonwealth intellectual property in the field of information technology*, DCITA, Canberra, 2000.

<sup>9</sup> See Liberal Party of Australia & The Nationals, *The Howard Government Election 2004 Policy: Strengthening Australia’s Arts*, 4 October 2004, p. 24, accessed on 12 November 2004 at [http://www.liberal.org.au/default.cfm?action=2004\\_policy](http://www.liberal.org.au/default.cfm?action=2004_policy). There was no elaboration on this policy.

<sup>10</sup> ANAO, *op cit*, p. 97.

<sup>11</sup> *ibid*, p. 22.

This would suggest that a significant proportion of agencies do not have systems in place to know what assets they own, use or control. This has consequences for the effective, efficient and ethical management of intellectual property assets by those agencies.<sup>12</sup>

11.13 The ANAO report provided examples of situations that require a greater awareness of intellectual property:

... depending on the source of intellectual property, there will often be a different focus on the sorts of management issues to be addressed. For example, for intellectual property developed in-house, questions of ownership and rights to intellectual property developed by agency staff will be different to the sorts of questions and issues that arise where intellectual property is developed by third parties under consultancy arrangements. One issue to consider is that of ownership of the intellectual property. An agency must decide whether to retain ownership, enter a joint ownership arrangement, license-out or opt not to own. In this latter case, where rights are passed to another party, the agency may decide to retain rights to access, use and sub-license the existing and new intellectual property through a royalty-free, irrevocable licence.<sup>13</sup>

11.14 Only just over half the agencies reported that they had mechanisms in place to decide on the appropriate level of ownership of intellectual property.<sup>14</sup>

11.15 The ANAO found that, although the *Commonwealth IT IP Guidelines* provide useful guidance to agencies on managing intellectual property in information technology (including consideration of ownership options), more general guidance and support were needed.<sup>15</sup>

11.16 The ANAO recommended the development of a whole-of-government approach to protect the Commonwealth's interests in intellectual property.<sup>16</sup> The ANAO proposed a framework for intellectual property management that

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<sup>12</sup> *ibid*, p. 68.

<sup>13</sup> *ibid*, p. 69.

<sup>14</sup> *ibid*, p. 21.

<sup>15</sup> *ibid*, p. 22. Accordingly, the ANAO recommended the development of such an approach and guidance (Recommendation 2). The ANAO noted that the Commonwealth does not have a whole-of-government policy approach, unlike all but one of the States.

<sup>16</sup> *ibid*, pp. 42, 59.

highlights key principles to be considered by agencies.<sup>17</sup> Central to this framework were leadership and corporate support, early identification of intellectual property, the agency's approach to commercialisation of intellectual property, deciding the appropriate level of ownership and control, ongoing monitoring and protection of intellectual property, and evaluating and reporting on the agency's performance of intellectual property management.<sup>18</sup>

## Evidence to the Committee

11.17 Some submissions specifically supported the ANAO's findings. AIIA submitted that the ANAO framework would address many of its concerns about Commonwealth intellectual property management.<sup>19</sup> AIIA argued that policies such as the DCITA Guidelines were 'poorly implemented in practice' for a range of reasons:

- Many procurement officials are simply unaware of their existence;
- IP is generally regarded as complex and is poorly understood by most procurement officials;
- Procurement officials are reluctant to spend additional time or resources in understanding the issue or obtaining government or external advice and prefer to adopt the 'path of least resistance', even if the parties would ultimately derive significant benefit from an alternate position;
- There is generally a lack of support for IP issues and effective IP management in the more senior bureaucratic levels of some agencies;
- The government's current fixation with accountability is driving procurement officials not to accept any risk, to 'stick to the book' and prove that they obtained something for the cost expended, even where the parties would clearly benefit from an alternative flexible approach;
- The 'we pay, we own' attitude in government is reinforced by the current legislative position, key standard contractual frameworks, such as the Government Information Technology Conditions (GITC) and even certain agency specific guidelines, such as the *Defence Intellectual Property Policy 2003*, which states that 'ownership of the Foreground IP should vest on its creation with Defence ...' (p.28).<sup>20</sup>

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<sup>17</sup> *ibid*, p. 97.

<sup>18</sup> *ibid*, pp. 198–201.

<sup>19</sup> *Submission 21*, p. 9.

<sup>20</sup> *Submission 21*, p. 9.

11.18 Screenrights supported the ANAO's recommendation that the Commonwealth Attorney-General's Department and DCITA should take 'a more active role in co-ordinating the management of Government copyright material.'<sup>21</sup> The Committee understands that the Commonwealth Government is currently examining ways of implementing the ANAO's recommendations.

11.19 Several government agencies questioned the current framework for management of copyright through the CCA, although they differed in their preferred solutions.

11.20 DOFA argued that each agency should administer its own copyright and that CCA should only provide an advisory role, arguing that DOFA was 'best placed to respond to requests for licences to use copyright material produced for [DOFA]'.<sup>22</sup>

11.21 The ALRC did not have a concluded view, but noted that if a more devolved system were implemented 'the ALRC would prefer to be supported by whole-of-government best practice approaches, particularly in relation to the negotiation of licence agreements'.<sup>23</sup> The ALRC also noted that revenue collected by CAL on behalf of Commonwealth agencies was paid to DCITA, and queried whether separate entities should receive the revenue generated by the use of their works, consistent with the Government's cost recovery policy.<sup>24</sup>

11.22 The National Archives favoured the establishment of two central agencies for the administration of Commonwealth copyright material: one for older material and another for more recent material. The National Archives considered that dividing responsibility for managing copyright on the basis of whether or not a work has been published was no longer relevant, particularly as governments often publish their own material.<sup>25</sup> The National Archives also commented that in relation to the Commonwealth records it holds:

...the arrangement for referring requests to authoring agencies is often unworkable in the experience of Archives and introduces unnecessary delays, complexities and inconsistencies for users of Commonwealth copyrighted

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<sup>21</sup> *Submission 31*, p. 4.

<sup>22</sup> *Submission 38*, p. 2.

<sup>23</sup> *Submission 3*, p. 5.

<sup>24</sup> *ibid*, p. 5.

<sup>25</sup> *Submission 37*, p. 6.

material ... In many cases the authoring agencies no longer exist or if they exist in name their functions may have changed so much they have no knowledge of the documents referred to them for copyright permission.<sup>26</sup>

11.23 The Australian Film Commission (AFC) noted that CCA only administered copyright in published print material and that specific agencies such as the Film Finance Corporation, the ABC, SBS and Film Australia manage the copyright they control. (However, the Committee notes that not all these organisations, such as the ABC and SBS, are necessarily ‘the Crown’ for the purposes of copyright.) The AFC argued that there should be a central point for administering government copyright in films and sound recordings.<sup>27</sup> The AFC argued that separate management by each agency of the material that it holds:

... can result in some confusion, particularly where the agency concerned no longer holds the material because it has been lodged with the [National Screen and Sound] Archive and is uncertain as to whether it actually controls the copyright.<sup>28</sup>

11.24 The AFC pointed to a recent example of difficulties with current arrangements. In the absence of a central point of copyright administration for audiovisual material, the ScreenSound - National Screen and Sound Archive’s database of copyright holders refers requests to the commissioning departments, which have traditionally either granted or denied access. However:

... in July 2003 ScreenSound referred a client wanting access to a sound recording of a Prime Ministerial speech from the 1940s to the commissioning department ... The [d]epartment referred him to the Attorney General’s Department, who referred him to the Department of Prime Minister and Cabinet, who referred him back to DCITA, who referred him back to ScreenSound.<sup>29</sup>

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<sup>26</sup> *ibid*, p. 7.

<sup>27</sup> *Submission 41*, p. 5.

<sup>28</sup> *ibid*.

<sup>29</sup> *ibid*.

## **Crown copyright management in the States and Territories**

11.25 Each State and Territory is responsible for managing government copyright in its own jurisdiction and their practices vary. Copyright may be administered by a central body, by each individual agency, or a combination of both.

11.26 All State and Territories license government copyright material. Most States have introduced intellectual property policies and guidelines which aim to provide information and guidance on the identification, management and use of copyright.<sup>30</sup> With the exception of the ACT, States that have not yet implemented any policies are in the process of doing so. Their management practices in relation to executive material are briefly outlined below.

11.27 In New South Wales the use of executive material is subject to the permission of the NSW Government and permission must be sought from the NSW Attorney General's Department. The agency which created and controls the copyright together with the applicant then settles the terms on which a licence or agreement is made for the use of copyright material.<sup>31</sup>

11.28 In Victoria, the Office of Chief Parliamentary Counsel administers copyright in legislation and judgments and each individual body administers copyright in other material. The Victorian Government has issued guidelines for the administration of Crown copyright.<sup>32</sup> The Guidelines provide that a fee or royalty should be charged for the right to reproduce government owned material. However, this may be waived or reduced where reproduction is for 'professional, technical or scientific purposes where profit is not a primary purpose of reproduction' and for educational purposes or where dissemination of official material is paramount and commercial considerations are relatively unimportant.

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<sup>30</sup> For example, see Queensland Government, *Queensland Public Sector Intellectual Property Principles*, August 2003, accessed at: [http://www.iie.qld.gov.au/publications/ip/ip\\_principles.pdf](http://www.iie.qld.gov.au/publications/ip/ip_principles.pdf); Western Australian Government, *Government Intellectual Property Policy and Best Practice Guidelines*, 2003, accessed at [http://www.doir.wa.gov.au/documents/businessandindustry/IPpolicy\\_may2003\(1\).pdf](http://www.doir.wa.gov.au/documents/businessandindustry/IPpolicy_may2003(1).pdf).

<sup>31</sup> See <http://www.lawlink.nsw.gov.au/crd.nsf/pages/crown-copyright>.

<sup>32</sup> Hon Jan Wade MP, Attorney-General (Vic) *Guidelines relating to Victorian Crown copyright* (August 1991, endorsed by the Attorney-General in December 1992).

11.29 Like Victoria, in South Australia the Attorney-General's Department administers copyright in legislation and judgments only and each individual agency administers copyright in other material. Permission to reproduce, if given, will be subject to conditions, including a requirement that the copyright owner's name and interest in the material be acknowledged when the material is reproduced or quoted.

11.30 In Tasmania, management of copyright is the responsibility of the agency that owns the copyright, under the direction of the Administrator of Crown Copyright in the Department of Justice and Industrial Relations. Guidelines for the administration of Crown copyright encourage agencies to consider the Tasmanian Government's broader social and economic goals when considering whether to commercialise intellectual property, noting that the public interest may override any benefit of commercialisation.<sup>33</sup> Agencies are instructed to ensure their staff are aware of the procedures to identify and protect materials in which Crown copyright may subsist. The guidelines also recommend that agencies establish a database of all licences, sales and other dealings with copyright material.

11.31 In two States, Queensland and Western Australia, a central government department is responsible for general copyright administration but some responsibilities are devolved to key departments.

11.32 In Western Australia copyright in executive material is administered by the WA Solicitor-General's Department. However, government departments and statutory corporations do administer copyright in material that is the subject of major commercial transactions, without reference to the Attorney-General's Department. The WA Solicitor-General's Department is currently reviewing its responsibility for the administration of copyright permission: it has been proposed that responsibility be devolved to the relevant departments and statutory corporations, with administration to be managed under standardised guidelines.<sup>34</sup>

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<sup>33</sup> Tasmanian Government, 'Guidelines for the administration of Crown copyright', R4.1.3, 2002, p. 3, available at [http://www.go.tas.gov.au/standards/standards\\_guidelines\\_menu.htm](http://www.go.tas.gov.au/standards/standards_guidelines_menu.htm).

<sup>34</sup> Information provided by Mr Jeff Saville, Senior Assistant State Solicitor, WA, November 2004.

11.33 In Queensland, Crown copyright administration and policy development are the responsibility of the Department of State Development and Innovation.<sup>35</sup> However, most agencies have a ‘beneficial use’ delegation from the Department of State Development and Innovation, under which they may licence the reproduction of material in which they acquire the copyright in or produce. Those few agencies that do not have this delegation refer requests to the Department of State Development and Innovation.<sup>36</sup>

11.34 Permission to reproduce executive material of the Northern Territory Government must be obtained from the Attorney-General’s Department. Undertakings to reproduce the material accurately and to acknowledge that reproduction is by permission of the government are required.<sup>37</sup>

11.35 In the ACT, the Department of Urban Services manages copyright in executive material. The department’s website states that any material may be downloaded, displayed, printed and copied, ‘in unaltered form only, for your personal use or for non-commercial use within your organisation’.<sup>38</sup> There appears to be no requirement that the copyright be acknowledged. Outside these circumstances, the ACT Government’s permission is required.

## **Policies and guidelines**

11.36 At State and Territory level, there is an increasing awareness of the importance of proper management of intellectual property and how it impacts on the aims and functions of the relevant agency.

11.37 The Western Australian Government has led the way in developing guidelines and policies for its agencies, first implementing an intellectual property management policy in 1997.<sup>39</sup> Key principles of its revised ‘Government Intellectual Property Policy and Best Practice Guidelines’ include:

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<sup>35</sup> See: <http://www.sd.qld.gov.au/dsdweb/htdocs/global/content.cfm?id=201>

<sup>36</sup> Information provided by Ms Natalie Camphorst, Department of State Development and Innovation, November 2004.

<sup>37</sup> See: [http://notes.nt.gov.au/dcm/legislat/legislat.nsf/\\$help?OpenHelp](http://notes.nt.gov.au/dcm/legislat/legislat.nsf/$help?OpenHelp)

<sup>38</sup> See: <http://www.urbanservices.act.gov.au/copyright.html>

<sup>39</sup> ANAO, *op cit*, p. 42.

- enhancement of service delivery through better management of intellectual property, and
- cooperation with the business community in the development and commercialisation of intellectual property.<sup>40</sup>

11.38 To assist agencies with the implementation of these policy objectives, the WA Government has also developed ‘Intellectual Property Guidelines’.<sup>41</sup> These Guidelines offer practical information on intellectual property and how to best manage and approach its commercialisation. The WA Government also established a Government Intellectual Property Policy Council in combination with a support program. The Council, which is responsible for reviewing intellectual property policy, is constituted by members from the Departments of Premier and Cabinet, Treasury, Industry and Resources, the State Solicitor’s Office and a range of ‘intellectual property rich’ agencies.<sup>42</sup> The Committee understands that the Council is not currently active.<sup>43</sup>

11.39 South Australia has also been active in policy development since 1999, when the Government published an ‘Intellectual Property Policy’ applicable to all agencies.<sup>44</sup> The policy includes principles to aid agencies in managing intellectual property, with each agency responsible for managing its own copyright. Generally permission to reproduce government copyright material is granted, provided that the copyright owner's name and interest in the material are acknowledged when the material is reproduced or quoted.

11.40 Queensland has put significant effort into developing policy on the management and commercialisation of intellectual property in recent years. The ‘Intellectual Property Principles’ have been developed to assist government agencies to manage and commercialise their intellectual property.<sup>45</sup> Guidelines which provide public sector agencies with practical information on how to best manage and commercialise intellectual property have also been published.<sup>46</sup> The policy principles and guidelines generally provide that agencies are

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<sup>40</sup> Western Australian Government, ‘Government Intellectual Property Policy and Best Practice Guidelines’, 2003.

<sup>41</sup> Western Australian Government, ‘Intellectual Property Guidelines’, 2002.

<sup>42</sup> ANAO, *op.cit.*, p. 42.

<sup>43</sup> Information from the WA Department of Industry and Resources, - 9 November 2004.

<sup>44</sup> South Australian Government, ‘Intellectual Property Policy’, December 1999.

<sup>45</sup> Queensland Government, ‘Queensland Public Sector Intellectual Property Principles’, April 2003.

<sup>46</sup> Queensland Government, ‘Queensland Public Sector Intellectual Property Guidelines’, September 2003.

responsible for intellectual property management, and that commercialisation of intellectual property should be ancillary to the agency's core business.

11.41 The NSW Premier's Department has established an inter-agency working group to develop a whole-of-government framework for the management of intellectual property in NSW. As a result, a draft 'IP Management Framework' is being finalised and is expected to be released in December 2004.<sup>47</sup>

11.42 The Victorian Government is committed to implementing new intellectual property policy guidelines to ensure that the knowledge generated by government is utilised for the benefit of the public. In late 2003 the Victorian Government was finalising a copyright policy to replace the 1991 Guidelines on Victorian Crown copyright,<sup>48</sup> and the Committee understands that as of November 2004 this policy had not been finalised. However, the Victorian Government told the Committee that it permits usage of copyright material for non-commercial purposes free of charge, subject to appropriate conditions such as the need for accuracy and attribution of source. Use for commercial purposes is subject to charge 'usually on a nominal cost-recovery basis' and subject to the same conditions of accuracy and attribution.

11.43 As well as guidelines for the administration of Crown copyright, Tasmania has produced policy principles for agencies dealing with intellectual property in information technology. The principles state that intellectual property produced through government outsourcing activities 'properly belongs to the Crown'. However, the principles recommend that agencies only acquire intellectual property they really require, and that they should allow commercialisation of their intellectual property if appropriate.<sup>49</sup> The Northern Territory is also currently preparing an intellectual property policy with a particular focus on computer software.<sup>50</sup>

11.44 In 2001 the ACT Government commenced work on a policy on the management of intellectual property, with a particular focus on information

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<sup>47</sup> ANAO, op cit, p. 43; information from NSW Premier's Department 9 November 2004.

<sup>48</sup> *ibid*, p. 43.

<sup>49</sup> [http://www.go.tas.gov.au/standards/itip\\_policyv1.0sept2001.htm](http://www.go.tas.gov.au/standards/itip_policyv1.0sept2001.htm).

<sup>50</sup> ANAO, op cit, p. 44.

technology issues. The Committee understands that this work has been terminated<sup>51</sup> and the draft policy has not been implemented given various unresolved issues.

## **A case study: primary legal materials**

11.45 Many of the submissions that raised concerns about government copyright management practices referred specifically to access to legislation and other primary legal materials.

### **The Commonwealth**

11.46 The Commonwealth's management practices ensure that legislation and judgments are available as widely as possible. In 1983 the Commonwealth commenced issuing licences to publishers and educational users allowing multiple reproductions of legislative material. It is likely that these licences have been replaced by the current licensing regime administered by the CCA.

11.47 The CCA may grant permission with a standard form licence or by a letter where the reproduction of legislative material is for a specific purpose. The CCA will grant permission for the reproduction of Commonwealth legislative material including Acts and regulations under the following conditions:

- the licence is revocable, non-exclusive, and non-transferable;
- all material published under the agreement may be reproduced without charge;
- separate permission must be sought for reproductions including Commonwealth formatting;
- all material reproduced must be accurate, in context and of a good standard; and
- all legislative material published under the agreement must include the acknowledgment/disclaimer provided by the CCA.<sup>52</sup>

11.48 A recent development which the Attorney-General stated will improve the democratic principle of federal government by allowing free and easy

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<sup>51</sup> *ibid*, p. 44.

<sup>52</sup> *Submission 60*, pp. 1–2.

access to clear legislation<sup>53</sup> is the *Legislative Instruments Act 2003* (Cth). The object of the legislation, which commenced on 1 January 2005, is to provide a comprehensive regime for the management of Commonwealth legislative instruments by, amongst other things, establishing the Federal Register of Legislative Instruments as a repository of Commonwealth legislative instruments, explanatory statements and compilations, and improving public access to such instruments.<sup>54</sup>

11.49 The Secretary of the Attorney-General's Department is responsible for maintaining the Register and ensuring public access.<sup>55</sup> The Register will be a database of all legislative instruments, and compilations in relation to legislative instruments.<sup>56</sup> The development of the legislation, in combination with the blanket licences granted to publishers and educational institutions, supports the policy of providing access to legislative material. At present only Commonwealth legislative material must be registered, although States can choose to register their legislative material.

11.50 The Commonwealth has also developed SCALEplus, a legal information retrieval system owned by the Attorney-General's Department and available free on-line. SCALEplus only contains legislation of the Commonwealth and non self-governing Territories.

### **The States and Territories**

11.51 As is the case with executive material, legislative and judicial material are managed differently in each State and Territory. As outlined in Chapter 7, two jurisdictions, NSW and the Northern Territory, have issued express waivers for copyright in legislative and judicial material.

11.52 The NSW Government's waivers are subject to the following conditions:

- that copyright continues to reside in the State of NSW,

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<sup>53</sup> The Hon Daryl Williams MP, Attorney General, 'Legislative Instruments Bill 2003: Second reading speech', *House of Representatives Hansard*, 26 June 2003, pp. 17625–27.

<sup>54</sup> *Legislative Instruments Act 2003*, section 3.

<sup>55</sup> Subsections 20(1) and 20(1A).

<sup>56</sup> Subsection 20(2).

- that the waiver may be revoked, varied or withdrawn if the conditions are breached, or otherwise on reasonable notice,
- that publication of material must not purport to be an official version,
- that, 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,
- that the arms of the State must not be used in connection with publication of material without authority, and
- that material must be accurately reproduced in proper context and be of an appropriate standard.<sup>57</sup>

11.53 In the Northern Territory, the Attorney-General claims copyright in legislative material, including bills, Acts, regulations, rules, by-laws, codes of practice, instruments of a legislative or administrative character, and explanatory material connected to legislation. Copyright in legislation is waived if certain conditions are met, including:

- the reproduction is accurate;
- the reproduction does not claim to be an official version; and
- the arms of the Northern Territory are not used in connection with the reproduction.

11.54 The waiver may also be revoked, varied or withdrawn on reasonable notice.<sup>58</sup>

11.55 A similar waiver applies in relation to written judgments, orders and awards of Northern Territory courts.<sup>59</sup>

11.56 Other jurisdictions have varying policies. In Victoria the guidelines for the administration of Crown copyright state that there should be ‘relatively

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<sup>57</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 a broader range of legislative materials).

<sup>58</sup> Northern Territory Government ‘Copyright policy concerning legislation’, 8 October 1996.

<sup>59</sup> Northern Territory Government ‘Copyright policy in judgements of the courts of the Northern Territory’, as published in the *Northern Territory Government Gazette*, G48, 9 December 1998.

wide access to State legislative materials by means of licences to publishers and educational institutions'.<sup>60</sup>

11.57 The Tasmanian Government states that it encourages public access to government and is providing online access to some government services. The Office of Parliamentary Counsel has created EnAct, a website which provides free public access to Tasmanian legislation with cross-references and amendment history.<sup>61</sup> The Tasmanian Government expects that the website will improve the effectiveness and standing of the law and the Parliament, improve access to Tasmanian legislation and reduce the related input costs of business and government.

11.58 In South Australia the Attorney-General is responsible for granting permission to reproduce legislation. Permission may be subject to conditions (for example, the name of the copyright owner must be clearly stated.)<sup>62</sup>

11.59 In Western Australia, applications for permission to reproduce legislative material are required for hardcopy and electronic reproductions. The Attorney General's Department is responsible for administering permission for hardcopy reproduction, with the WA State Law Publisher responsible for electronic reproduction requests.<sup>63</sup> The WA State Law Publisher website until recently only allowed limited general access to legislative material.<sup>64</sup>

11.60 In Queensland, copyright in legislation is managed by the Office of the Queensland Parliamentary Counsel (OQPC). OQPC provides access to legislation on its website and allows users to download, store in cache, display, print and copy the material in unaltered form only. Users may not transmit, distribute or commercialise the material without the permission of the State of Queensland. Official versions of legislation may be purchased from the Queensland Government Printer.<sup>65</sup>

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<sup>60</sup> Hon Jan Wade MP, *op cit*.

<sup>61</sup> See: <http://www.dpac.tas.gov.au/divisions/opc/about.html>.

<sup>62</sup> See: [http://www.parliament.sa.gov.au/info/13\\_copyright.shtm](http://www.parliament.sa.gov.au/info/13_copyright.shtm).

<sup>63</sup> The WA State Law Publisher operates as a branch of the Ministry of Premier and Cabinet and is responsible for raising some revenue to augment its funding.

<sup>64</sup> While previously users could only access individual sections of an Act and needed to pay to have access to an entire Act, as of 1 July 2004, greater access for non-commercial purposes is granted free of charge, according to information provided by the Senior Assistant State Solicitor for WA on 9 November 2004.

<sup>65</sup> See: <http://www.goprint.qld.gov.au/web/web/index.asp>

11.61 In the ACT legislation has been made available on-line for many years. The Office of Parliamentary Counsel is responsible for managing copyright in legislation and providing access online.<sup>66</sup> Its website allows users to access authorised printed legislation by downloading authorised files from the website and allowing the user to print a copy. Thus, a document printed from an authorised file is legally presumed to be an accurate copy of the piece of legislation. Permission must be sought if the user intends to copy, adapt, publish, distribute or commercialise any material on this site.

11.62 Most Australian States have also established Councils of Law Reporting to assist in publishing, printing and managing copyright in judgments. Each Council is constituted by State legislation which varies between jurisdictions.<sup>67</sup> Generally, the role of the Councils is to prepare, publish and sell reports of judicial decisions, or arrange for their preparation, publication and sale.

11.63 The NSW Council of Law Reporting, established under the *Council of Law Reporting Act 1969* (NSW), has the power to prepare, publish and sell, or arrange for the preparation, publication and sale of judicial decisions. Material prepared and published by the Council remains the official version and the Council's role is not affected by the NSW waiver of copyright in judgments. Similar legislative models apply in Victoria<sup>68</sup> and Tasmania.<sup>69</sup> The *Law Reporting Act 1981* (WA) does not refer to copyright, but gives the Attorney-General power to authorise publishing of judicial reports<sup>70</sup> and establishes a Law Reporting Advisory Board to advise the Attorney-General.<sup>71</sup>

11.64 Two jurisdictions, the Northern Territory and Queensland, have Councils of Law Reporting which began as voluntary organisations and were

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<sup>66</sup> See further: [www.legislation.act.gov.au](http://www.legislation.act.gov.au).

<sup>67</sup> See: *Council of Law Reporting Act 1969* (NSW); *Council of Law Reporting Act 1990* (Tas); *Council of Law Reporting in Victoria Act 1967* (Vic); *Law Reporting Act 1981* (WA). Queensland and the Northern Territory have established Councils of Law Reporting which began as voluntary associations and were incorporated in 1907 and 1991 respectively.

<sup>68</sup> *Council of Law Reporting in Victoria Act 1967* (Vic).

<sup>69</sup> *Council of Law Reporting Act 1990* (Tas).

<sup>70</sup> Section 3 of the *Law Reporting Act 1981* (WA)

<sup>71</sup> Section 7 of the *Law Reporting Act 1981* (WA)

later incorporated.<sup>72</sup> As in NSW, the waiver of copyright in Northern Territory judgments does not affect the Council's role.

11.65 While some Councils of Law Reporting publish law reports themselves, others enter into exclusive agreements with commercial publishers to publish reports on their behalf. LexisNexis expressed concern that some agreements between Councils and commercial publishers were not open to tender and argued that any contract for an authorised series should be put out to tender in the interest of fair competition.<sup>73</sup>

### **Electronic dissemination**

11.66 Technological advances have impacted on how government material is stored and disseminated. Two models have developed that utilise technological advances to provide legislative and judicial information online: Australasian Legal Information Institute (AustLII); and the Commonwealth's SCALEplus, discussed above.

11.67 AustLII is a joint initiative by the University of Technology Sydney and the University of New South Wales. AustLII's stated aim is to improve access to justice by publishing primary legal materials and secondary legal materials created by public bodies for purposes of public access. This model has been viewed favourably internationally<sup>74</sup> and similar institutes have developed in other countries.

11.68 The development of SCALEplus and AustLII is consistent with the increased expectations of the public to have free and convenient access to legal information. AustLII is reliant on government for the information it publishes on its website. The Committee was told during this inquiry that the WA Government had ceased to supply legislation to AustLII but that AustLII was able to link to WA legislation on the State Law Publisher's website.<sup>75</sup>

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<sup>72</sup> The Northern Territory Council of Law Reporting was incorporated in 1991 and the Queensland Council of Law Reporting was incorporated in 1907.

<sup>73</sup> *Submission 11*, p. 10.

<sup>74</sup> See for example: T McMahon, 'Public policy issues in electronic access to the Law in Canada', *University of Technology Sydney Law Review*, 2000, p. 11; D Harvey, 'A judicial perspective on public access to case law on the internet', *University of Technology Sydney Law Review*, 2000, p. 7.

<sup>75</sup> Mr Jeff Saville, WA State Solicitor's Office, 9 November 2004.

## The views of legal publishers

11.69 AustLII said it had encountered difficulties because of varying practices in copyright management:

- Three jurisdictions in effect say to AustLII ‘we will not assist you to obtain our legislation but we will not stop you from trying to extract it from our website’. This is often extremely difficult and contributes considerably to delays in updating of these databases on AustLII due to the staff time that must be expended.
- Some jurisdictions will only supply legislative data in a proprietary format (such as Framemaker or Lotus Notes) rather than an open exchange format (such as RTF). The necessity to convert these formats into a consistent format also contributes to considerable delays in updating of some legislative databases.
- For those jurisdictions that do supply data, timeliness of supply varies somewhat but has not been a major ongoing problem except in the case of Western Australia. However, there have been situations where supply has periodically stopped for months at a time.
- The Western Australian government (via the State Law Publisher) has never been willing to provide AustLII with updates to its legislation more regularly than six-monthly. It is now proposing to terminate any supply of legislation to AustLII from mid-2004 because it says it will now provide legislation for free access on its own website. This website will not have the same value-adding to the legislation that AustLII provides (though it will no doubt have its own virtues). The effect of this will be to destroy the only national search facility for Australian legislation.<sup>76</sup>

In its submission, AustLII referred to other difficulties in obtaining access to legal materials from State and Territory governments:

- The New South Wales government provides free access to the reports of the NSW Law Reform Commission on its own website, but has not in the past been willing to allow AustLII to republish NSWLRC reports. AustLII already publishes the complete set of ALRC reports, and would like to develop a national searchable collection of law reform reports, but the unavailability of the NSWLRC reports, the next largest set in Australia, is

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<sup>76</sup> *Submission 25*, pp. 7–8. The Committee notes that the WA Government has since taken this action.

a significant impediment to our doing so. We should note that these policies do change over time and might now be different.

- A draft contract from a State government concerning AustLII's publication of legislation and judgments from that jurisdiction states that AustLII must, on termination of the agreement, immediately destroy any cases or legislation it is publishing. This would involve the destruction of considerable work paid for by public monies not provided by the State concerned. It appears to be an over-exercise of Crown copyright when public interests could be quite sufficiently protected by notices stating that the data was no longer being updated. The problem will probably be resolved via negotiations, as has been the case when other government agencies have proposed such conditions of supply, but it is a problem that should not arise.<sup>77</sup>

11.70 Thomson stated it had 'experienced a great deal of uncertainty' in some jurisdictions in obtaining rights to reproduce government material and the conditions that are attached.<sup>78</sup>

Each government body has its own set of terms on which they will grant access to their material (eg. some prefer a royalty payment on each sale whilst others prefer payment of an annual fee). Each involves separate negotiation. Sometimes this can become drawn out because they do not understand the publishing process or the way in which the publisher will use the material to produce a product.

11.71 Thomson further stated:

...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>79</sup>

11.72 In Thomson's view, there should be a uniform approach to the management of copyright, including the granting of permission and the terms

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<sup>77</sup> *ibid*, pp. 7–8.

<sup>78</sup> *Submission 13*, p. 7.

<sup>79</sup> *ibid*, p. 7.

imposed on the use of the material. Thomson stated ‘[t]he approach should be open and transparent and should be applied consistently by all governments, their departments and agencies.’<sup>80</sup>

11.73 LexisNexis expressed similar views:

The current situation sees a different approach taken to Crown copyright in every jurisdiction in Australia. Even within a single jurisdiction there are differences depending upon the type of material to be reproduced or the manner of reproduction.

Differences include:

- Varying approaches taken to the same types of materials *between* jurisdictions – for example, in relation to legislation there are blanket licensing agreements, waivers, value-add policies, silence, letters granting permissions etc.
- Where licensing agreements are in place, the scale of fees charged for supply vary and conditions can differ markedly between jurisdictions. There are currently no standard guidelines as to an appropriate scale of fees to be charged for supply of materials under licensing agreements.
- Varying approaches taken *within* jurisdictions for various materials.<sup>81</sup>

11.74 LexisNexis claimed that the lack of uniformity has had an adverse impact on its operations:

Given the number of differences in approach both between and within jurisdictions, compliance with policies becomes a very difficult undertaking. It is difficult to know what policy is in place depending upon the type of material. It is also difficult to know when a policy in a particular jurisdiction might change. In addition, in some jurisdictions the policy is not clearly and transparently defined. These factors combine to make general compliance for publishers a very challenging and difficult task.<sup>82</sup>

11.75 It is clear that these organisations have encountered difficulties in attempting to provide national coverage of primary legal materials. In relation

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<sup>80</sup> *ibid*, p. 8.

<sup>81</sup> *Submission 11*, p. 10.

<sup>82</sup> *ibid*, p. 13.

to legislation, LexisNexis outlined its current licensing arrangements with the Commonwealth, States and Territories. While the Committee notes that the information is not necessarily representative of all agreements between publishers and the various jurisdictions, there may be some common provisions. LexisNexis has entered into individual agreements with a number of Commonwealth, State and Territory governments for the reproduction of legislative materials which have included the following terms and conditions:

- a single licence will cover hardcopy and digital reproduction – except WA where separate permission is required for electronic and hardcopy reproduction;
- in most jurisdictions a small flat fee is payable for the supply of information in electronic format and is not related to the granting of permission (fees vary between jurisdictions); and
- in WA the fee payable is per update and is comparable to the fees paid in other jurisdictions.

11.76 AustLII also claimed that it had encountered difficulties in getting access to legislative material. AustLII's submission noted its intention to link NSW legislative and judicial material to blanket waivers issued by the NSW Government, but noted it had been difficult to do the same for other States, as in most instances there are no definitive intellectual policies on State Government websites to link to.<sup>83</sup> Thomson commented that different licensing practices in combination with a lack of knowledge about copyright are leading to protracted licence negotiations.<sup>84</sup>

## **International developments in Crown copyright management**

11.77 Copyright management and practices in the following jurisdictions are briefly outlined below:

- the UK;
- the EU, under its directive on the re-use of public information;
- New Zealand;
- Canada; and
- the USA.

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<sup>83</sup> *Submission 25*, p. 5.

<sup>84</sup> *Submission 13*, p. 8.

## The UK

11.78 Crown copyright in the UK is managed by the HMSO. Its publishing arm was privatised in 1996 and now trades as The Stationery Office Limited.

11.79 The UK Government considered it important that certain responsibilities undertaken by the former HMSO be retained within government, including the administration of Crown copyright and the regulation of contracts dealing with printing and publishing legislation and other official materials. These responsibilities are still handled by HMSO which is now part of the Cabinet Office. As discussed in Chapter 3, in 1999 the management of Crown copyright was considered in a White Paper,<sup>85</sup> which established a framework for effectively managing Crown copyright based upon eight guiding principles:

- coherent application for the re-use and licensing of government materials and information;
- transparent licensing and charging terms;
- consistency of approach across central government, extending the principles as appropriate, to all public sector information;
- establishing routes and finding guides enabling users to locate material;
- increasing use of waiver of copyright liberalising broad categories of information with the lightest of management;
- a streamlined administrative process, where licensing control is required, making maximum use of new technology;
- accountability will be strengthened by the Controller of HMSO with close supervision and regulation of the delegated exercise of her authority as Queen's Printer regulating standards across government; and
- clear co-ordination and control by HMSO providing a central one-stop shop approach to combat fragmentation and loss of coherence in exercising these principles.

11.80 Categories of material in which Crown copyright should be waived were listed, including legislation, press notices, forms, consultative documents, unpublished public records and other material. Guidance Notes which outline the nature and conditions of such waivers have been issued.<sup>86</sup> It has always

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<sup>85</sup> Minister for the Cabinet Office, *White Paper*, op cit.

<sup>86</sup> See, for example, Guidance Note 6: *Reproduction of United Kingdom, England, Wales and Northern Ireland Primary and Secondary Legislation* at: [http://www.hmso.gov.uk/copyright/guidance/gn\\_06.htm](http://www.hmso.gov.uk/copyright/guidance/gn_06.htm), revised 7 Oct 2002.

been part of the UK management of Crown copyright to make such information available without undue restriction.<sup>87</sup>

11.81 The White Paper's framework included the establishment of an Information Asset Register (IAR) to enhance the accessibility and availability of official information. IAR aims to cover information held by all government departments and agencies, including databases, old files, recent electronic files, collections of statistics, and research. The IAR concentrates on information resources that have not yet been or will not be formally published.<sup>88</sup>

11.82 In late 2003 HMSO conducted a survey on the IAR and found that promotion and education of departments on the resource requirements of the emerging information obligations under the European Directive on the re-use of public sector information was needed. The survey highlighted government organisations' inclination to a departmental focus to the detriment of the customer or end-user.<sup>89</sup> HMSO has overall responsibility for IAR formats and standards with departments responsible implementing their own IARs.

11.83 HMSO has created various guidance notes designed to guide, alert and advise on a range of publishing, copyright and access issues.<sup>90</sup> HMSO has also developed and maintains a list of public bodies with Crown status, as outlined in Chapter 8. The list was introduced to coincide with the launch of the click-use licence. Under the click-use licence, re-users such as publishers can take out one licence to use material from a variety of Crown sources. The list was introduced to minimise the likelihood of re-using material under click-use that was not Crown copyright. The list groups the organisations under their parent department and includes as subcategories departments in Scotland, Northern Ireland and Wales. HMSO aims to update the list regularly to reflect changes in the status or name of the organisations and add new bodies, but does not guarantee that the list is comprehensive.

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<sup>87</sup> Historically this was done through Treasury circulars.

<sup>88</sup> For further information on the IAR see: [http://www.inforoute.hmso.gov.uk/inforoute/about\\_iar.htm](http://www.inforoute.hmso.gov.uk/inforoute/about_iar.htm).

<sup>89</sup> For further information on the IAR progress report see:  
[http://www.inforoute.hmso.gov.uk/inforoute/redev\\_project03.htm](http://www.inforoute.hmso.gov.uk/inforoute/redev_project03.htm).

<sup>90</sup> A current list of guidance notes is available from the HMSO website at: [http://www.hmso.gov.uk/copyright/guidance/guidance\\_notes.htm](http://www.hmso.gov.uk/copyright/guidance/guidance_notes.htm). Topics include copyright in public records; reproduction of Crown copyright scientific, technical and medical articles; copyright and publishing notices; notices on government websites (publishing); copyright in works commissioned by the Crown; and reproduction of primary and secondary legislation.

11.84 An Advisory Panel on Crown Copyright was established on 14 April 2003 to advise the UK government on issues relating to Crown copyright. Its role is, amongst other things, to advise ministers on how to encourage re-use of government information. The panel also advises the Controller of HMSO about changes and opportunities in the information industry, so that the licensing of Crown copyright information is aligned with current and emerging developments.<sup>91</sup> One clear impact of these changes has been the introduction of online licence agreements.

### **Directive on the re-use of public information in the EU**

11.85 In 2003 the EU passed a Directive dealing with the re-use of public sector information.<sup>92</sup> The Directive which must be implemented by 1 July 2005 establishes a minimum set of rules governing the re-use and the practical means of facilitating re-use of existing documents held by public sector bodies of member States.<sup>93</sup> ‘Public sector bodies’ include State, regional and local authorities, bodies governed by public law, and associations of such bodies.<sup>94</sup>

11.86 The Directive is a response to the lack of uniformity in re-use of public information across Europe. Some countries have a policy of making all documents freely available, while others are more restrictive in their approach. In certain instances the policy varies considerably between public sector bodies in the same country. The UK Advisory Panel on Crown Copyright claimed that adoption of the Directive would achieve:

- a single and consistent regime governing re-use of public sector information, applicable across the public sector;
- clarification of the rules reducing disputes;
- a simple and cost-effective means of redress in the event of non-compliance; and

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<sup>91</sup> Further information is available on the Advisory Panel on Crown Copyright’s website at <http://www.hmso.gov.uk/apcc/index.htm>.

<sup>92</sup> Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (the Directive).

<sup>93</sup> *Ibid.*, article 1.

<sup>94</sup> The terms ‘public sector body’ and ‘body governed by public law’ are defined in Article 2 of the Directive.

- a growth in value-added information products and services based on public sector information.<sup>95</sup>

11.87 The Directive does not impose an obligation on member States in relation to allowing the re-use of documents but leaves it to their discretion. It applies only to ‘documents that are made accessible for re-use when public sector bodies licence, sell, disseminate, exchange or give out information’.<sup>96</sup> Thus it applies in circumstances where copyright has already been waived or licensed by the government of the member State. The Directive is expressed not to affect the intellectual property rights of public sector bodies.<sup>97</sup> Its main features are:

- public sector bodies shall make documents available in ‘any pre-existing format or language, through electronic means where possible and appropriate’;<sup>98</sup>
- where charges are made, ‘the total income from supplying and allowing re-use of documents shall not exceed the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment’;<sup>99</sup>
- conditions and charges on the re-use of documents must be transparent;<sup>100</sup>
- public sector bodies may impose conditions on the re-use of documents in the form of a licence, and licences should be standardised;<sup>101</sup>
- practical arrangements must be in place to facilitate the search for documents available for re-use;<sup>102</sup>
- any conditions on the re-use of documents must be ‘non-discriminatory for comparable categories of re-use’;<sup>103</sup> and
- no contract can grant exclusive rights to third parties – the re-use of documents shall be open to all.<sup>104</sup>

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<sup>95</sup> Advisory Panel on Crown Copyright, *Response to partial regulatory impact assessment on the EU Directive on the re-use of public sector information*, p. 1.

<sup>96</sup> Recital 9 of the Directive.

<sup>97</sup> Recital 22 of the Directive.

<sup>98</sup> Article 5 of the Directive.

<sup>99</sup> Article 6 of the Directive.

<sup>100</sup> Article 7 of the Directive.

<sup>101</sup> Article 8 of the Directive.

<sup>102</sup> Article 9 of the Directive.

<sup>103</sup> Article 10 of the Directive.

<sup>104</sup> Article 11 of the Directive. There is a public interest exception to this prohibition in Article 11(2).

11.88 The HMSO and the UK Department of Trade and Industry have jointly issued a Consultation Document seeking views on how the Directive may be most appropriately implemented in the UK by 1 July 2005. The Advisory Panel on Crown Copyright has supported implementation of the Directive within broader access and re-use policies.<sup>105</sup>

### **New Zealand**

11.89 In New Zealand there is no central agency administering Crown copyright and accordingly each individual agency manages its own. It is common practice for government departments in New Zealand to include a notice on Crown copyright materials such as the following:

The copyright owner authorises reproduction of this work, in whole or in part, so long as no charge is made for the supply of copies, and the integrity and attribution of the work as a publication of [*the relevant department*] is not interfered with in any way.<sup>106</sup>

### **Canada**

11.90 In Canada, copyright in federal Government material is administered by Canadian Government Publishing, which is responsible for granting permission and/or issuing licences. Requests are made either to the author department or directly to Canadian Government Publishing, which will grant permissions or licences once authorised by the author department.<sup>107</sup>

11.91 As in Australia, different Provinces of Canada manage Crown copyright differently. For example, the legislation and regulations of Saskatchewan, Manitoba, Ontario, Prince Edward Island and New Brunswick are managed by the Queen's Printer, while legislation and regulations of Nova Scotia are managed by Legislative Counsel. British Columbia allows reproductions of specific Acts or regulations, in whole or in part, for personal or legal use,<sup>108</sup> whereas Alberta does not permit any reproduction of Acts or regulations for any

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<sup>105</sup> Available at: [http://www.hmso.gov.uk/apcc/reports/RIA\\_response.pdf](http://www.hmso.gov.uk/apcc/reports/RIA_response.pdf).

<sup>106</sup> For an example of the use of this notice, see [http://www.med.govt.nz/buslt/int\\_prop/digital/discussion/](http://www.med.govt.nz/buslt/int_prop/digital/discussion/)

<sup>107</sup> See further: <http://cgp-egc.gc.ca/copyright/agreement-e.html>.

<sup>108</sup> See further: <http://www.gov.bc.ca/bvprd/bc/content.do?brwld=%4020y6v%7C0YQtuW>.

purpose without the prior consent of the Queen's Printer.<sup>109</sup> Manitoba and Saskatchewan charge fees for access to their statutes (an annual subscription in 2000 of \$95 CA and \$275 CA respectively).<sup>110</sup> In a 1998 survey, a third of subscriptions to the statutes of Saskatchewan had been purchased by the Saskatchewan Government.<sup>111</sup>

11.92 The Canadian Legal Information Institute (CanLII) is a non-profit organisation initiated by the Federation of Law Societies of Canada. CanLII attempts to gather legislative and judicial texts from federal, provincial and territorial jurisdictions.<sup>112</sup>

## The US

11.93 As noted in Chapter 3, copyright protection is not available for 'any work' of the US federal government, defined as work prepared by officers or employees in the course of their duties.<sup>113</sup> However, the US Government may hold copyright that is transferred to it by assignment or otherwise. In addition, the restriction on copyright ownership does not apply to individual state governments.

11.94 The US Government Printing Office (GPO) was established in 1860 and its activities are defined in the US Code.<sup>114</sup> The GPO produces, procures and disseminates printed and electronic publications of the Congress, executive departments and establishments of the Federal Government. The Public Printer is the head of the GPO and is appointed by the US President in consultation with the Senate. The Public Printer must maintain an electronic directory of Federal electronic information, provide a system of online access to the Congressional Record and the Federal Register, and operate an electronic storage facility for Federal electronic information.<sup>115</sup> The GPO is subject to the Federal Depository Library Program and must provide official government

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<sup>109</sup> See further: [http://www.qp.gov.ab.ca/custom\\_page.cfm?page\\_id=22](http://www.qp.gov.ab.ca/custom_page.cfm?page_id=22).

<sup>110</sup> McMahon, *op cit*, p. 11.

<sup>111</sup> A Hubbertz, 'Response to Closing the Window: How Public Sector Restructuring Limits Access to Government Information', available at <http://www.usask.ca/library/gic/17/hubbertz.html>.

<sup>112</sup> CanLII is a part of the informal association of organisations including AustLII that publish legislative and judicial material freely on the Internet. See: [http://www.canlii.org/infocollections\\_en.html](http://www.canlii.org/infocollections_en.html).

<sup>113</sup> US Copyright Act, section 105.

<sup>114</sup> See the public printing and documents chapter of Title 44.

<sup>115</sup> Under s 4101.

information products to regional depository libraries. Online only products are made available on its website.<sup>116</sup>

11.95 In relation to legal materials, the Legal Information Institute (LII) established in 1992 is part of the informal association of organisations that publish legal material on the Internet. It is managed and operated by the University of Cornell Law School and attempts to make law more accessible to US legal professionals, students, teachers, and the general public in the US and abroad.

### **The views of State governments**

11.96 Most submissions from the States<sup>117</sup> agreed that there was value in uniformity in copyright management but expressed some concern about the impact on their ability to develop their own policies.

11.97 The NSW Government supported uniformity in principle, but noted that the benefits would have to outweigh the likely costs involved in achieving uniformity. In its view, each jurisdiction might require a different approach based on individual requirements.<sup>118</sup> The South Australian Attorney-General expressed similar views, noting that uniformity was unlikely to occur because of diverse views and practices.<sup>119</sup> The Western Australian Department of Premier and Cabinet and the Western Australian Attorney-General considered uniformity desirable, but stated that it should be achieved by agreement between the relevant parties.<sup>120</sup>

11.98 The Victorian Government noted that it is fundamental to a federation that States and the Commonwealth are entitled to adopt different positions. However, the Victorian Government supported the Commonwealth, referring the issue to the Standing Committee of Attorneys-General specifically to ‘consider the feasibility of uniform guidelines’ for administration and licensing.<sup>121</sup>

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<sup>116</sup> See: <http://www.gpoaccess.gov>.

<sup>117</sup> No views were submitted by the ACT or NT governments.

<sup>118</sup> *Submission 56*, p. 9.

<sup>119</sup> *Submission 52*, p. 5. The Chief Justice of the Supreme Court of South Australia supported the principle of uniformity but did not place great importance on it (*Submission 39*, p. 2).

<sup>120</sup> *Submission 29*, p. 4; *Submission 34*, p. 5.

<sup>121</sup> *Submission 64*, p. 11.

11.99 Submissions from the Queensland Government were less supportive. While agreeing that uniformity in government practice was a desirable goal, the Queensland Government submitted that there was no suitable single model either within or among the States, Territories and the Commonwealth.<sup>122</sup> The Queensland Department of Natural Resources, Mines and Energy argued that a uniform approach was unnecessary and that it was not possible to adopt uniform access and licensing conditions for all material.<sup>123</sup>

### **The Committee's views**

11.100 The Committee notes that most States support the principle of uniformity in approach, while wishing to retain some flexibility. The implications of a uniform approach are significant and potentially wide-reaching. The Committee considers that there is significant merit in the Victorian Government's suggestion that the matter should be referred to the Standing Committee of Attorneys-General, in order that it may be explored in more depth.

**Recommendation 12: The Committee recommends that uniformity in the management of Crown copyright across State and Territory Governments be referred to the Standing Committee of Attorneys-General for consideration.**

11.101 In terms of having a central agency to administer government copyright, as is the case in the Commonwealth, the Committee notes that the Queensland Government opposed this approach.<sup>124</sup> Some States and Territories already have a central agency that is responsible for copyright administration, while others leave the task to individual agencies.

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<sup>122</sup> *Submission 71*, p. 14.

<sup>123</sup> *Submission 65*, p. 18.

<sup>124</sup> The Committee notes, as discussed above, that the Department of State Development and Innovation assumes a central role for a few agencies which have not been granted a beneficial use delegation under which they conduct their own licensing arrangements.

11.102 The Committee considers that a coordinated approach to common issues both ensures consistency and allows users to have access to information about copyright issues more easily. The Committee notes comments from FACS<sup>125</sup> and the National Archives<sup>126</sup> that uniformity is particularly important where agencies change their name or functions. Consequently the Committee encourages States and Territories that have not already done so to consider this option.

**Recommendation 13: The Committee recommends that each State and Territory Government that has not already done so consider giving a central agency responsibility for managing Crown copyright, similar to the Commonwealth CCA model.**

11.103 The Committee considers that the same arguments supporting uniformity in copyright administration for literary and other works should also apply to film and sound recordings where the Crown owns copyright. Consequently it supports the AFC's suggestion for a central agency to administer Commonwealth copyright in these materials, and considers that the existing framework of the CCA would make it a sensible choice.

**Recommendation 14: The Committee recommends that the CCA be given responsibility for managing copyright in film and sound recordings where copyright is owned by the Commonwealth.**

11.104 The Department of Education, Science and Training (DEST) submitted that copyright material should be made easily and freely available for education, training and research purposes.<sup>127</sup> DEST argued that the default position for access to materials produced with government funds should be that they are freely available for such purposes. DEST suggested that the default position should not apply where material has a planned commercial benefit for government or where the government intends the research to be

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<sup>125</sup> *Submission 36*, p. 5.

<sup>126</sup> *Submission 37*, p. 7.

<sup>127</sup> *Submission 43*, p. 1.

commercialised. Decisions on which material should be freely available and which should be treated as commercial should be made ‘with consistency across Government’. DEST also supported the development of standardised licences which would detail the permitted uses of material.

11.105 The Committee notes that the CCA’s website has few materials available to provide guidance on copyright in material owned by government. While there is information on Commonwealth copyright notices and when permission is needed to use Commonwealth copyright material, no other information is available. This compares unfavourably with the UK, where the HMSO’s website provides guidance notes on a range of topics, such as reproduction of court forms, and copyright in public records.

11.106 Whilst the ACC’s website provides some information for government, the Committee considers that the CCA should produce more written information to provide guidance and advice for Commonwealth agencies as well as users. Expanding the CCA’s role to allow it to be more proactive would provide a clear and consistent approach to the management of Crown copyright and decrease the uncertainty about copyright issues that has featured so strongly in this inquiry.

**Recommendation 15: The Committee recommends that the CCA’s role be expanded to provide advice and guidance on Commonwealth Crown copyright, and that further material be disseminated on its website.**

## **The need for education for government and its employees**

11.107 During this inquiry, the Committee heard significant criticism, particularly during the Sydney forum, that government employees were often unaware of the Part VII provisions and/or did not make provision for copyright ownership in relevant contracts. While some government agencies are no doubt very practised in developing suitable contracts, others may lack that experience and knowledge.

11.108 In addition to legislative reforms, the Committee considers that governments should increase their efforts to educate government employees on copyright and moral rights issues, both by the creation of guidelines and by specific training.

11.109 If sections 176–8 are repealed, governments may have to rely more heavily on contract to own copyright where a work is commissioned.

11.110 The Committee is mindful of the ANAO’s comment that ‘the management of intellectual property will often involve a series of complex decisions regarding the appropriate level of ownership and control of a particular intellectual property asset’.<sup>128</sup> However, only half of the Commonwealth agencies the ANAO surveyed had mechanisms to identify intellectual property.

11.111 The Committee was unable within the limits of this inquiry to examine in detail and compare the practices of different agencies at Commonwealth, State and Territory level. Some large agencies that are well-practised in negotiating large contracts with significant intellectual property implications, such as the Department of Defence, will no doubt be proficient. Smaller agencies may well benefit greatly from the provision of standard contracts and education in their legal and financial management responsibilities.

11.112 The ANAO found there was a need for broader guidance and support for agencies on the management of intellectual property<sup>129</sup> and recommended a whole-of-government approach and guidance for the Commonwealth.<sup>130</sup> The Committee endorses this recommendation and urges the Commonwealth Government to develop and implement comprehensive guidelines and policies as soon as possible.

11.113 The Committee also suggests that States and Territories should follow this approach if they have not already done so.

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<sup>128</sup> ANAO, *op cit*, p. 69.

<sup>129</sup> *ibid*, p. 22.

<sup>130</sup> *ibid*, Recommendation 2.

**Recommendation 16: The Committee recommends that the Commonwealth Government develop and implement comprehensive intellectual property management guidelines to promote best practice and assist agencies to meet their responsibilities. Education and training of government employees must also be a high priority. The Committee urges State and Territory Governments which have not already taken such steps to do so.**

## Additional Comments – Mr John Gilchrist

One Committee member, Mr John Gilchrist, supports all of the recommendations of the Committee, but has additional comments in respect of recommendations 1, 4, 7 and 8.

**Recommendation 1: The Committee recommends that the provisions relating to the subsistence and ownership of Crown copyright in sections 176-179 of the Copyright Act 1968 be repealed.**

Mr Gilchrist supports this recommendation but notes that the Committee received submissions from Government concerning their need to undertake acts comprised in the copyright in works, which may be privately owned, produced under statutory requirements and in fulfilment of statutory obligations imposed on Government. An example is the submission of survey plans for registration under state land and planning laws. Submissions by the WA Department of Land Information, the Queensland Government and Queensland Department of Natural Resources, Mines and Energy in particular pointed to this need. These governments to some extent presently rely on s176(2) and s177 for that purpose, but the unanimous view of the Committee is that those sections should be repealed.

With the abolition of these provisions, the authors of these submitted works would normally retain copyright in them. But Mr Gilchrist considers that Government would generally be entitled, under an implied licence, to do limited acts comprised in the copyright in the submitted works without infringement of copyright for the purposes of fulfilling their statutory functions.

However he considers it unreasonable to base the government's rights on what is implicit from the process. Mr Gilchrist considers that there is a compelling public interest for a provision to be inserted in the Copyright Act, similar to s 48 of the United Kingdom Copyright, Designs and Patents Act, to expressly enable Government to effectively carry out its public duties. As there is an independent review of Crown use provisions, it may be appropriate to consider this question in the context of that review.

**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.**

Mr Gilchrist considers that if this recommendation is not followed, the statutory licence discussed under Recommendation 7 (below) dealing with primary sources of the law for Australian publishers should extend to enable the reproduction, publication and communication to the public of the listed parliamentary and executive materials. He considers that the public interest in access to, dissemination of, and use by, the public of these materials outweighs other interests. In the case of some executive materials it may be reasonable to restrict this to a proportion (say 30% of the number of pages in those works) but if such a restriction is imposed it should still, for example, be sufficient to enable an executive summary of all the recommendations of a report to be commercially published under the statutory licence. The statutory licence should only cover Crown copyright materials. It should not extend to cover privately owned copyright works by way of illustration, appendix or otherwise in these materials, or to reports and other materials that may be published by the Commonwealth or a State but in which copyright vests in a third party such as the annual reports of CAL and Telstra. The likelihood of privately owned copyright works appearing in these materials will increase if the Committee's recommendations to abolish Division 1 of Part VII of the Act, (specifically s176(2) and s177) are implemented and in these circumstances it is important to the functioning of this licence that Crown publishers and communicators of

these executive materials clearly indicate the ownership of works contained within them. The need to identify privately owned copyright works applies equally to our recommendation that these Crown materials be placed in the public domain.

This statutory licence or waiver should not affect the copyright in the published edition of judicial, legislative and executive materials owned by Government. Thus, for example, commercial reproduction for publication of these materials without infringement of this right would either require a different typographical layout or a licence from the Government to facsimile reproduce that published edition.

**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.**

Mr Gilchrist considers that it is open to the Commonwealth to seek the cooperation of other governments to replace the Crown prerogative rights over primary source materials with a copyright and with the prospect that Government should have rights in primary sources of the law as works under the Copyright Act.

There are a number of encouragements to do so. The prerogative right is limited in its scope to printing and publication. The works it covers are the subject of some uncertainty. The modern concept of copyright in works enshrined in the Copyright Act contains within it rights which are broader in their nature and reflect current means of dissemination and exploitation. The coverage of copyright in works is clear. Copyright also extends worldwide. The prerogative right does not. Mr Gilchrist considers that these two rights do not coexist over primary sources of the law and that copyright may provide a better basis for those legitimate public interests in the accuracy and integrity of this material which Governments have sought in licensing practice to preserve. Indeed, two out of three of the major Australian commercial law publishers' submissions to

this Committee favoured the abolition of prerogative rights but the retention of Crown rights in judicial and legislative material by substitution with a copyright.

If copyright in primary legal materials is subject to a broad statutory licence under the Copyright Act, that statutory licence or waiver should enable any Australian publisher (commercial law or otherwise), to reproduce, publish and communicate to the public primary legal materials without infringement of copyright in the works, and to do so without charge, licence fee or royalty to the copyright owner. As an incentive for all the governments in the Australian federation to achieve a consistent approach to this policy objective, the Commonwealth and the States should seek to establish uniform conditions in the statutory licence to preserve the accuracy and integrity of material subject to the licence but in no case should these conditions be capable of being used as an instrument of censorship.

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

If contrary to our recommendations, the Crown should continue to own prerogative rights in primary source materials, those prerogative rights will continue to subsist in the prescribed works listed in s182A. As mentioned above, it is nonetheless open to the Commonwealth to seek the cooperation of other governments to replace the Crown prerogative rights over primary source materials with a copyright and with the prospect that Government should have rights in primary sources of the law as works under the Copyright Act.

If that occurs, Mr Gilchrist considers that s 182A of the Act should be widened in its effect. The section should be amended to provide that any person may reproduce for a particular purpose or communicate to another person for a particular purpose a whole copy of a Government primary legal source and/or executive and parliamentary work listed in Recommendation 4. That is, the section should be amended to enable all forms of reproduction and communication. Any such act should neither be an infringement of copyright in the work or the published edition copyright owned by Government that may subsist in the work. The precise scope of primary legal works listed in the

existing s 182A should also be clarified to ensure complete coverage of the law in the light of comments by Ricketson and Creswell referred to in Chapter 7 of this Report. In the light of submissions received by the Committee, the section should also make it clear that it does not cover commercially produced material, such as ‘value-added’ material in the form of summaries, notes and commentaries.

The Copyright Law Committee on Reprographic Reproduction (the Franki Committee) some years ago proposed that the provision enable an organisation to make copies for distribution to its members. The section incorporated in the Copyright Act appears to be narrower in scope than that intended (see *Baillieu v Australian Electoral Commission* (1996) 33 IPR 494). The section should be amended to give effect to this wider intention and to enable any educational institution to reproduce or communicate those works for its students. In all circumstances the acts permitted under s 182A should be subject to the present ‘non-commercial’ limitation on charging. If multiple reproduction or communication of these Government materials is undertaken in a non-facsimile form under this section, then similar conditions concerning the accuracy and integrity of material for the proposed broader commercial publication licence ought to be imposed.



## Appendix 1

### List of submissions

Sub. no.	Submitter	<i>Abbreviation / acronym</i>
1	Australian National Audit Office	<i>ANAO</i>
2	Royal Australian Mint	
3	Australian Law Reform Commission	<i>ALRC</i>
4	Australian Institute of Criminology	<i>AIC</i>
5	The University of Melbourne	
6	McGraw Hill Education	<i>McGraw Hill</i>
7	Council of Australian University Librarians	<i>CAUL</i>
8	Mr Ron Ross	
9	WA State Solicitor's Office* WA State Solicitor's Office (Part 2)	
10	CCH Australia Limited	<i>CCH</i>
11	LexisNexis Australia LexisNexis Australia (Part 2)	<i>LexisNexis</i>
12	Swinburne University of Technology	
13	Thomson Legal & Regulatory Limited	<i>Thomson</i>
14	ANZLIC – the Spatial Information Council	<i>ANZLIC</i>
15	Film Australia	
16	WA Department of Land Information	
17	Professor Brian Fitzgerald	
18	Bureau of Meteorology	

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\* Confidential

Sub. no.	Submitter	Abbreviation / acronym
19	Australian Libraries' Copyright Committee and Australian Digital Alliance	<i>ALCC</i> <i>ADA</i>
20	Australian Spatial Copyright Collections Limited	<i>ASCC</i>
21	Australian Information Industry Association	<i>AIIA</i>
22	Association of Parliamentary Libraries of Australasia	<i>APLA</i>
23	Department of the House of Representatives	
24	Vi\$copy Ltd	<i>Vi\$copy</i>
25	Australasian Legal Information Institute	<i>AustLII</i>
26	National Library of Australia	
27	Australian Copyright Council	<i>ACC</i>
28	AEShareNet Limited	<i>AESN</i>
29	WA Department of the Premier and Cabinet	
30	Council of Australian State Libraries	<i>CASL</i>
31	Screenrights	
32	Australian Library and Information Association	<i>ALIA</i>
33	Law Council of Australia	
34	Attorney-General for Western Australia	
35	Western Australian Department of Industry and Resources	
36	Department of Family and Community Services	<i>FACS</i>
37	National Archives of Australia	
38	Department of Finance and Administration	<i>DOFA</i>
39	Hon John Doyle, Chief Justice of South Australia	
40	National Association for the Visual Arts Ltd	<i>NAVA</i>
41	Australian Film Commission	<i>AFC</i>
42	Law Institute of Victoria	
43	Department of Education, Science and Training	<i>DEST</i>

Sub. no.	Submitter	Abbreviation / acronym
44	The Law Society of Western Australia	
45	Department of Health and Ageing	
46	Flexible Learning Advisory Group	<i>FLAG</i>
47	Arts Law Centre of Australia	<i>Arts Law</i>
48	Copyright Agency Limited Copyright Agency Limited (Part 2) Copyright Agency Limited (Part 3)	<i>CAL</i>
49	Australian Vice-Chancellors' Committee	<i>AVCC</i>
50	Australia Council for the Arts	
51	Department of Foreign Affairs and Trade	<i>DFAT</i>
52	Attorney-General for South Australia Attorney-General for South Australia (Part 2)	
53	Australian Society of Archivists Inc	
54	Australian Broadcasting Corporation	<i>ABC</i>
55	Department of Veterans' Affairs	
56	NSW Government	
57	NSW Attorney General's Department	
58 <sup>#</sup>	Ms Judith Bannister	
59	Australasian Performing Right Association and Australasian Mechanical Copyright Owners Society	<i>APRA</i> <i>AMCOS</i>
60	Department of Communications, Information Technology and the Arts	<i>DCITA</i>
61	Federal Court of Australia	
62 <sup>*</sup>	Ministerial Council on Education, Employment, Training and Youth Affairs Schools Resourcing Taskforce	<i>MCEETYA</i>
63	Australian Electoral Commission	<i>AEC</i>

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<sup>#</sup> Not for publication

<sup>\*</sup> Confidential

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Sub. no.	Submitter	<i>Abbreviation / acronym</i>
64	Victorian Government Victorian Government (Part 2*)	
65	Queensland Department of Natural Resources, Mines and Energy	
66	The Law Society of New South Wales	
67	Department of the Senate	
68	Australian Society of Authors	
69	Administrative Review Council	<i>ARC</i>
70	Judge D J McGill SC, District Court of Queensland	
71	Queensland Government	
72	Solicitor for the Northern Territory	
73	Mr Ken Michael Mr Ken Michael (Part 2)	
74	Department of Employment and Workplace Relations	<i>DEWR</i>
75	The Royal Australian Institute of Architects	<i>RAIA</i>
76	Barry Family	
77	Department of Justice, Tasmania	

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\* Confidential

## Appendix 2

### List of those who participated in the Committee's consultations

#### Public forum, Sydney, 27 July 2004

*(listed in alphabetical order of agencies)*

Mr Geoffrey Walker, Deputy President, Administrative Appeals Tribunal  
Mr Paul Kelly, Executive Director, ANZLIC – the Spatial Information Council  
Ms Eve McGregor, Corporate Counsel, APRA Limited  
Mr Scot Morris, Director – International Relations, APRA Limited  
Ms Kate Curr, Association of Parliamentary Libraries of Australasia  
Mr Brendan O'Callaghan, Graduate Legal Officer, Attorney-General's  
Department  
Mr Philip Chung, Executive Director, Australasian Legal Information Institute  
(AustLII)  
Professor Graham Greenleaf, Co-Director, Australasian Legal Information  
Institute (AustLII)  
Ms Tamara Pallos, Policy Officer, Australia Council for the Arts  
Ms Libby Baulch, Executive Officer, Australian Copyright Council  
Mr Marlowe Thompson, Project Officer Litigation Team, Parliamentary and  
Ministerial Section, Australian Electoral Commission  
Ms Vanessa Tuckfield, Project Officer Copyright IP, Vocational, Education and  
Training, Australian Flexible Learning Framework  
Ms Bridget Larsen, Policy Manager, Australian Information Industry  
Association  
Ms Sarah Waladan, Copyright Advisor (Law and Policy), Australian Libraries  
Copyright Committee, and Executive Officer, Australian Digital Alliance  
Mr Chris Shain, Australian Institute of Professional Photography and Society of  
Advertising, Commercial and Magazine Photographers  
Ms Colette Ormonde, Copyright Adviser, Australian Library and Information  
Association  
Dr Jeremy Fisher, Executive Director, Australian Society of Authors

- Mr Jack de Lange, Chief Executive Officer, Australian Spatial Copyright Collections Limited
- Mr Matthew Deaner, Manager Legal, Policy and Industry Development, Australian Subscription Television and Radio Association
- Mr Conor King, Director, AVCC Policy and Analysis, Australian Vice-Chancellors' Committee
- Mr Anthony Barry
- Mr Charles Alexander, Member, Intellectual Property Committee, Business Law Section, Law Council of Australia
- Ms Sharon Bennett, Business Director, CCH Australia Limited
- Mr Michael Fraser, Chief Executive, Copyright Agency Limited
- Ms Caroline Morgan, General Manager and Company Secretary, Copyright Agency Limited
- Ms Melissa Willan, Copyright Agency Limited
- Ms Eve Woodberry, University Librarian UNE, Council of Australian University Librarians
- Mr Peter Ostergaard, Manager, Rights Management, Intellectual Property Branch, Department of Communications, Information Technology and the Arts
- Mr Mark Cunliffe, First Assistant Secretary, Legal Services Division, Department of Defence
- Ms Sandra Somerville, Principal Lawyer, Intellectual Property Unit, Legal Services Branch, Department of Education and the Arts
- Mr Ian Albrey, Senior Government Lawyer, Schools & Indigenous Section, Procurement, Assurance & Legal Group, Department of Education, Science and Training
- Mr Henry Carr, Principal Government Lawyer, Department of Employment and Workplace Relations
- Ms Sophie Nevell, Legal Policy Officer, Civil Law Policy, Department of Justice, Victoria
- Mr Neale Hooper, Assistant Crown Solicitor, Intellectual Property, Technology and Communication Team in Crown Law, Department of Justice and Attorney-General, Queensland
- Mr Tim Beale, Department of Justice and Attorney-General (Crown Law), Queensland
- Dr Anne Fitzgerald, Principal Legal Officer, Crown Law, Intellectual Property, Technology and Communication Team, Department of Justice and Attorney-General, Queensland

Ms Natasha Camphorst, Principal Policy Officer, Department of State  
Development & Innovation, Queensland

Ms Robyn McClelland, Clerk Assistant (Table), Department of the House of  
Representatives

Ms May Priddle, Manager, Information and Records Services, Department of  
the Treasury

Judge D J McGill, District Court of Queensland

The Hon Justice K Lindgren, Federal Court of Australia and President,  
Copyright Tribunal

Ms Bev Dalgairns, Manager, Film Library, Film Australia

Ms Judith Bannister, Lecturer, School of Law, Flinders University of South  
Australia

Mr Jeff Roberts, Assistant Director, IP Research and Projects, IP Australia

Ms Julie Austin, Editorial Standards and Policy Manager, LexisNexis Australia

Ms Daemoni Bishop, Publishing Director, LexisNexis Australia

Ms Laura Whitton, Acquisitions Editor, Schools Division, McGraw-Hill  
Education

Ms Sharyn Ch'ang, National Director – Intellectual Property, Ministerial  
Council on Education, Employment, Training and Youth Affairs – Schools  
Resourcing Taskforce

Mr Paul Dalglish, Assistant Director, Access and Information Services,  
National Archives of Australia

Ms Delia Browne, Legal Adviser, National Association for the Visual Arts

Ms Tamara Winikoff, Executive Director, National Association for the Visual  
Arts

Mr Ben Atkinson, Solicitor, NSW Attorney General's Department

Ms Samantha Schrader, Senior Lawyer, Office of Australian Government  
Solicitor

Mr Simon Lake, Chief Executive, Screenrights

Ms Bronwyn Coop, Manager, Policy & Research, State Library of NSW

Mr Rick Barton, Company Secretary and Legal Counsel, The Royal Australian  
Institute of Architects

Mr Michael Dean, Intellectual Property Officer, The University of Melbourne

Mr Brett McCarthy, Solicitor, Thomson Legal & Regulatory Limited

Ms Anita Sibrits, Commercial Manager, General Law, Thomson Legal &  
Regulatory Limited

Ms Justine Clarke, Intellectual Property Research Institute of Australia,  
University of Melbourne

Ms Mary Wyburn, Faculty of Economics & Business, University of Sydney  
Ms Chryssy Tintner, Chief Executive Officer, Vi\$copy Ltd

### **Perth, 20 August 2004**

#### **WA Government representatives**

Mr Bruce Roberts, Registrar of Titles, Department of Land Information  
Mr John Strijk, Manager, State Law Publisher  
Mr Peter van Bruchem, Department of Industry and Resources  
Mr John Lightowlers, General Counsel, Public Sector Review, Ministry of the  
Premier and Cabinet  
Ms Irene Hislop, Ministry of the Premier and Cabinet  
Ms Nhi Do, Department of Education and Training  
Ms Sue Lapham, Department of Education and Training  
Ms Sarah Sandstad, State Solicitor's Office  
Mr Jeff Saville, Senior Assistant State Solicitor, State Solicitor's Office

The Hon Paul Seaman QC, retired judge of the Supreme Court of Western  
Australia

### **Melbourne, 24 August 2004**

#### **State Government representatives**

Mr Rupert Burns, Senior Legal Adviser, Department of Premier and Cabinet,  
Victoria  
Mr Chris Humphreys, Director, Civil Law Policy, Department of Justice,  
Victoria  
Mr Eamonn Moran QC, Chief Parliamentary Counsel and Government Printer,  
Victoria  
Ms Sophie Nevell, Legal Policy Officer, Civil Law Policy, Department of  
Justice, Victoria  
Ms Ruvani Wickremesinghe, Assistant Director, Civil Law Policy, Department  
of Justice, Victoria  
Mr Simon Millington, Senior Solicitor, Crown Law, Tasmania  
Ms Anna Moulton, Senior Policy Officer, Department of Justice, Tasmania

Ms Giulia Bernardi, Director, Prudential Management Group, Attorney-General's Department, South Australia

**Representatives of other agencies**

Mr Terry Healy, General Counsel, CSIRO

Ms Elizabeth Beal, Director, Victoria, Communications Law Centre

Professor Christopher Arup, Communications Law Centre

Ms Natalina Velardi, Manager, Research & Information, Law Institute of Victoria

Mr David Jansen, Victorian Government Solicitor, Law Institute of Victoria

Ms Robin Wright, Swinburne Legal, Swinburne University of Technology



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## Appendix 3

### NSW waivers of copyright in judgments and legislation

#### **Notice: Copyright in judicial decisions<sup>1</sup>**

Recognising that the Crown has copyright in decisions of the courts and tribunals of New South Wales, including but not limited to prerogative rights and privileges of the Crown in the nature of copyright, and that it is desirable in the interests of the people of New South Wales that access to such decisions should not be impeded except in limited special circumstances:

I, The Honourable John Hannaford, Attorney General for the State of New South Wales, make and publish this instrument on behalf of the State of New South Wales.

#### **Definitions**

1. In this instrument:

“authorisation” means the authorisation granted by this instrument;

“copyright” includes any prerogative right or privilege of the Crown in the nature of copyright;

“Council” means the Council of Law Reporting established by the Council of Law Reporting Act 1969 of New South Wales;

“judicial decision” means:

(a) a judgment, order or award of a State court; or

(b) the reasons for any judgment, order or award given by the State court or a member of the State court, that has or have been publicly delivered, made or given;

“State” means the State of New South Wales, and includes the Crown in right of the State of New South Wales;

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<sup>1</sup> The Hon John Hannaford MLC, Attorney General, ‘Notice: Copyright in judicial decisions’ *NSW Government Gazette* No.23 (3 March 1995) p. 1087

“State court” means:

- (a) any court constituted or continued by or under a law of New South Wales; or
- (b) any tribunal or other body constituted or continued by or under a law of New South Wales and exercising judicial or industrial arbitration functions.

### **Authorisation**

2. Any publisher is by this instrument authorised to publish and otherwise deal with any judicial decision, subject to the following conditions:

- (a) copyright in judicial decisions continues to reside in the State;
- (b) the State reserves the right at any time to revoke, vary or withdraw the authorisation if the conditions of its grant are breached and otherwise on reasonable notice;
- (c) any publication of material pursuant to the authorisation must not indicate directly or indirectly that it is an official version of the material or that it is a version of the material published by or for the Council or any other law reporting agency of the State;
- (d) any publication of material pursuant to the authorisation must not:
  - include any headnote or other summary of a judicial decision (or any summary of submissions) prepared by or for the Council or other law report agency, except with the further authority of the Council or agency; or
  - reproduce any footnotes, comments, case lists, cross-references or other editorial material in any report of a judicial decision prepared by or for the Council or agency, except with the further authority of the Council or agency;
- (e) the arms of the State must not be used in connection with the publication of material pursuant to the authorisation, except with the further authority of the Governor (acting with the advice of the Executive Council) or of the Attorney General;
- (f) any publication of material pursuant to the authorisation is required to be accurately reproduced in proper context and to be of an appropriate standard.

**Non-enforcement of copyright**

3. The State will not enforce copyright in any judicial decision to the extent that it is published or otherwise dealt with in accordance with the authorisation. For this purpose, the authorisation has effect as a licence binding on the State.

**Revocation, variation or withdrawal of authorisation**

4. Any revocation, variation or withdrawal of the authorisation may be effected generally or in relation to specified publishers or specified classes of publishers. The authorisation may also be revoked, varied or withdrawn in relation to specified judicial decisions or specified classes of judicial decisions. Any such revocation, variation or withdrawal may be by notice in the New South Wales Government Gazette, or by notice to any particular publisher, or in any other way as determined from time to time by the Attorney General.

**Unauthorised Documents Act 1922**

5. Attention is drawn to the Unauthorised Documents Act 1922 of New South Wales, which restricts the use of the State coat of arms.

**Copyright Act 1968 of the Commonwealth**

6. Nothing in this instrument affects the rights of any person (other than the State) under the Copyright Act 1968 of the Commonwealth. In particular, attention is drawn to section 182A of that Act, which gives any person the right to make one copy, by reprographic reproduction, of a judicial decision.

Dated at Sydney this 28<sup>th</sup> day of February, 1995.

The Hon John Hannaford  
Attorney General

\* \* \* \* \*

## Notice: Copyright in legislation and other material<sup>2</sup>

Whereas:

- (1) it is recognised that the Crown has copyright in the legislation of New South Wales and in certain other material, including but not limited to prerogative rights and privileges of the Crown in the nature of copyright, and that it is desirable in the interests of the people of New South Wales that access to such legislation and material should not be impeded except in limited special circumstances, and
- (2) a notice relating to such copyright was published in Government Gazette No 94 of 27 August 1993, and
- (3) it is expedient to extend the authorisation to publish and otherwise deal with such legislation and material, as provided for in that notice:

I, The Honourable J W Shaw QC, MLC, Attorney General for the State of New South Wales, make and publish this instrument on behalf of the State of New South Wales.

### Definitions

1 In this instrument:

“authorisation” means the authorisation granted by this instrument.

“copyright” includes any prerogative right or privilege of the Crown in the nature of copyright.

“legislative material” means:

- (a) Acts of the Parliament of New South Wales, and
- (b) statutory rules within the meaning of the Interpretation Act 1987, and
- (c) environmental planning instruments within the meaning of the Environmental Planning and Assessment Act 1979, and
- (d) proclamations or orders made under an Act of the Parliament of New South Wales and published in the Government Gazette, and

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<sup>2</sup> 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.

- (e) admission rules made under the Legal Profession Act 1987 and rules made by the costs assessors' rules committee under section 208R of that Act, and
  - (f) any other instruments that are required under any law to be made, approved, or confirmed by the Governor or a Minister of State for New South Wales and that are published in the Government Gazette, and
  - (g) provisions applying as a law of New South Wales, by virtue of an Act of the Parliament of New South Wales, and
  - (h) any of the above in the form in which they are officially printed or reprinted, and with or without the inclusion of further amendments duly made, and
  - (i) official explanatory notes and memoranda published in connection with any of the above, and
  - (j) tables of provisions, indexes or notes published with any of the above.
- “State” means the State of New South Wales, and includes the Crown in right of the State of New South Wales.

## **Authorisation**

2 Any publisher is by this instrument authorised to publish and otherwise deal with any legislative material, subject to the following conditions:

- (a) copyright in the legislative material continues to reside in the State,
- (b) State reserves the right at any time to revoke, vary or withdraw the authorisation if the conditions of its grant are breached and otherwise on reasonable notice,
- (c) Any publication of material pursuant to the authorisation must not indicate directly or indirectly that it is an official version of the material,
- (d) the arms of the State must not be used in connection with the publication of material pursuant to the authorisation, except with the further authority of the Governor (acting with the advice of the Executive Council) or of the Attorney General,
- (e) any publication of material pursuant to the authorisation is required to be accurately reproduced in proper context and to be of appropriate standard.

**Non-enforcement of copyright**

3 The State will not enforce copyright in legislative material to the extent that it is published or otherwise dealt with in accordance with the authorisation. For this purpose, the authorisation has effect as a licence binding on the State

**Revocation, variation or withdrawal of authorisation**

4 Any revocation, variation or withdrawal of the authorisation may be effected generally or in relation to specified publishers or specified classes of publishers. The authorisation may also be revoked, varied or withdrawn in relation to specified legislative material or specified classes of legislative material. Any such revocation, variation or withdrawal may be by notice in the Government Gazette, or by notice to any particular publisher, or in any other way as determined from time to time by the Attorney General.

**Unauthorised Documents Act 1922**

5 Attention is drawn to the Unauthorised Documents Act 1922, which restricts use of the State coat of arms.

**Copyright Act 1968 of the Commonwealth**

6 Nothing in this instrument affects the rights of any person (other than the State) under the Copyright Act 1968 of the Commonwealth.

**Previous instrument**

7 This instrument is intended to replace the instrument published in Gazette No 94 of 27 August 1993 in relation to copyright, and accordingly the authorisation granted by the previous instrument is subsumed by the authorisation granted by this instrument. However, this instrument does not affect any rights or liabilities accrued or accruing under the previous instrument.

Dated at Sydney this 17<sup>th</sup> day of September 1996

The Hon J W Shaw QC, MLC  
Attorney General

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