

Crown copyright in legal materials: Strategies to maximise public use of public legal information

Graham Greenleaf
Professor of Law, University of New South Wales
Co-Director, AustLII
Co-Director, Baker & McKenzie Cyberspace Law and Policy Centre

26 March 2004

*This paper is a submission in response to the Australian Copyright Law Review Committee's publication *Crown Copyright* (February 2004). The submission is on behalf of the Australasian Legal Information Institute (AustLII – <http://www.austlii.edu.au>).*

This submission focuses on Crown copyright in those legally-related materials which should be generally available to the public (such as legislation, judicial decisions, law reform reports, and Royal Commission reports) but may be the subject of Crown copyright or Crown prerogative. We describe these materials in short as 'public legal information'.

New Zealand has made a specific copyright exception for legal materials defined to include Bills, legislation, regulations, bylaws, parliamentary debates, reports of select committees, judgments of courts and tribunals, and reports of commissions of enquiry¹. We would add reports by government bodies proposing changes to the law and intended for public dissemination to this list, and it would then be similar to our view of 'public legal information'.

The gist of our submission is that the public interest requires a broad approach to public policies concerning these documents, of which reforms to Crown copyright are only the first part. The other two parts are:

- The role that licences to the public of government materials can play; and
- The responsibility of governments to provide effective access to electronic copies of government materials, so as to facilitate republication by others.

Each of these elements is addressed in turn.

Competition and value-adding

There are two starting points for our approach to Crown copyright in public legal information.

There are clear public interests furthered by maximising the availability of such materials, including 'government accountability, access to justice, the principles of open government, the rule of law and democracy'²;

¹ *Copyright Act 1994* (NZ) s27

² CLRC [122] outlining factors relevant to Crown copyright.

There are benefits of competition in the provision of these Crown copyright materials in different formats, with different forms of value-adding, and at different prices ranging from free to expensive. As the Prices Surveillance Authority said³

‘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.’

Competition between publishers (including free access publishers) is what is needed to ensure ‘adequate development’. No one publisher, whether it be government, a commercial publisher, or AustLII, can anticipate all the different forms of value-adding that different classes of users may need or value (or be willing to pay for). Neither does any one publisher have the technical ability to meet the needs of all different categories of users. Facilitating competition is the only way to service the public interest.

Reform of Crown copyright and Crown prerogative

The public interest only requires that public bodies responsible for producing or administering judgments, legislation, law reform reports and the like are able to exercise a very limited amount of control over the subsequent uses of these works.

Use of Crown copyright to prevent secondary publication

They do not need to control the mere fact of republication of these works by others, because of the public interest in maximising access, and the public interest in competitive publication (as discussed above). In fact, since they may be a publisher of the same material on their own institutional websites, it is undesirable that they control republication by others, for obvious anti-competitive reasons.

As we detail in the final section of this paper, Crown copyright has not in the past been the main impediment to republication of public legal materials by AustLII: the difficulty of obtaining a flow of data in electronic form has been more significant. It took AustLII five years (1995-99) to negotiate to obtain access to electronic copies of all Australian legislation and case law of superior courts in all Australian jurisdictions. In a small number of instances, there has been a continuing refusal to provide access to data AustLII would like to republish, and Crown copyright now prevents us from obtaining that data from other electronic sources.

However, in the current environment where a great deal of legal documents are now available via the Internet from government websites. Crown copyright does impose considerable transactional costs on republication (with different value-adding) by AustLII or any other publisher. The need to engage in often lengthy negotiations at a high level in order to republish, even if the negotiations are usually successful, imposes a considerable bottleneck on a small organisation. It would be far easier, and just as polite, to be able to inform a government body that AustLII intended to republish some category of public legal documents, and request an opportunity to discuss how best that could be done so as to provide maximum benefits to all stakeholders.

Protecting ‘integrity’ of public legal documents

As a matter distinct from prevention of publication, it seems more reasonable for governments to be able to ensure certain aspects of what can most concisely be described as

³ (1992); cited CLRC [85]

the ‘integrity’ of the works when republished by others. These include the factors identified by the CLRC⁴ as ‘the accuracy, integrity and quality of government material’, and ‘the authenticity of official versions of government materials’. The waivers of copyright by the NSW government in relation to judicial decisions and legislation⁵ reflect this limited approach to use of copyright to protect ‘integrity’ quite well. The Canadian approach allowing reproduction but requiring that ‘due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version’⁶ is more succinct but of much the same effect.

While it is not unreasonable for governments to use copyright to exercise responsibilities concerning these matters, they should not do so in a way which is too heavy-handed and anti-competitive. Where non-official publications only purport to be ‘unofficial’ publications, and alternative ‘official’ sources are available, there is no need for any continuous exercise of what should be regarded as residual rights. In our experience as free-access legal publishers, Australian governments, Courts and Tribunals have made only very limited use of Crown copyright to try to direct the way in which AustLII publishes legislation or judgments (a couple of examples are given in the final part of this paper). Commercial publishers may have a different experience, and we look forward to reading their submissions.

On the other hand, New Zealand has made a specific exception for legal materials by placing in the public domain Bills, legislation, regulations, bylaws, parliamentary debates, reports of select committees, judgments of courts and tribunals, and reports of commissions of enquiry⁷. The position under US Federal law is much the same, and also applies to other works of the Federal government.

In light of the New Zealand and US example, it is doubtful whether there is any need to retain any Crown copyright in these classes of public legal materials. We recommend that their example should be followed.

There are other approaches to the protection of the public interest in the integrity of public legal documents not based on copyright:

(i) The moral rights of attribution and integrity could provide a reasonable amount of protection for the interests that governments should properly try to protect here, if it was not for the fact that s190 precludes governments from exercising moral rights. However, it would be a fairly blunt instrument to achieve this objective as it protects authors against anything ‘that is prejudicial to the author’s honour or reputation’, and this is not an appropriate description of the public interest here.

(ii) Alternatively, it is possible that s52 of the Trade Practices Act would provide a sufficient remedy wherever a person was using cases, legislation or other public legal documents in a false or misleading way, at least in the context of trade or commerce.

⁴ See [122]

⁵ See CLRC Appendix B for text

⁶ Canada Federal Law Order SI/97-5, 8 January 1997 (as cited in CLRC [121])

⁷ *Copyright Act 1994* (NZ) s27

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’.

There are other public interests that governments, Courts and Tribunals may need to protect, particularly in relation to judgments, including privacy, commercial confidences and national security. Copyright is simply an inappropriate instrument to protect these interests, even if it has been so used in the past. They should be protected by specific actions or legislation which include appropriate defences, not by copyright. In particular, where Courts and Tribunals do not consider that certain judgments should be published at all, or only published in any anonymised form, because of privacy considerations, privacy laws should provide this protection.

Issue 2: We submit that, in relation to public legal materials, the approach taken in New Zealand should be followed and that they should be placed in the public domain.

Issue 3: We submit that, in relation to public legal materials, governments should not be afforded moral rights.

Issue 10: We submit that s182A should be made irrelevant by placement of public legal materials in the public domain.

Issue 11: We submit that the Crown prerogative should be abolished, at least in relation to public legal materials, and probably in relation to all materials.

Licences to the public of government materials

If Crown copyright is retained to some extent, it is still highly desirable for governments to provide general licences to the public for the re-use of government materials.

The waivers of copyright by the NSW government in relation to judicial decisions and legislation in 1995 and 1996⁸ are still ground-breaking examples of how governments can undertake this. They can be seen as ahead of their time, as an example in the area of Crown copyright of the approach to a more flexible assertion of copyright ownership (through various partial licences back to the public) which is being advocated by organisations such as Creative Commons⁹ (though principally in relation to private owners of copyright).

In Australia, a similar approach is being taken in the VET sector by AEShareNet¹⁰ which has released a ‘Free for Education’ licence, and Creative Commons Australia¹¹ which has released the first draft of an ‘Attribution – NonCommercial – Sharealike’ licence (one of the set of Creative Commons licences).

⁸ See CLRC Appendix B for text

⁹ <<http://www.creativecommons.org>>

¹⁰ <<http://www.aesharenet.com.au/FfE/>>

¹¹ <<http://www.creativecommons.org.au>>

The fact that such a waiver or licence to the public exists is one thing, but whether the public is aware of it is another. Publishers will be aware, but the general public including educators and businesses are unlikely to be aware. AustLII receives many enquiries from its users requesting permission to republish cases or legislation on AustLII in books, teaching materials or other publications. We are usually unable to point them to any ready answer or source of advice or consent, beyond telling them to contact the relevant Court or PCO, which is not very useful.

At AustLII, we intend to make a start in relation to the easier public identification of re-use rights, by linking every item of NSW legislation, and every decision of a NSW Court or Tribunal, to a copy of the abovementioned licences by the NSW government. We would like to do this in relation to all Australian legal documents but there is usually nothing definitive to link to.

Issue 13: We submit that (if Crown copyright still applies) all Australian governments should adopt an approach to the licensing to the public of all essential legal information which is similar to that taken by the NSW government in relation to cases and legislation.

It would be highly desirable if, similar to the approach that has been taken by the Creative Commons project internationally, and by AShareNet in Australia, one or more standard licences was developed, plus a symbol which could be placed on applicable government documents to indicate that the document was licensed to the public according to those terms. This could be called the 'Government Public Document' licence (or some such), or licences.

If necessary, a 'Government Public Document' licence could be 'ported' (in the terminology used by Creative Commons) from one Australian jurisdiction to another so that it contained minor variations of terminology applicable to each jurisdiction, provided it still maintained the same legal effect in each jurisdiction and could therefore be accurately described by the same symbol and Licence Elements. We submit that Australian governments should cooperate to achieve this standardisation of licences to the public.

AustLII would like to be involved in the development of any such licences, and we will include this as one of the topics to be discussed at a conference on *Publication of Court and Tribunal Decisions* that we will host in November 2004. The Baker & McKenzie Cyberspace Law and Policy Centre will also be involved in this development.

We also submit that Australian government bodies responsible for particular works to which Crown copyright applies (assuming it is retained) should be required by law to indicate on the face of the work whether a 'Government Public Document' licence applies to the work, and if so which type of licence.

These submissions concerning a 'Government Public Document' licence should be of general relevance to government works, not only to public legal information.

Responsibility of governments to provide effective access to electronic copies

Abandonment of Crown copyright, or the provision of general licences to the public, is in itself insufficient to effectively promote the public interest in access to legal information. If all that a publisher wishes to do is to republish extracts from cases, legislation or law reform reports, or perhaps an occasional full case or statute, it may be enough.

However, where a publisher (such as AustLII or a commercial legal publisher) wishes to publish all the legislation of a jurisdiction, or all the decisions of a Court or Tribunal, these removals of legal restraint amount to nothing unless an effective electronic source of the data (and a continuous one for new cases and legislation) is available.

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.

The Declaration on Free Access to Law¹² adopted by providers of free access to legal information from around the world states in part:

Independent non-profit organisations have the right to publish public legal information and the government bodies that create or control that information should provide access to it so that it can be published.

AustLII has argued since 1995 that monopoly government provision of free access to legal information is not sufficient to promote the public interest¹³. We argue that official bodies should accept that they have seven obligations in the provision of public legal information if they are to give optimal support to the rule of law and other values:

- 1 *Provision in a completed form*, including additional information best provided at source, such as the consolidation of legislation, and the addition of catchwords (index terms) or even summaries to cases.
- 2 *Provision in an authoritative form*, such as use of court-designated citations for cases and (eventually) use of digital signatures to authenticate the versions distributed.
- 3 *Provision in the form best facilitating dissemination*, which should always now mean in electronic form, should in most cases be possible by email or more sophisticated forms of data delivery, and should be possible in a form facilitating conversion.
- 4 *Provision on a marginal-cost-recovery basis to anyone*, so that governments do not attempt to profit from the sale of public legal information, thereby creating artificial barriers to access to law.

12

13 See Greenleaf, G, Mowbray, A. King, G and van Dijk, P (1995) Public access to law via internet: the Australasian Legal Information Institute (1995) *Journal of Law & Information Science*, Vol 6 Issue 1 (Originally presented at Sixth Asian Pacific Specials, Health and Law Librarians Conference, Sydney, 30 August 1995) ; G Greenleaf, A Mowbray G King 'New directions in law via the internet - The AustLII Papers' *Journal of Information, Law and Technology* (JILT), Issue 2, 1997, University of Warwick Faculty of Law, at <http://elj.warwick.ac.uk/jilt/issue/1997_2> , and G Greenleaf 'Free the Law: How the Australasian Legal Information Institute (AustLII) Achieved the Free Availability of Legal Information on the Internet' 2000 (1). *The Journal of Information, Law and Technology* (JILT) at <<http://www.law.warwick.ac.uk/jilt/00-1/transcript.html>>.

- 5 *Provision with no re-use restrictions or licence fees*, subject only to such minimal restrictions as are necessary to preserve the integrity of published data¹⁴.
- 6 *Preservation of a copy in the care of the public authority*, so that an archive of the data is preserved to enable greater competition whenever a new entrant wishes to publish the data, whether or not the public authority publishes the data itself.
- 7 *Non-discriminatory recognition of citations*, so that Court-designated citations are not removed from 'reported' cases, ending the privileged status of citations of 'official' reports¹⁵.

A corollary of these propositions is that it is not sufficient for official bodies only to publish public legal information for free access on their own web sites. Provision to other publishers (including both free access providers and commercial publishers) is also necessary for sound public policy, and is more important than official self-publication. Such dissemination is necessary to ensure that free-access is not second-rate access.

The new EU Directive¹⁶ of 2003 establishing standards for the re-use of government information where information is made publicly available takes a broadly similar approach to that which AustLII has advocated, including a prohibition on exclusive rights of republication, a requirement of practical arrangements to facilitate finding documents for re-use, non-discriminatory conditions of supply, and a requirement to make all existing forms of a document available. The AustLII policies differ in proposing that public legal information is a special case where the maximum that governments should recover for its dissemination is the marginal cost of distribution, not 'a reasonable return on investment'.

In many cases, Australian Courts, Tribunals, Parliamentary Counsel's Offices and government agencies are among the world's leaders in providing effective electronic access for republication purposes. This progressive approach is shown by such factors as (i) the general adoption of 'Court-designated citations' (vendor-neutral and medium-neutral; (ii) that none have attempted to charge AustLII for access to data; and (iii) that almost all Courts and Tribunals now provide data to AustLII by email, in high quality formats (usually RTF), and on a very regular basis.

For AustLII, these practices are of vital importance to its viability, as it is now the only provider of free access to legal information in Australia which attempts to provide national coverage, since the Commonwealth Government's SCALE system abandoned everything except Commonwealth legislation in 2003.

The practices of Parliamentary Counsel's offices (or other legislative data providers) are much more variable. Some, such as the New South Wales PCO do their utmost to

¹⁴ Poulin (2003) takes a similar position: 'In order to be truly open, publication must not be restricted by any conditions as to subsequent use or republication of the documents, except for conditions needed to ensure accuracy.'

¹⁵ This seventh element was not included in our original list in 1995, but the importance of citations has subsequently become more obvious.

¹⁶ Directive 2003/98/EC of 17 November 2003 on the re-use of public sector information; see CLRC [90]-[94] for a summary.

accommodate those wishing to republish, and fulfil all the 'good practice' criteria mentioned above. In some other jurisdictions lower quality facilities for supply of legislation impose considerable burdens on AustLII and (we assume) all other publishers. Examples of these problems are:

- 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.

Apart from these difficulties in obtaining access to legislation, there are other situations where AustLII continues to experience considerable difficulties due to Crown copyright use. Some examples are:

- The Western Australian government has never been willing to allow AustLII to provide the higher quality RTF versions of its legislation, only the lower quality text versions. In recent years it has even prohibited AustLII from allowing downloads of full copies of any WA legislation in any form, limiting AustLII to providing only individual sections of Acts. The effect of these actions is an attempt to force AustLII to offer a second-rate service, in order to enhance the financial position of the State's own legislation service. We question whether this is an appropriate use of Crown copyright.
- 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 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.

Issue 17: We submit that, as part of their overall reform of the policies related to Crown copyright, and the administration of Crown copyright, Australian governments should adopt comprehensive policies, along the lines of the seven AustLII policies outlined above, and the similar policies adopted recently by the European Union, in order to facilitate republication of public legal information.