



Australian Government

**Department of Communications,
Information Technology and the Arts**

our reference

The Director
Copyright Law Review Committee Secretariat
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

CROWN COPYRIGHT SUBMISSION

I refer to your invitation for interested parties to submit comments on issues identified by the Copyright Law Review Committee (CLRC) as part of its reference concerning Crown copyright provisions in the *Copyright Act 1968*. The Department of Communications, Information Technology and the Arts (the Department) is jointly responsible for copyright policy with the Attorney-General's Department.

The Department, through the Commonwealth Copyright Administration (CCA), is responsible for administration of copyright in published Commonwealth copyright publications on behalf of Australian Government departments and agencies. It also has portfolio responsibility for significant users and caretakers of Commonwealth Crown copyright materials such as the National Archives of Australia and the National Library of Australia. It is therefore well placed to provide the CLRC with factual information about current practice in the management of Crown copyright by the Australian Government, and Commonwealth ownership and management of copyright more generally.

The purpose of this submission is to assist the CLRC through the provision of relevant information and by highlighting a number of factors that the Department considers relevant to this inquiry. While the issues identified by the CLRC are not specifically addressed, they are touched upon as they relate to our specific role and portfolio experience.

In addition to our submission, we understand that some agencies that are part of the Department's portfolio have made independent submissions for consideration by the Committee.

In light of the Department's responsibilities and role in managing copyright materials, we are providing information covering issues arising from the Commonwealth's role as a publisher, creator, purchaser and owner of copyright materials. We also draw your attention to uncertainties caused by the lack of a definition of 'the Commonwealth' for the purposes of the Copyright Act and the practical difficulties this creates for the CCA. Discussion of these issues is set out in the enclosed submission.

Yours sincerely

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Submission by
The Department of Communications, Information Technology and the Arts
to the inquiry of
Copyright Law Review Committee
into Crown Copyright

Commonwealth as a creator, publisher, purchaser, and owner of copyright materials

From this Department's perspective, the Commonwealth's role as a creator, publisher and owner of copyright materials raises the following issues:

- public interest in and use of Crown copyright materials;
- appropriate use of sensitive materials;
- Commonwealth commissioning and procurement of copyright materials; and
- use of copyright materials to further both commercial and broader policy interests of the Commonwealth.

Public interest in and use of Crown copyright materials

Published materials

Australian Government agencies produce a large volume of materials. These are produced for many purposes, including engendering public discussion and education, promoting community standards, and facilitating public access to Government services. It is therefore generally in the interest of the Government to ensure that material published by Australian Government agencies is widely distributed.

The CCA operates in accordance with the 1989 Commonwealth Government Charter of Printing and Publishing Responsibilities. In accordance with Section 2(h) of the Charter, it is the responsibility of the CCA to 'ensure that Crown copyright is claimed and protected and to deal with requests for rights and permissions to reproduce Crown Copyright material and determine appropriate conditions under which any rights or permissions may be granted.'

Under the current administrative arrangements for the CCA, the public benefits gained from making available information contained in Commonwealth publications is a key reason why requests to reproduce Commonwealth copyright are approved more often than not.

This approach is most clearly demonstrated in relation to requests to use Commonwealth legislative material (includes legislation, regulations, and other statutory instruments). All requests to reproduce such material are approved by the CCA without charge, subject to a requirement that the applicant include a standard disclaimer and copyright notice.

As noted in the CLRC issues paper (paragraph 66), the 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 normally collected for commercial use of published Commonwealth materials. Fees are, however, waived under certain circumstances where the proposed commercial use of the material is deemed of particular public interest.

Therefore, while the existence of copyright in Commonwealth publications is generally not used to deny access, use or dissemination of material in the public interest, it does enable the Commonwealth to impose conditions on their use (e.g. requiring the inclusion of standard acknowledgments and disclaimers). It also enables the Commonwealth to charge fees for the commercial use of materials that have been produced and published with public monies.

Unpublished materials

The CCA does not have responsibility for management of unpublished material. It only receives a couple of requests to use unpublished material each year. These inquiries are referred either to the author agency or to the National Archives of Australia for response.

The National Archives of Australia (NAA) has broad responsibility for management of unpublished Commonwealth material. It carries out this task in liaison with the agencies that are responsible for the creation of the materials in its holdings. Under the 30-year rule, unpublished Commonwealth copyright material (with exceptions relating to material of a certain confidential character) is made available for public use by the NAA. The NAA has well-established processes for dealing with requests to access and use such material. We understand that the NAA is providing a separate submission on issues of concern to that agency.

Appropriate use of sensitive published materials

The Australian Government publishes a range of sensitive materials that are critical to the health and welfare of the Australian community. For this reason, some Government agencies have a policy of maintaining strict control over the conditions of use of some of the materials they publish. Of particular concern is any use of Commonwealth copyright materials that could risk implying Government endorsement of a particular political party, or a commercial product or service. The Commonwealth is able to use its copyright in such

materials to control the way they are used (ie to ensure that they are reproduced or made available in an appropriate manner).

While promoting public access to published Commonwealth materials by allowing public use of the materials is of primary importance to the CCA, a request to reproduce published Commonwealth copyright materials may be denied where a clear accountable public policy reason exists. This generally relates to use of current materials, including requests to reproduce official forms and other materials where the reproduction could be seen as potentially endorsing a particular product or service. Materials that people may rely on in making informed decisions on health, immigration and financial matters are of particular sensitivity. For example, to ensure that only official versions of Government forms are used by the public, forms published by the Department of Immigration and Multicultural and Indigenous Affairs may not be reproduced unless they have been modified to include the word 'sample' as a prominent watermark.

In its audit report, *Taxation Reform: Community Education and Information Programme* (Report number 12, 1998), the Australian National Audit Office (ANAO) noted that there are sensitivities related to political use of Commonwealth copyright materials, particularly in an election campaign. While the ANAO did not suggest that such use was entirely inappropriate, it is clear that it considers that some uses of Commonwealth copyright materials in a political context may be inappropriate.

In another example, the Department of Defence has advised the CCA that it does not allow use of photographs from the Defence image gallery by a supplier of defence material unless the image can be directly related to an existing commercial arrangement between that supplier and the Department of Defence. The Department has advised that they wish to ensure that copyright material generated by them should not be able to be used by industry in contexts in which a commercial/supply relationship with the Commonwealth could be wrongly implied or inferred. While trade practices/passing off principles may possibly be applicable, copyright is a more immediate and effective tool for the Commonwealth to exercise in these circumstances.

Commonwealth commissioning and procurement of copyright materials

In considering strategies for the commissioning and procurement of copyright materials, Commonwealth agencies are encouraged to examine the costs/benefits of retaining Commonwealth copyright ownership in gaining the best value for money from their investment in the material (e.g. a licence to use the material may cost less than full Commonwealth copyright ownership). As a consequence, it is fairly common for copyright in some of the content included in Commonwealth publications not to belong to the Commonwealth.

Evidence collected by the Department as part of an ongoing review of the CCA, indicates that when acquiring rights to third party copyright materials, Australian Government Departments will mostly only acquire the rights they need to achieve the objective the material will be used for. Of 43 agencies surveyed by the CCA in late 2002, most stated that they did not rely on the default provisions under s176 of the Copyright Act, but rather generally relied on the inclusion of specific intellectual property clauses in procurement contracts.

For example, Government reports may include photographs or other illustrations, or extracts from other materials which the Commonwealth has obtained a conditional licence to use. Such a licence may only give the Commonwealth a limited right use to the material, such as printed copy only and not digital use or limited rights to on-licence the material. This approach may provide cost savings, while the Commonwealth's ownership of copyright in the primary publication enables it to prevent unauthorised use of underlying material as it appears within its publication. This is particularly important in circumstances where it is not practical for the author/copyright owner of the underlying material to take such action.

A further example of the Commonwealth being able to use its copyright to protect underlying materials is provided by Artbank. Artbank is a self-supporting program within DCITA which purchases artworks from Australian artists and makes them available for rental. Artbank makes images (both digital and photographic) of artwork available to allow potential and existing customers to allow them to make a selection of artwork. While the photograph may be taken as part of a Government function, the Government does not have copyright in the subject of the photograph (though it has a licence to make a photograph and digital reproduction for purposes related to the functions of Artbank). The Government's ownership of copyright in the photograph enables it to take any action that it considers appropriate to prevent unauthorised use of the work as it appears in the photograph.

Use of copyright materials to further commercial and broader policy interests of the Commonwealth

On occasion, the Commonwealth invests in the development of products or services either fully owned by the Commonwealth or in partnership with third party service providers. On completion of a product, there may be some public benefit from the Commonwealth being able to commercialise the product itself, or allowing the developer or another third party to own copyright for further commercialisation and industry development. This flexibility may make it possible for the Commonwealth to gain improved value for money in procurement of services and may also support broader Government policy objectives, including industry development objectives. Owning or having the option of owning copyright in such material therefore enables the Government to protect its interests and pursue these objectives.

For example, the Commonwealth is a significant investor in the development of IT products. In some cases, there may be commercial application of such products or services. The *Commonwealth IT IP Guidelines: Management and commercialisation of intellectual property in the field of information technology* encourage agencies to take a flexible approach to consideration of ownership options for IT products. The Guidelines have the dual aim of obtaining value for money in Government purchasing and encouraging industry development. The Guidelines are based on the assumption that the Commonwealth can own the copyright in IT products it has had developed. It is suggested that the industry development objectives can be met through a number of IP ownership models, including shared ownership of IP in IT products and services between the Commonwealth and a private sector body. This flexibility is dependent upon the Commonwealth being able to own copyright in the material it commissions.

The Commonwealth may also have a commercial interest it wishes to protect in the materials it directly creates or publishes. For example, the Commonwealth has at various times divested itself of ownership in agencies involved in the delivery of particular assets or services. This has occurred through commercial transactions and it may be reasonable to expect that the purchaser of the rights to the services would expect to obtain rights to some, if not all, the intellectual property that are an essential part of the delivery of that asset or service. The IP might extend both to internal records and to materials on the public record (for example promotional materials).

It is arguable that ownership of copyright gives the Commonwealth additional flexibility in consideration of ownership options and delivery models for a variety of Government services.

For example, when the Commonwealth sold the Snowy Mountains Engineering Corporation (SMEC) in 1993, the Commonwealth (through the National Archives of Australia) gave the purchaser an exclusive licence to use specified copyright materials that had been created while the business was under Commonwealth ownership. If the Commonwealth had been unable to licence ownership in the copyright, it is possible that the sale would have generated less revenue to the Government.

Definition of the Crown in the Copyright Act

The absence of a definitive definition of the Crown for the purposes of the Copyright Act creates some uncertainties and potential inconsistencies across Australian Government agencies with regard to their authority to own and licence copyright materials. This, in turn, also creates uncertainties with respect to the ownership status of individual materials which have been created by individual agencies which have changed in legal status over time.

The Copyright Act does not define 'the Commonwealth' apart from providing that it includes 'the Administration of a Territory' (s.10(1)). Therefore, the meaning of the

expression must be inferred from the context in which it appears. It is presumed that a word is intended to be used in the same manner throughout the Act unless the contrary intention appears.

There are a number of possible interpretations of how the Copyright Act operates in relation to bodies which have a legal personality distinct from that of the Commonwealth, but which nevertheless for some purposes may be treated as an agent or emanation of the Commonwealth.

In advice provided to the Department in August 2000, the Australian Government Solicitor (AGS) advised the Department that there seems to be three possible interpretations of 'the Commonwealth':

- the legal person that is the Commonwealth;
- the Crown in right of the Commonwealth; or
- the Commonwealth as a federal entity.

An excerpt from the AGS advice providing a detailed discussion of these three interpretations is at Attachment A.

Consequently, there is some confusion as to which agencies are part of the Commonwealth for the purposes of the Copyright Act. In some cases, agencies which would appear to have a similar function may have a different status for the purpose of the Copyright Act. For example, the AGS advice indicates that the Australia Council, the Australian National Maritime Museum; and the National Museum of Australia 'probably' are 'the Commonwealth' for the purposes of the Act, whereas the National Gallery of Australia and the National Library of Australia 'probably' are not.

A practical consequence of this uncertainty is that the scope of the CCA's responsibility is unclear. As noted above, the CCA is responsible for administration of copyright in published Commonwealth copyright publications on behalf of Australian Government departments and agencies. However, the lack of a definitive list or test for agencies which are part of the Commonwealth for the purposes of the Copyright Act creates some uncertainty about which materials the CCA is responsible for.

Excerpt from advice provided by the Australian Government Solicitor to the Department of Communications, Information Technology and the Arts in August 2000 concerning interpretation of the Copyright Act 1968 Part VII: Commonwealth bodies

What is 'the Commonwealth'?

14. The Copyright Act does not define 'the Commonwealth' apart from providing that it includes 'the Administration of a Territory' (s.10(1)). Therefore the meaning of the expression must be inferred from the context in which it appears. It is presumed that a word is intended to be used in the same manner throughout the Act unless the contrary intention appears (see DC Pearce and RS Geddes *Statutory Interpretation in Australia* (4th ed) 1996 at [4.4], [4.5]).

15. In this context, there seem to be three possible interpretations of 'the Commonwealth':

- the legal person that is the Commonwealth;
- the Crown in right of the Commonwealth; or
- the Commonwealth as a federal entity.

These three views are considered below.

'Commonwealth' as legal person

16. First, it can be argued that in the Copyright Act 'the Commonwealth' refers simply to the legal person that is the Commonwealth. On this view 'the Commonwealth' would not include any Commonwealth agency or authority which is a separate legal person having the capacity to hold property in its own right.

17. In support of this view it can be noted that much other Commonwealth legislation distinguishes between the Commonwealth itself and other Commonwealth entities. For example the provisions relating to the use of designs by the Crown in Part VIA of the *Designs Act 1906* expressly define 'the Commonwealth' to include 'an authority of the Commonwealth' (s.40(2)). That same definition also is used for corresponding provisions relating to the Crown in the *Patents Act 1990* (s.162). It would not have been difficult for the Parliament to have included a similar definition in Part VII of the Copyright Act.

18. It should be noted however that it seems that there could be some entities which have no corporate status separate from the Commonwealth but which nevertheless may not be 'the Commonwealth' for the purposes of Part VII. In an opinion dated 12 May 1989, Dr

Gavan Griffith (then Solicitor-General) expressed the view that the meaning of ‘the Commonwealth’ in Part VII of the Act is restricted to the executive arm of government, with the result that section 176, 177 and 178 have no application in respect of the works of the Parliament and the federal judiciary. Here however we are considering bodies which are part of the executive arm of government.

‘Commonwealth’ for ‘shield of the Crown’ purposes

19. Secondly, it can be argued that ‘the Commonwealth’ for the purposes of the Copyright Act includes any body which is entitled to share the privileges and immunities of the Crown in right of the Commonwealth.

20. At common law ‘the Crown’ has certain privileges and immunities which are not shared by other persons. An example of this is the presumption that can be applied in statutory interpretation that the general words of legislation do not bind the Crown or its instrumentalities or agents (see *Bropho v Western Australia* (1990) 171 CLR 1 at 22). In this context ‘the Crown’ can refer to the Crown in right of the Commonwealth or the Crown in right of a State.

21. It is possible for a statutory body to share this potential Crown immunity. Whether a body will share Crown immunity will depend on the intention to be inferred from the statute under which the body is constituted (*Townsville Hospitals Board v Council of the City of Townsville* (1982) 149 CLR 282 at 289). A body may be given the privileges and immunities of the Crown for some purposes but not others (*Townsville Hospitals Board* at 288; see also *Deputy Commissioner of Taxation v State Bank of NSW* (1992) 174 CLR 219 at 230).

22. It seems that a primary factor in determining whether a statutory body enjoys Crown immunity in respect of carrying on a particular activity is the extent to which the body is subject to direction or control by or on behalf of the Crown (see *Townsville Hospitals Board* at 289, 291-292). This requires only an examination of the potential legal powers available with which to exercise control: it does not require any examination of the actual extent to which particular actions are the result of the exercise of control (see *Superannuation Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330 at 348).

23. In this advice we will refer to the approach described above as the ‘shield of the Crown’ test. It should not be readily inferred that a statutory body is to be entitled to Crown privileges and immunities:

All persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them. It is not difficult for the legislature to provide in express terms that a corporation shall have the privileges and immunities of the Crown, and where it does not do so it should not readily be

concluded that it had that intention. (*Townsville Hospitals Board* per Gibbs CJ at 291)

24. It seems that a body incorporated under the general Corporations Law generally will not be ‘the Commonwealth’ under the ‘shield of the Crown’ test (see *Commonwealth v Bogle* (1953) 89 CLR 229 at 268; *Townsville Hospitals Board v Council of the City of Townsville* (1982) 149 CLR 282 at 289). We do not think that the special legislative provision made by the *Commonwealth Authorities and Companies Act 1997* in relation to ‘Commonwealth companies’ and ‘wholly-owned Commonwealth companies’ alters this conclusion. Those provisions clearly encompass many bodies which are intended to remain generally independent of the Commonwealth.

‘Commonwealth’ for federal purposes

25. Thirdly, it can be argued that, for the purposes of the Copyright Act, ‘the Commonwealth’ should be given the same meaning that it has for the purposes of provisions of the Commonwealth Constitution.

26. A different approach to the ‘shield of the Crown’ test has been adopted by the High Court in deciding whether a body is ‘the Commonwealth’ or ‘a State’ for the purposes of the provisions of the Constitution relating to federal jurisdiction (ss 75(iii), 75(iv) and 78) and related provisions of the *Judiciary Act 1903*. This same approach has been used by the High Court in deciding whether the property of a statutory body is property of a ‘State’ protected against Commonwealth taxation by section 114 of the Constitution (see *Deputy Commissioner of Taxation v State Bank of NSW* (1992) 174 CLR 219 at 233).

27. The test here is whether an intention is manifest that ‘the Commonwealth should operate in a particular field through a corporation created for the purpose’ or, on the other hand, that the Commonwealth intends ‘to put into the field a corporation to perform its functions independently of the Commonwealth...so that the concept of a Commonwealth activity cannot realistically be applied to that which the corporation does’ (*Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 338; see also *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639 at 644). For the purposes of this test, the following factors may be considered (see *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639 at 649-652):

- whether the incorporated body has corporators;
- 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);
- the financial relationship between the body and the Commonwealth; and

- the extent of any 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.

It seems in this test that the most important factor also is the degree to which the body concerned is subject to control by the executive government.

28. It seems that using this test a wider range of bodies will be treated as an emanation of the Commonwealth than may be entitled to the immunities of the Commonwealth in accordance with the 'shield of the Crown' principles noted above (see *Maguire v Simpson* (1977) 139 CLR 362 at 406). Strong views have been expressed to the effect that references to 'the Commonwealth' should be given a wide meaning in the context of the scope of federal jurisdiction under s.75(iii) (see *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 335; *Maguire v Simpson* (1977) 139 CLR 362 at 397-398, 405-406). In the context of drawing a distinction between the 'shield of the Crown' test and this test, it has been said that:

...the Constitution treats the Commonwealth and the States as organisations or institutions of government possessing distinct individualities so that, whilst formally they may not be juristic persons, they are conceived as politically organised bodies having mutual legal relations and amenable to the jurisdiction of courts exercising federal jurisdiction (*State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1997) 189 CLR 253 at 283)

There are observations to similar effect in *Deputy Commissioner of Taxation v State Bank of NSW* (1992) 174 CLR 219 at 230. In this advice we will refer to this approach as the 'federal' test.

29. It is arguable that the 'federal' test requires a **legislative** intention that the Commonwealth operate through that body (see *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 338; *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639 at 645; *Re Residential Tenancies Tribunal of NSW and Henderson and Anor; ex parte Defence Housing Authority* (1997) 190 CLR 410 at 448). However the Solicitor-General, Mr David Bennett QC, in an opinion dated 20 May 1999 has expressed the view that a body incorporated under the general Corporations Law in some circumstances could meet this test. The Solicitor-General's opinion indicates that it will be necessary in such cases for the Commonwealth to control **all** the shares or other membership rights relating to the company. This is because the member with the controlling interest in the company will not have unfettered control of the company, given the potential rights of other members and the duty of the directors of the company to act in the interests of the company as a whole.

Conclusion: preferred test for ‘the Commonwealth’

30. The preponderance of opinion supports a broader approach than that which excludes from the definition any body which has a legal personality separate from that of the Commonwealth.

31. It appears to have been assumed to date that the references to ‘the Commonwealth’ in the Copyright Act also encompass certain other bodies which have the capacity to hold property in their own name (see *Re Australasian Performing Rights Association and Australian Broadcasting Commission* (1982) 62 FLR 20 at 27-28; *Allied Mills Industries v Trade Practices Commission* (1981) 34 ALR 105 at 116; see also S. Ricketson, *The Law of Intellectual Property* (2nd ed., 1999) at [14.170]; LBC *The Laws of Australia* Vol.23 para. [435]). Views to this effect have been expressed by the former Solicitor-General in his opinion of 12 May 1989, by Mr Robert J Ellicott QC (a former Solicitor-General and a former Federal Court judge) and Mr David Yates in an opinion dated 23 April 1992 and also by the Australian Government Solicitor in the many previous advices which have been given in this area.

32. Note however that the Full Court of the Federal Court expressed some reservations about assuming a wider meaning for the expression ‘the Commonwealth’ in *Re Copyright Act 1968*; *Re Australasian Performing Rights Association and Australian Broadcasting Commission* (1982) 65 FLR 437 at 440-441 and 448.

33. The meaning of the expression ‘the Commonwealth’ in a particular Act could have the same scope as the reference to ‘the Commonwealth’ using the ‘federal’ test (see *Maguire v Simpson* (1977) 139 CLR 362 at 368, 389-390, 391, 397-399, 405-406 and 407 in relation to Judiciary Act s.64; *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639 at 648 in relation to Judiciary Act s.38). However, of course, the meaning of the provision in an Act or Parliament will depend on the particular legislative context (see *Deputy Commissioner of Taxation v State Bank of NSW* (1992) 174 CLR 219 at 232).

34. Since the decision in the case of *Deputy Commissioner of Taxation v State Bank of NSW* (1992) 174 CLR 219, the Australian Government Solicitor has used the ‘federal’ test rather than the ‘shield of the Crown’ test for the purposes of deciding whether a body should be treated as ‘the Commonwealth’ for the purposes of Part VII of the Copyright Act. Your request for advice has promoted a reconsideration by the Australian Government Solicitor of the preferable test.

35. The only case in which the Copyright Act question has received significant judicial consideration appears to draw no distinction between the ‘shield of the Crown’ test and the ‘federal’ test (see *Re Copyright Act 1968*; *Re Australasian Performing Rights Association and Australian Broadcasting Commission* (1982) 65 FLR 437 per Bowen CJ and Franki J at 441-442, Sheppard J at 452-456, see in particular at 454). However it

seems that Sheppard J of the Federal Court in *Allied Mills Industries v Trade Practices Commission* (1981) 34 ALR 105 at 116 may have assumed that the test used for deciding whether a body is 'the Commonwealth' for the purposes of s.75(iii) of the Constitution (i.e. what is referred to here as the 'federal' test) should be used for deciding whether the body is 'the Commonwealth' for the purposes of the Copyright Act.

36. Although it is now clear from the case law that the 'shield of the Crown' test and the 'federal' test are to be regarded as distinct tests based on differing underlying principles, both tests in practice require an examination of similar factors, most importantly the scope for government control over the body in question. We note above the judicial statements which support a restrictive application of the 'shield of the Crown' test and an expansive application of the 'federal' test.

37. Part VII of the Copyright Act gives 'the Commonwealth' and 'a State' certain rights to acquire copyright and to use copyright material where the copyright in that material is owned by other persons. It can be said that this gives the Commonwealth and the States certain privileges and immunities which are not enjoyed by other persons (see in particular the right to use copyright material in s.183). In our view, given this legislative context, it seems that a court would be disposed to give the scope of these provisions a relatively narrow construction. It seems to us that a court would prefer the 'shield of the Crown' test to the 'federal' test in this context.

38. In their advice of 23 April 1992, Ellicott QC and Yates state the kind of factors considered by the courts in deciding whether a body is treated as part of the Commonwealth for the purposes of the Constitution are 'helpful' in determining whether the body should be regarded as 'the Commonwealth' for the purposes of Part VII of the Copyright Act. However it seems to us that, in any case where the application of the 'shield of the Crown' test will lead to a different result to the 'federal' test, the 'shield of the Crown' test should be preferred. The Chief General Counsel, Mr Henry Burmester QC, agrees with this view.

Does the copyright vest in the Commonwealth body or the Commonwealth itself?

39. It seems that current practice generally within the Commonwealth has been to assume that the effect of sections 176, 177 and 178 of the Copyright Act is to vest copyright in the Commonwealth rather than the body that is treated as an emanation of the Commonwealth which made or first published the relevant material. This practice is supported by the advice of 23 April 1992 by Ellicott QC and Yates and by a number of subsequent opinions from the Australian Government Solicitor.

40. However the reasoning that supports this is not clear to us. This approach involves interpreting 'the Commonwealth' where it first occurs in subsections 176(2), section 177 and subsection 178(2) to mean the Commonwealth as a legal person, but interpreting 'the

Commonwealth' in the second place where it occurs in those provisions to give it a wider meaning which includes other bodies. As mentioned above, it is presumed that an expression has a consistent meaning throughout an Act unless the contrary intention appears. It is not clear to us that there is any contrary intention here that can be inferred from the terms of the Act. Nor are we aware of any desired policy outcome which is consistent with this interpretation. It appears open instead to adopt an interpretation whereby, for example, a statutory corporation within the 'shield of the Crown' which makes a literary work would itself own copyright in that work pursuant to subsection 176(2).

41. While it seems to us that the effect of the Act in these circumstances remains unclear, we note that in practice uncertainties in this area are removed where the Commonwealth enters into an appropriately drafted deed to assign to the relevant statutory body any present or future copyright which would otherwise vest in the Commonwealth under these provisions. This has been done in a number of cases relying on the provision made in Part X of the Copyright Act to assign copyright (s.196) and future copyright (s.197). However note that there are special issues relating to assignment of copyright acquired through the prerogative and not statute which would need to be considered if any assignment was to cover those rights.