



Tasmania

DEPARTMENT *of* JUSTICE

OFFICE OF THE SECRETARY

18 October 2004

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

Dear Ms Gell

REVIEW OF CROWN COPYRIGHT

The Department of Justice (the Department) administers Crown copyright on behalf of the Tasmanian Government. Below is our response to the Copyright Law Review Committee's (CLRC) Discussion Paper on the Review of Crown Copyright, which was released for the consultation forum of 27 July 2004. Thank you for the opportunity to provide a submission at this late stage of the review process.

Current Copyright Framework

The Department supports the retention of the current statutory framework with respect to Crown copyright, but believes that there are some areas which could benefit from clarification.

This submission, which does not attempt to address all of the issues raised in the Discussion Paper, provides a brief outline of the Department's views on the following issues:

- Crown copyright in legislation and judgments
- Commercialisation of Crown copyright materials
- Meaning of "under the Direction and Control, of"
- Meaning of "the State"
- Freedom of Information Legislation and copyright
- Management of Crown copyright

The Department supports the retention of Crown copyright in all works produced by, for, and on behalf of the Crown, including legislation and judgments. The Department is

not aware of any policy or operational problems that have arisen as a result of the operation of the current statutory framework in this State.

Crown Copyright Legislation and Judgments

Tasmanian legislation and judgments of the Supreme Court are made readily available and free of charge to the public and legal profession on the internet. Other materials such as Parliamentary Bills and Hansard are also freely available on the internet and available in hardcopy form, from the Parliamentary Clerk of Papers, and once they have been enacted, from the Parliamentary library.

The Tasmanian Legislation WebSite (“The Law”) gives free public access to Tasmanian legislation. This comprehensive site, which has recently been redeveloped, offers advanced searching and browsing capabilities with hyperlinking and an amendment history. The development of this site has been a significant public investment made in the interests of better access to law. It is not believed that there are any difficulties associated with access to the law in this State.

The *Legislation Publication Act 1996* provides for the establishment of a database by the Chief Parliamentary Counsel, as the source of the authorised version of legislation in force in the State of Tasmania. The Act provides that the Chief Parliamentary Counsel may approve the production of copies of authorised versions of Acts or statutory rules, and copies of reprints in electronic or printed form by a person approved in writing by the Chief Parliamentary Counsel, for the purposes of production or distribution. Currently hardcopies of the authorised versions of legislation may be purchased from the Printing Authority of Tasmania.

Supreme Court judgments and decisions of the Tasmanian Anti-Discrimination Tribunal are published on the Austlii website. Electronic copies of Supreme Court judgments are provided to legal publishing companies, including Austlii, free of charge. The Anti-Discrimination Tribunal decisions are also published on the Magistrates Court website, as are coronial findings.

The State Government has a standard policy in respect of materials published on Government websites which provides (*inter alia*):

“Apart from any use permitted by the [Copyright] Act, the State of Tasmania grants users of this site a licence (within the meaning of the Act) to download, print and otherwise reproduce the information for non-commercial purposes only.

If it is indicated on a website that specific information may be used for commercial purposes, users are licensed to the extent so expressed and subject to the condition that the copyright owner’s name and interest in the information be acknowledged when the information is reproduced or quoted, either in whole or in part.”

The policy (Attachment 1) is accessible from all government websites.

In respect of the commercial application of legislation, the Tasmanian Government does not, as a matter of practice, charge publishers for the reproduction of these materials. It does, however, impose standard conditions such as the display of disclaimers, links to The Law website, indicators of the currency of the material, and a statement indicating that the reproduced legislation is not the authorised version.

The ability to impose these types of controls on the reproduction of such materials is in the public interest, by providing an effective means of ensuring the accuracy and integrity of the material. However, this control is not exercised to the detriment of the equally important requirement of ensuring free public access to such material. The Department does not believe that the public's right to access such materials in this State would be better served by removal of Crown copyright. The Government believes that its current practices and policy achieve an appropriate balance between the public interest in freely obtaining access to such materials, whilst ensuring the integrity of the material made available.

It is also submitted that the replacement of Crown copyright protections with new civil and or criminal remedies to ensure the accuracy of material reproduced is not warranted.

Commercialisation of Crown Copyright Materials

Notwithstanding the current policy and practice in relation to the dissemination of legislation and judgments, the right is reserved, where appropriate, to seek a financial return from those who seek to publish government materials for commercial gain.

Certainty of ownership of Crown copyright ensures that the investment of public funds in the production of materials is maximised, by ensuring that the Government can freely reproduce and redevelop them where appropriate, for the public benefit.

It should also be recognised that the capacity to commercially exploit the copyright in a work (in IT products for example) may offset the cost of its production, and may allow enhancement of a service or product, for the public's benefit.

“Under the Direction and Control”

It is recognised that the interpretation of the phrase “under the direction and control of, the Commonwealth or the State” is an area which could benefit from clarification, if there is any serious doubt as to its scope - for example, its application to works performed under contract. The Department does not support the proposal to replace the words “under the direction or control of” in section 176 of the *Copyright Act* 1968 (“the Act”) with the words “in the course of employment with”. This amendment would unduly restrict the operation of the provision, and would exclude for example independent contractors, consultants, volunteers, work experience students and other unpaid workers. This is particularly important in the contemporary context, as it is increasingly common for work which once would have been undertaken by the

government ‘proper’, to be contracted out to third parties. In any event, the ownership of copyright in works made by a person “in the course of employment”, including a State employee or officer employed under the *State Service Act 2000* is already provided for by sections 17 and 35 of the Act. Hence the proposed amendment would simply be a duplication of section 35 and therefore entirely unnecessary.

As a matter of good practice, the Government seeks to ensure that the question of copyright ownership is clearly dealt with by contract, where materials are produced for the Government by third party contractors.

However, given the broad spectrum of government activity, it is not always possible to ensure that copyright is dealt with by way of a commissioning agreement. It is therefore acknowledged that the breadth of section 176 gives the Government some measure of comfort in this regard. The “direction and control” provision also ensures that where public funds have been expended, the question of Crown copyright ownership is beyond doubt.

Furthermore, it is reasonable that the Crown (whether the Commonwealth or the State) own copyright in materials produced by independent contractors or consultants under the “direction and control” of the Crown. This is because materials produced under the direction or control of the Crown:

- are produced to meet the requirements of the Crown in undertaking core government functions for public purposes and therefore would not otherwise be produced unless required and commissioned by the Crown – this is despite the fact that, in some circumstances such materials may have the potential for much wider application and commercial exploitation; and
- are, in the vast majority of cases, paid for on a commercial basis with public funds.

The Commonwealth or State should therefore own and be in the position to control the use of these materials. However, this rule is applied flexibly. For example, parties may and do negotiate the question of copyright ownership with the State Government, just as they may do so in private sector negotiations. In some cases the State may make, and has made, a commercial decision that contractors are either to be assigned all copyright ownership in works made under a commission by the State or will be the first owner of the copyright as specified in the relevant contract. This is reflected, for example, in the attached policy document “Information Technology-Related Intellectual Property Policy Principles” (Attachment 2), which is located on the Government Online website (www.go.tas.gov.au).

Crown Prerogative

While it would appear that the extent of the Crown Prerogative is unclear, there is nothing to indicate that this uncertainty has given rise to problems which would warrant its removal.

Meaning of “the State”

While it is acknowledged that this is an area which could benefit from clarification, the Department does not support any of the proposals outlined in the Discussion Paper.

The development of a codified list is not supported given the difficulties associated with maintaining an accurate and up to date list. While it is acknowledged that it could be useful to have a publicly available list of Crown bodies managed administratively by the State, this may also be difficult to maintain. It is considered that this is a policy issue for each State to determine.

The inclusion of a non-exhaustive list of factors for the courts’ consideration in determining the status of an entity could be further explored, but given that a substantial body of law has developed in relation to this often complex question, this suggested approach may not prove particularly useful.

Freedom of Information and Copyright

Access to information and the right to reproduce material are two separate issues. The *Freedom of Information Act 1991* confers upon a person the right to be provided with certain “information” contained in records in the possession of an agency or a Minister, not the records or documents themselves. Where appropriate, the Crown may provide such information by making, or allowing a person to make photocopies of documents from those records, in which case licence to make those copies is implied.

Management of Crown Copyright

While it is agreed that national uniformity in the administration of Crown copyright is a desirable goal, it is considered difficult to achieve given the varying copyright management practices across jurisdictions. However, this Review process has facilitated the sharing of information between jurisdictions regarding their management practices, which could lead towards greater consistency of approach.

Conclusion

I expect that the Commonwealth Government will consult the States and Territories in relation to any proposed amendments which may arise from the Committee’s final recommendations, at which time the Tasmanian Government may wish to make further submissions.

Yours sincerely

Peter Hault
SECRETARY