



CHIEF JUSTICE'S CHAMBERS
FEDERAL COURT OF AUSTRALIA
305 WILLIAM STREET
MELBOURNE VIC 3000

23 April 2004

Professor James Lahore
Chairman
Copyright Law Review Committee
Attorney-General's Department
Robert Garran Offices
Barton ACT 2600

Dear Professor Lahore,

Crown Copyright – Issues Paper February 2004

Thank you for your invitation to comment upon the Crown Copyright Issues Paper. The comments that follow reflect the views of a committee of interested judges, including Justice Kevin Lindgren, the President of the Copyright Tribunal, who were good enough to consider the Issues Paper at my request.

The particular relevance of the Issues Paper to the Court relates to judgments, rules, practice notes and notices by District Registrars to practitioners. I will use the word “judgment” in this submission to refer to a judgment (strictly so-called), order or ruling, and to the reasons delivered in support.

In the case of a judgment of a single judge, that judge is the author of the judgment. In the case of joint judgments, the two or more judges whose joint judgment it is, are its authors.

As the Issues Paper states, there has been thought to be uncertainty as to whether:

1. ss 176 and 177 of the *Copyright Act 1968* (Cth) create copyright in a judgment in the Commonwealth or a State (see pars 28–31) and
2. the Commonwealth or State owns copyright in judgments by reason of Crown prerogative (see par 51).

I suggest it should be accepted as desirable that there be no copyright in judgments, and that this objective be achieved by amendment of the Act. The device of a unilateral waiver by government (see par 73 and Appendix B) is 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.

I make the following points in support of this suggestion:

- judges will write just as many judgments, no more and no less, whether or not copyright exists in them, so that the relevant purpose of copyright (encouragement of authorship) would not be defeated if copyright did not exist in judgments;
- in a common law system such as ours, part of the law is found in judgments, which should, therefore, be freely available;
- there is little danger of inaccurate reproduction in this electronic age.

So far as I am aware, no one presently receives any financial benefit from any copyright that exists in judgments.

In relation to this Court, there is in existence no contractual arrangement (with a publisher, for example) which would be inconsistent with the non-existence of copyright in judgments. Needless to say, I am here addressing only the literary work which is the judgment; not, for example, catchwords or headnotes, which are literary works of the publishers.

There are three possible qualifications to be considered.

First, what about the reasons for decision of administrative tribunals, Commonwealth and State? I do not think it appropriate for me to express a view in relation to them. Perhaps you have sought submissions from tribunals?

Secondly, should the proposed amendment operate retrospectively or apply only to works coming into existence after its commencement? If the former, there would have to be considered whether there would be an “acquisition of property on just terms” issue; cf *Constitution* s 51(xxxi). The better view, however, may be that there would not be an acquisition of (continuing to exist) property, but an extinguishment of property.

Thirdly, a consequence of the non-existence of copyright would be that there would also not exist, under Pt IX of the Act, the moral rights of judges as the authors of judgments, that is, the right of attribution of authorship, the right not to have authorship falsely attributed, and the right of integrity of authorship (see the definitions of “work”, “artistic work”, “dramatic work”, “literary work” and “musical work” in s 189 of the Act, as requiring the existence of copyright). I venture to suggest that the loss of these rights would not trouble judges.

In so far as Issue 5 in the Issues Paper refers to “materials produced by ... the judiciary”, my suggestion that copyright not exist in judgments does not apply to other materials of which judges are the authors. In respect of these, judges would have the usual authorial rights, including copyright and moral rights.

For the avoidance of doubt, I make the suggestion that there be no copyright in judgments from the standpoint that the judiciary is independent of and separate from the executive; the judiciary does not operate under the direction or control of the Crown (cf ss 176–178 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.

In contrast to judgments, rules of court are legislative in character, and are made, in the case of this Court, by “[t]he Judges of the Court or a majority of them”: see *Federal Court of Australia Act 1976* (Cth) s 59(1). Practice notes and notices to practitioners are administrative communications by the Court to the profession and to unrepresented parties in litigation before the Court, made in exercise of inherent or implied power.

The suggestion which I have made in relation to judgments is applicable, *a fortiori*, to a court’s rules, practice notes and notices to practitioners.

If, contrary to my suggestion, it should be decided that copyright is to continue to subsist in judgments, the legislation should be amended:

- to make it clear that that copyright exists in the judges who are the authors of the judgments; and
- to provide for a statutory licence in favour of any person to reproduce them free of charge.

Yours sincerely,

MEJ BLACK
Chief Justice
(Signed and sent by email)