



**Law  
Institute  
Victoria**

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**BY E-MAIL & NORMAL MAIL**

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

Dear Professor Lahore,

**RE: CROWN COPYRIGHT**

I refer to your letter of 11 February 2004 requesting comments on the discussion paper released by the Copyright Law Review Committee on Crown Copyright.

The Law Institute of Victoria (LIV) welcomes the opportunity to comment on the discussion paper and attach the LIV's submission.

If you would like to discuss any of the matters raised please do not hesitate to contact me or Natalina Velardi on 9607 9382.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Chris Dale".

**Chris Dale  
President  
Law Institute of Victoria**



## **Law Institute of Victoria**

### **Submission on Copyright Law Review Committee Issues Paper ‘Crown Copyright’ dated February 2004**

#### **1. Background**

The Copyright Law Review Committee prepared an Issues Paper in February 2004 on Crown Copyright (the ‘Issues Paper’). By letters dated 11 February 2004 to the CEO and President of the Law Institute of Victoria (‘LIV’) the LIV was invited to comment on the Issues Paper. The LIV welcomes the opportunity to comment on the Issues Paper. It provides general overall comments and specific comments.

#### **2. General Comments and summary**

The LIV considers that only small changes need to be made to the area of Crown copyright. It believes that it is not an area that needs to be changed in a wholesale manner. The LIV considers that:

- Crown copyright should be retained. There is no cogent case to support the abolition of Crown copyright.
- Similarly, it is inappropriate to abolish Crown copyright or Crown prerogative in any particular type of material, and there is no need to distinguish between the material produced by different arms of government.
- The context in which Crown copyright operates is distinct from the operation of commercial copyright. The purpose for the creation of the copyright in a Crown context is to advance a public purpose, such as education and information. An example is the distribution of judgments and legislation. In a commercial organisation the purpose is focused on sale and profit making.
- The LIV does not favour an exhaustive legislative definition of the Crown, so as to preserve the existing jurisprudence surrounding this concept, and to maintain flexibility.
- However, notwithstanding this, there is scope for the legislation to provide greater clarity on what constitutes an instrumentality of the Crown. The line between public and private sector organisations can sometimes be blurred. Greater guidance should be provided in the form of a list of factors to consider in determining whether a body constitutes an instrumentality of the Crown. Such a list would serve as a guide only to a Court. The Courts would be left with a discretion in considering cases before them.

Such a list would assist practitioners in determining which side of the line the particular organisation that is being considered falls; that is, is the body an instrumentality of the Crown or not? Such a list should be flexible enough deal with changes to economic and/or political circumstances.

- The present legislative provisions that provide for special exceptions to copyright infringement for government material are adequate.
- Government bodies and instrumentalities should be left to manage their own asset and any copyright which attaches to them.
- Government bodies and instrumentalities should issue policies to deal with the position in relation to Crown copyright. Any policies that are developed should be readily accessible and should be broadly consistent with one another. This may necessitate a general policy framework being promulgated by agreement between state and federal governments, which will set out principles from which specific departmental policies can be developed.

### **3. Specific Comments on issues raised in the Issues Paper:**

3.1 *Issues 1 and 2: Should government ownership of copyright material extend to all works and subject matter. For example, should it only apply to literary works? Should artistic works such as architectural plans be excluded?*

*Should government enjoy all the exclusive rights of copyright?*

LIV considers that government ownership of copyright should extend to all works and subject matter. In general, the government should be placed in the same position as anyone else in relation to copyright ownership. There may be an exception where, as a matter of public policy, it is desirable that a copyright work be placed into the public domain because there is some public interest in not having the government retain copyright. For example, there is an argument that legislation and statutory rules and prescribed forms should be dealt with in this way. However, in the opinion of the LIV these matters can also be dealt with by the granting of limited statutory licences for non-commercial publication (see our discussion of this issue below).

3.2 *Issue 3: Should moral rights apply in the context of government copyright?*

Yes. This is consistent with the LIV's view that the government should be in the same position as anyone else in relation to copyright ownership. All copyright owners who are not the authors or creators of the relevant copyright material must deal with moral rights. This may be achieved by seeking consents from the owners of those moral rights, whether employees or contractors. At the very least acknowledgements can be sought that certain acts are reasonable even though they may otherwise infringe the rights of integrity or attribution. From a practical point of view within the government sphere, moral rights in relation to literary works such as legislation, statutory rules, judgments, and government contracts, should not greatly impact on government's right to deal with copyright material where those dealings are either expressly authorised by the *Copyright Act*, or are authorised or required under other legislation (such as freedom of information legislation), or government policy which is consistent with the public interest.

3.3 *Issue 4: Is the legislative scheme establishing government ownership of copyright material appropriate? In particular, should the government acquire ownership of copyright material by virtue of:*

- a) *sections 176 and 178 (works, sound recordings and cinematograph films made by, or under the direction or control of the government),*
- b) *section 177 (works if published by, or under the direction or control of, the government),*
- c) *section 35(6) (works made pursuant to the terms of employment under a contract of service or apprenticeship)?*

Yes. The use, nature, potential sensitivity of material and the public interest in maintaining material separate from other material, means that the current provisions are appropriate. Governments must have the ability to acquire copyright to ensure that they have control over the reproduction, modification, adaptation and publication of copyright works and other subject matter, given the need to protect the public interest and to comply with their legal obligations. So as to ensure that the manner in which copyright is used by government is consistent, appropriate policies can be developed. The emphasis of these policies should be on the manner in which government exercises its copyright, not whether the copyright subsists in the first place.

3.4 *Issue 5: The Committee seeks your views as to the Copyright Act should make express provision with respect to copyright in materials produced by:*

- a) *the executive;*
- b) *the judiciary; and*
- c) *the legislative.*

Under the present law, the issue of whether Crown copyright attaches is not usually analysed in terms of which arm of the government produced the relevant subject matter. The LIV queries whether it is necessary to make this distinction. Policy statements currently exist which clarify whether Crown copyright exists.

In the case of judicial proceedings, when judgments are published in official reports, copyright attaches at least to some part of the judgment and royalty payments are made to the government.

In the case of legislation, governments are free to (and do) charge for reproduction of forms within legislation. Changing the current position would introduce more complexity in an area that is currently operating efficiently. In the LIV's view, existing licensing regimes are appropriate because they regulate the commercial exploitation of judicial reports and legislative subject matter, while still ensuring their accessibility. It is also worth noting that other fair dealing defences under the *Copyright Act* may also apply.

**3.5 *Issues 6 and 7: What entities should be included as part of 'the Commonwealth or a State' for the purposes of the Copyright Act and how this should be determined.***

*Should all material produced as part of a government function to be deemed to have been created by the government. If so, in whom should the copyright vest?*

In practical terms, this area causes the most difficulty to practitioners. This is particularly the case because of the growing number of semi-government agencies and public/private ventures that are being undertaken at all levels of government.

Paragraph 27 of the Issues Paper suggests that a list of bodies covered by the *Copyright Act* be contained in Regulations to the Act. LIV considers that this approach would be unworkable. Such a list would need to be constantly updated and may not cover bodies that, using other general criteria, would be included in a definition of the 'Commonwealth or a State' for the purposes of the *Copyright Act*. If such a list is to be created, it must be non-exhaustive.

A better approach would be for the Act to set out non-exhaustive factors that a Court may take into consideration in determining whether a body falls within the definition. Factors such as those outlined in paragraph 24 of the Issues Paper are the sort of factors the LIV would include in the definition. Other factors would include:

- The amount of direction and control a government Minister or department has over the body;
- The activity undertaken by the body; and
- The way in which the body is constituted.

This is a non exhaustive list. It should be left to the Court's discretion to build on the list and the principles established by previous cases.

**3.6 *Issue 8: What is the appropriate duration of government copyright? Should it be the same as for non-government copyright material?***

Consistent with the basic principle of parity with other copyright owners, the LIV considers that the duration of copyright for government material should be the same as that for non-government material. Any differential treatment would also necessarily complicate the Act and its administration. There would be potentially different periods of copyright ownership and duration for works and other subject matter of the same type, determined only by the party by whom, or at whose direction or control, they were created.

The LIV considers that it is important to distinguish between a document as a record and the copyright in that document or material. If the material is Crown material, the Crown can establish policy guidelines on how that material is to be dealt with. Duration of copyright may not affect the existence of the documents. Therefore, management of the works is a separate issue to the duration of copyright in the material.

The LIV notes that many Acts refer to the *Copyright Act* for the period within which material is to be kept by government. Changing the time period for the duration of government copyright may detrimentally affect or inhibit the government in its operations.

**3.7 *Issue 9: Should the exceptions apply to government copyright material in the same way as they do to non-government copyright material? Should there be a special exception for copyright owned by the government?***

The LIV considers that the exceptions that apply in the non-government area should also apply to the government area, for the reasons stated above. There are already some limited exceptions, and there is no need to expand those.

**3.8** *Issue 10: The Committee seeks your view as to whether the license in s 182A to reproduce legislative materials and the decisions of courts and tribunals should be expanded to allow multiple copies? Alternatively, is a blanket licence scheme an appropriate model?*

The LIV considers that the current position should not be changed. This adequately protects the need for accessibility, whilst regulating commercial exploitation of this type of material.

**3.9** *Issue 11: The Committee seeks your view as to the appropriate nature and scope of the prerogative rights in the nature of copyright be clarified or replaced by legislation?*

This area has a long history which has served the public and government well. This area should not be changed.

**3.10** *Issue 12: The Committee seeks your view as to any issues arising under the Commonwealth Constitution and how these may affect possible options for reform.*

No comment provided.

**3.11** *Issue 13: The Committee seeks your view as to the practical operation of the law relating to the administration or licensing of copyright material. In particular, should the government practice be encouraged to achieve uniformity throughout the different Australian jurisdictions?*

This issue covers material that is broader than Crown copyright. The LIV considers that wherever possible uniformity in laws between States and Territories should be encouraged.

**3.12** *Issue 14: The Committee seeks your view as to the appropriateness of the law relating to government ownership of copyright given the operation of information and privacy laws in regulating access to, and use of, personal and government information.*

In considering this issue it is important to consider the rationale behind the access to information and privacy laws. This should be distinguished from the rationale for the existence of copyright, and in particular, Crown copyright.

Access to information and privacy laws revolve around the principle of individuals having rights to certain information in the operation of government. Privacy laws are designed to protect an individual's information from being misused and/or accessed in a way that is inappropriate, and to grant to that individual access to that information under certain conditions. The Issues Paper notes that the 'object of freedom of information laws is to provide the Australian community with access to information in possession of the government'.

As noted in the Issues paper, copyright strikes 'a balance between two different objectives: the encouragement of creativity through reward of effort and investment, and the dissemination of its products'.

The LIV does not see a conflict in the way two areas operate. The LIV agrees with *Commonwealth v. John Fairfax & Sons Ltd* (1980) 147 CLR 39 that '[I]n the governmental sphere this is more appropriately dealt with by specific laws dealing with disclosure and not by copyright which has a limited scope to protect the confidentiality of information because it only subsists in the written expression of ideas and not ideas themselves.'

**3.13** *Issue 15: The Committee seeks your view as to the effect of new technologies on the government ownership of copyright material. In particular*  
a) *does copyright continue to be relevant?*  
b) *how does one safeguard against the distortion or inappropriate use of government material made available through new technologies?*

- c) *is facilitating government information online inconsistent with the policy objectives behind government ownership of copyright?*

If government makes available information on line, it is exercising its copyright over the works in making the works available on line in the same way as any other copyright owner. Generally, works made available online will only be works which are publicly available in any event. Government should, as a necessary consequence of making information available online, investigate, fund and implement appropriate technological protection measures.

- 3.14 *Issue 16: The Committee seeks your view as to whether, as a matter of public policy, the government should own copyright in materials produced by the:*
- a) *executive arm of government?*
  - b) *legislative arm of government?*
  - c) *judicial arm of government?*

See answer to issue 5 above.

- 3.15 *Issue 17: The Committee notes that these models, and other overseas models, do not treat government copyright material in a uniform manner and seeks your views as to whether any of them provide useful models for Australia.*

The models listed as 'International examples' on pages 40-50 of the Issues Paper provide examples of how different jurisdictions deal with Crown copyright. Each is predicated on its own historical background and cultural context. The LIV considers that the Australian model is a workable model given our historical background and cultural context. However, it favours careful consideration of the recommendations made by the Canadian Information Highway Advisory Council:

- 'Crown copyright should be maintained
- The Crown in Right of Canada should, as a rule, place federal government information and data in the public domain.
- Where Crown copyright is asserted for generating revenue, licensing should be based on the principles of non-exclusivity licences for its use on the basis of cost recovery...'<sup>1</sup>

- 3.16 *Issues 18 and 19: The Committee seeks your view as to options for reform, legislative or otherwise, and the costs and benefits of those options.*

*Are there any transitional issues arising out of the options for reform?*

The LIV has considered the options for reform listed in paragraph 124 of the Issues Paper. The following comments are provided.

- Crown copyright and the Crown prerogative should be retained. There is no cogent case to support the abolition of Crown copyright.
- The LIV does not favour an exhaustive legislative definition of the Crown, so as to preserve the existing jurisprudence surrounding this concept, and to maintain flexibility.
- Greater clarity should be provided in legislation on what constitutes an instrumentality of the Crown. As noted above, the line between public and private sector organisations can sometimes be blurred. Greater guidance should be provided in the form of a non-exhaustive list of factors to consider in determining whether a body constitutes an instrumentality of the Crown. Such a list would serve as a guide only to a Court. The Courts would be left with a discretion in considering cases before them.  
Such a list would assist practitioners in determining which side of the line the particular organisation that is being considered falls; that is, is the body an instrumentality of the Crown or not? Such a list should be flexible enough deal with changes to economic and/or political circumstances.
- The present legislative provisions that provide for special exceptions to copyright infringement for government material are adequate.

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<sup>1</sup> See page 48 of the Issues Paper.

- There is no need to waive or licence Crown copyright and/or Crown prerogative in all circumstances, given the adequacy of the current exceptions and statutory licences and fair dealing provisions.
- Government bodies and instrumentalities should be left to manage their own assets and any copyright which attaches to them.
- Government bodies and instrumentalities should issue policies to deal with the position in relation to Crown copyright. Any policies that are developed should be readily accessible. This is a matter of government policy. It may involve the issuing of individual or class licences consistent with those policies as they are developed.
- The LIV favours the approach of retaining the current legislation, but making minor amendments to clarify the definition of the Crown. Such an approach would assist courts and practitioners and the public in better understanding that definition, and to improve the administration of Crown copyright by the development of government policies and procedures which are accessible to the public, and which are fair and consistent.

*3.17 Issue 20: The Committee seeks your view as to any other matters arising out of this Issues Paper.*

All comments are incorporated in the general or specific responses above.