


LEXISNEXIS AUSTRALIA

crown copyright

SUBMISSION

March 2004



A submission to address issues outlined in the Crown Copyright Issues Paper of February 2004 as set out by the Copyright Law Review Committee.



LexisNexis™

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overview

LexisNexis thanks the Copyright Law Review Committee for allowing LexisNexis the opportunity to make a written submission on this important topic.

LexisNexis, previously trading as Butterworths, is part of the international commercial publishing company Reed-Elsevier. We have been operating in Australia for over 92 years and are one of the leading legal publishers in this country. We employ approximately 350 people in Australia, including highly skilled editors, graphic designers and marketing staff, and publish over 170 titles plus a list of approximately 450 books written by Australian authors. This submission addresses some of the issues outlined in the Issues Paper of February 2004 on Crown Copyright as set out by the Copyright Law Review Committee.

The following submission relates specifically to legislative materials, case law and other associated¹ materials (together 'Government Legal Materials'). In particular, the submission will address Issues 2, 9, 10, 13, 15, 16, 17, 18 and 20 as identified in the Issues Paper.

The structure of the submission is as follows:

Part 1 – Supporting Arguments: Public Policy / Practical Operation

This section deals with the public policy implications of copyright in Government Legal Materials. It also highlights the difficulties in the practical operation of the current system.

Copyright in Government Legal Materials should be dealt with in such a way as to ease bureaucracy, streamline administration surrounding permissions, provide certainty and facilitate the goal of widespread dissemination of these materials.

Part 2 – Preferred Result of the Review

This section outlines LexisNexis' preferred result of this review and provides a checklist of what LexisNexis believes would be a beneficial outcome for the Australian public and the understanding of law within Australia as a result of this review.

Part 3 – Legal Mechanisms to Achieve Result

This section outlines possible legal mechanisms that might be employed to achieve the suggested preferred result.

Part 4 – Other

This section deals with miscellaneous matters arising from the review. In particular, the focus of this section is on authorised report series and the role of Councils of Law Reporting.

¹ Associated materials can be created by government or by third parties as required by law. Examples of associated materials created by government include **Parliamentary and Ministerial information** (Gazette Notices; Ministerial Directions; Ministerial Speeches); **Court Practice Directions, hearing dates and related information**; **Decisions and information from statutory bodies** (eg Administrative Appeals Tribunal Decisions; Takeovers Panel Decisions; Takeovers Panel Media Releases); **Codes of Practice, Administrative Guidelines and Policy Papers**; **Government department / agency forms and precedents**; **Miscellaneous information** (eg Child Support Tables; Consumer Price Index; Life Expectancy Tables; Tax rates). Examples of associated materials created by third parties are discussed in section 4.4.

1 SUPPORTING ARGUMENTS: PUBLIC POLICY / PRACTICAL OPERATION

1.1 public policy

There are a number of public policy arguments to consider in assessing the issue of Crown copyright in Government Legal Materials, including:

- Public interest in wide dissemination of these materials
- No copyright incentives are needed to encourage the creation of these materials
- Recognition of public policy in other jurisdictions
- Positive contribution by non-government publishers
- Competition implications
- Licensing fees — implications for dissemination
- Maintaining integrity of material

These arguments, as outlined below, support the view that there should be a right for any publisher to reproduce Government Legal Materials for any purpose and in any medium, for no charge.

1.1.1 Public interest in wide dissemination of legal and associated material

Legislative materials and case law are created by parliament and the courts, for the benefit of the public. These materials are not created for the purpose of profit. The State should encourage the dissemination of such materials as it is in the interest of the State to raise awareness of the law as much as possible.

Similar arguments apply to material created for associated purposes.² The public interest requires affordable access not only to legislative and judicial material but also to other forms of government material, such as the forms required for use in court or for submission to government departments and agencies.

Therefore publishers should not be subject to legal restrictions that prevent publishers from publishing or incorporating all or parts of legislation, case law and associated material in their publications on the basis that publishers assist in the goal of disseminating such information. The public policy of access to information should be treated as more important than the government's aim of leveraging and trying to commercialise 'an asset of the State'. Government Legal Materials are not an asset of the State, but rather, are an asset of the public.

1.1.2 No copyright incentives are needed to encourage the creation of these materials

Government Legal Materials will be created and distributed by government, regardless of whether any law or prerogative protects such materials.

Moreover, if the current rules are reformed, and non-government publishers were allowed to freely copy and distribute such materials, then the State would not cease the creation of Government Legal Materials.

² For examples of associated materials see footnote 1.

In addition, it may be argued that current copyright laws have not been successful in creating the right incentives in relation to the distribution of Government Legal Materials. Government Printing Offices, which in the past have had exclusive publication and distribution rights, have been unable to satisfy the distribution needs of the market. In this regard, non-government publishers have supplemented the role of the Government Printing Offices by providing alternative distribution services in line with customer expectations of information delivery.

1.1.3 Recognition of public policy in other jurisdictions

Many governments have recognised the importance of wide dissemination of primary legal materials and associated materials, and created laws or policies to further such dissemination. This approach has been taken in a number of jurisdictions both within Australia and overseas, for example:³

- UK⁴ (after an extensive review and consultation process in 1999, Crown copyright in legislation was waived);
- New Zealand (legislation amended to declare copyright does not exist in certain types of material);
- United States (legislation is the public domain);
- New South Wales (Crown copyright waived); and
- Northern Territory (Crown copyright waived).

This approach is also supported by previous reviews conducted within Australia. For example, the 1992 review conducted by the Prices Surveillance Authority as referred to in para 85 of the Issues Paper in its key recommendation that Crown copyright in legislation and related materials be abolished:⁵

‘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.’

LexisNexis supports the approaches of the UK and the United States, as well as the recommendation of the Prices Surveillance Authority.

1.1.4 Positive contribution by non-government publishers

LexisNexis currently publishes a wide variety of legal materials, including publications that include Government Legal Materials. Many of these publications are purchased from LexisNexis by government departments and agencies, including Crown Law Offices, Government Solicitors and Police Departments. This demonstrates that the government itself recognises the positive contribution of non-government publishers such as LexisNexis, over and above the government’s own internal publisher.

This positive contribution of non-government publishers includes:

- Enhancing understanding of government materials
- Reducing costs for market
- Reducing administration costs for governments.

Non-government publishers include commercial publishers (such as LexisNexis) and other publishers (such as Austlii, Universities and Law Societies).

3 See paras 89-119 of the Copyright Review Paper for a fuller treatment of the jurisdictions that have adopted such an approach

4 As stated on the HMSO website (www.hmso.gov.uk), ‘Increasing liberalisation has been the backdrop to numerous policy initiatives, all designed to increase public awareness and access to government information’.

5 Prices Surveillance Authority, Inquiry into the publications pricing policy of the Australian Government Publishing Service, 1992, p91-92 cited in Copyright Law Review Committee, Issues Paper – Crown Copyright, February 2004, para 85.

Enhancing understanding of materials

Commercial publishers assist in the dissemination and understanding of the vast body of legal government material by making it accessible, user-friendly and by frequently providing commentary on particular legislative provisions (for example, the judicial interpretation of legislative provisions). The specialist commentary of commercial publishers is particularly important given the breadth of the market – services are provided to a wide range of legal and non-legal people from legal practitioners through to numerous government departments and agencies, all of whom have differing information needs. In all Australian jurisdictions, commercial publishers assist the government in this way.

LexisNexis offers a fully integrated research system via its online databases whereby users may research legislative, case and commentary materials from a single source. This service is highly valued by users as it reduces the need to search multiple databases to find all relevant legal material. LexisNexis frequently receives requests from customers to expand the range of materials published online to include government material so that this may be searched alongside existing LexisNexis content. In some cases the government material is already freely available in different formats; customers request we add it to our databases for the convenience of being able to access it in conjunction with commentary materials that assist in the interpretation and understanding of the primary material.

Similar integrated legal research systems are provided, to a greater or lesser degree, by other non-government publishers. Users typically establish preference for one system over others.

In order to conduct a search of legislative materials and case law from many jurisdictions over any one system, a user needs only to learn one electronic interface and one set of database search commands (often using one search). No one government offers such a service. The more materials that can be added to a single system, the more useful the system is for a user.

There is a clear benefit to society from an improved understanding and access to legal and associated materials. Of particular benefit is the provision of better and more effective legal services to the public, increased opportunity for compliance through greater awareness and understanding of requirements and improved government administration.

Reducing costs for market

Commercial publishers assist in reducing costs for the market. The market is made up of a diverse range of customers of Government Legal Materials - examples include the legal profession, universities (academics, students, university libraries), government departments, community groups and the commercial sector.

Without commercial publishers, research costs would increase – publishers assist in consolidating materials, making them easier to access, streamlining search times and providing value-add material that increases understanding of the primary materials. The service that commercial publishers provide contributes to the reduction of research costs that would have been incurred had the options of the researcher been limited to the searching of a disparate array of original sources for primary materials. This results in a corresponding reduction in legal costs.

Reducing administration costs for governments

If commercial publishers were not operating in the market, the full burden of wide dissemination and explanation of legislative and case materials and the associated costs would fall to the State and Federal Governments. Given the breadth of groups that use such material (eg the legal profession, government departments, members of the police service, members of the commercial sector etc) and the differing information needs of such groups, these costs could be considerable.

Primary legal materials and associated materials are created for the benefit of the public. As the government must produce such material irrespective of the presence of commercial publishers in the market, there will be no associated reduction in costs due to the absence of non-government publishers within the market.

In summary, non-government publishers make a positive contribution to all Australian jurisdictions and assist both State and Federal Governments in the performance of their duties by:

- assisting in the dissemination of legislative and case materials and increasing access to these materials through an offering of consolidated and timely services to the market;
- providing specialist resources to the market for legal practitioners, government departments and the wider community;
- increasing understanding of legal material by practitioners, non-practitioners and government departments (for example, members of the police service) through guidance and interpretation of materials;
- reducing legal research and government administrative costs; and
- reducing the scope for error in the provision of professional legal and government services.

If commercial publishers were not assisting the government in the dissemination of Government Legal Materials there would be higher administration costs for government, a reduced understanding of the law by the public, higher legal costs to the public and potentially a lower standard of professional legal and government advice.

1.1.5 Competition arguments

Need for competition

As argued above, there are strong public policy grounds for the widespread dissemination of Government Legal Materials. It therefore follows that restricting the number of publishers who can assist with this role would be detrimental to society.

Increased competition not only assists with the wider dissemination of materials, but it also serves to improve the quality of offerings by publishers to the market. Customers will not tolerate a service that offers inaccurate reproduction of materials – competition therefore reinforces the integrity of the original materials in their reproduced form.

In summary, a reduction in competition will lead to higher costs for consumers, a potential lessening of quality and the narrowing of dissemination of legal and associated materials.

Means of restricting competition

Legislation and case law can only be created by government and associated bodies. It is not an option for publishers to create this material themselves, and therefore publishers are reliant on governments to apply competitive and fair principles in granting permissions to reproduce.

A reduction in competition to republish Government Legal Materials can arise primarily in one of two ways:

- Charging licence fees that are prohibitive

Commercial publishers may be priced out of the market if prohibitive licence fees are charged. This may result in the situation that the government has a monopoly over the market. Along with this comes all the downsides for the public that a monopoly in many cases brings.

- Unreasonable withholding of permission to reproduce materials

Unreasonable withholding of permission to reproduce may serve the purpose of eliminating or reducing the number of publishers from the market. This would put any government publisher in a favourable competitive position in the market place. Such a restriction could arise through the application of an unfair and anti-competitive policy as set by the government (eg blanket refusal to permit republication, permission to republish in very limited circumstances) or unreasonable application of policy to a specific case or a particular publisher.⁶

These issues are currently being faced by LexisNexis.

This situation is in contrast to the recommendations of the *Review of Intellectual Property Legislation under the Competition Principles Agreement* (the Egras Committee), which recommended that the government should not be provided preferential treatment under the Copyright Act compared with other parties.⁷

1.1.6 Licensing fees - implications for dissemination

If fees are to be charged for the right to reproduce government material, the public policy should be taken into account: government material is created for the benefit of the public, so that fees should not discourage or inhibit the dissemination of those materials.

In addition to copyright licence fees, some jurisdictions in Australia charge a flat rate fee for access to or the delivery of government materials, for example, in electronic form. LexisNexis is prepared to pay such fees for the *delivery* of government material, provided such fees are reasonable and calculated on a cost-recovery basis.

However, LexisNexis does not believe it is in the public interest for any form of additional premium to be charged by governments for the *right to reproduce* primary legal material. Significant licensing fees cannot be absorbed by commercial publishers and may need to be passed on to individual users, reducing the affordability of subscriptions to commercial legal databases and ultimately restricting the widest possible dissemination of legal material.

Licensing fees also restrict the ability of smaller publishing companies to compete in the market, a further consequence that is not in the public interest.

If significant fees are charged, these may be passed on to customers, which include:

- universities
- government departments
- legal service clinics and community centres
- legal aid offices
- suburban and country solicitors
- police departments.

Similarly, if high fees are charged by particular bodies or jurisdictions for reproduction or distribution rights, commercial publishers have to re-assess whether it remains viable to continue publishing works containing that material in those jurisdictions. This has the potential of:

6 This also goes against a recent EU Directive: Licences may impose conditions, but 'these conditions shall not unnecessarily restrict possibilities for re-use and shall not be used to restrict competition' (Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information; Article 8(1))

7 As cited in Copyright Law Review Committee, Issues Paper – Crown Copyright, February 2004, para 86: Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement*, September 2000, p114

- reducing access to that material;
- leaving fewer specialist resources for the legal, corporate and government markets;
- increasing operational difficulties for legal practitioners, government departments and agencies;
- increasing operational difficulties for practitioners from other jurisdictions to practise in those jurisdictions;
- increasing the scope for errors in the provision of professional legal, government and corporate services.

In short, any licensing fees charged by the government for Government Legal Materials will increase the price of publications created and distributed by commercial publishers, and may put non-commercial publishers out of business. The cost of legal services will therefore increase as a result. These licence fees charged by the government could be considered to be a tax on legal publications, and in effect, a tax on the provision of legal services.

1.1.7 Maintaining integrity of material

An argument that is sometimes cited in support of restricting permission to reproduce government material is the need to ensure the accuracy and quality of all versions. LexisNexis is committed to reproducing legislative, other governmental and judicial material that is accurate, up-to-date and of a high quality. As a commercial operator, it is imperative that our publications maintain the high standards of quality and accuracy expected by the market place. In this way the public policy concerns of government material being reproduced accurately will continue to be met through competition and commercial principles.

However, if it is considered that further safeguards are necessary, a model similar to that applied in the UK in relation to the reproducing of legislation could be applied (ie the use of centrally available guidelines for publishers to follow when reproducing materials).⁸

1.2 Practical Operation

The practical operation of the current scheme brings with it a number of difficulties to commercial publishers, including:

- Uncertainty for publishers
- Inconsistency of approach
- Issues surrounding value-add model
- Compliance issues generally (administrative difficulties)
- Compliance issues with impracticable licensing conditions
- Delays in obtaining permissions

1.2.1 Uncertainty for publishers

The current legislative scheme offers no certainty for commercial publishers. At any time, an individual government can change its policy or apply the policy in a different manner. Alternatively, a government may decide at any time to apply prohibitive licensing fees.

It is contrary to the public interest to present commercial operators with the uncertainty of schemes and licences that are subject to change at the sole discretion of individual governments and government bodies or departments. A lack of clarity and certainty discourages commercial

⁸ As cited in Copyright Law Review Committee, Issues Paper – Crown Copyright, February 2004, para 101. Further information as to the UK guidelines are found on the HMSO website (www.hmso.gov.uk).

operators from investing in developing products and services in jurisdictions that may easily retract permission. This in turn reduces the availability and promotion of legal information in those jurisdictions.

Additionally, as set out in the Issues Paper, the current legal rules are uncertain. Due to this uncertainty, and possible civil and criminal copyright sanctions, LexisNexis takes a conservative view of the current law relating to copyright in Government Legal Materials. The current uncertainties also increase LexisNexis' transaction costs and, even with a conservative approach, have led to a number of copyright disputes in the past.

1.2.2 Inconsistency of approach

The current situation sees a different approach taken to Crown copyright in every jurisdiction in Australia. Even within a single jurisdiction there are differences depending upon the type of material to be reproduced or the manner of reproduction.

Differences include:

- Varying approaches taken to the same types of materials *between* jurisdictions – for example, in relation to legislation there are blanket licensing agreements, waivers, value-add policies, silence, letters granting permissions etc.
- Where licensing agreements are in place, the scale of fees charged for supply vary and conditions can differ markedly between jurisdictions. There are currently no standard guidelines as to an appropriate scale of fees to be charged for supply of materials under licensing agreements.
- Varying approaches taken *within* jurisdictions for various materials.

The following case study (which concerns reproduction of WA legislative materials) illustrates some of the practical difficulties faced by publishers.

CASE STUDY – WA LEGISLATION

In Western Australia, application to reproduce legislation must be made to two separate bodies depending upon the format it is intended to be reproduced in. If the legislative materials are to be reproduced in electronic form, permission must be sought from the WA State Law Publisher. If the same material is to be reproduced in hard copy form, permission must be sought from the WA Attorney General._

The WA State Law Publisher issues blanket licences for the reproduction of legislative materials electronically. This blanket licence includes detailed provisions regarding the copyright notices to be included in electronic publications. LexisNexis has entered into such a licensing agreement with the WA State Law Publisher and therefore has permission to reproduce WA legislation in its electronic works.

In contrast, LexisNexis was recently informed that the WA Attorney General has the following policy in relation to the reproduction of WA legislative materials in hard copy form:²

‘In relation to copyright permissions for the hard copy reproduction of the State’s legislation...the Attorney General normally gives free permission where the material is to be reproduced in an educational work and there is value adding, normally by way of commentary on the legislation. The Attorney General does not normally give permission simply for hard copy reproductions of the State’s legislation without any value adding.’

Responding to this policy, LexisNexis sought formal permission to reproduce legislation and put forward an explanation of the value-add elements within our works. However, it was determined by the Attorney General that there was not sufficient value adding for a number of LexisNexis’ publications and LexisNexis was advised that much of the legislation reproduced in our hard copy services would need to be removed. It was drawn to our attention that it is a crime to distribute works that are known to be infringing copies.

It should be noted that the only way in which LexisNexis became aware of this policy was through correspondence with the WA government. We have not been able to identify any publicly available document which describes the policy, nor are we aware whether it has been applied fairly in relation to all publishers. The government has elaborated upon the policy, stating: ³

‘It may, of course, be very convenient for users to have both that discussion of the law and the statute in the one place. However, nothing prevents LexisNexis publishing that text and the reader also having the State Law Publisher’s copy of the legislation when reading the LexisNexis text...

The mere collection of legislation itself in the one work does not amount to value adding. Of course, such a collection may be useful. However, this cannot constitute value adding such that the State would simply allow individuals or companies to publish its legislation in opposition to the authorised State Law Publisher...

Adding the legislation to the text may clearly be value adding. However, the question is whether this is value adding, which the State deems sufficient to grant a free permission to reproduce, knowing that to do so will reduce the likelihood of the reader equipping themselves with an authorised State Law Publisher version of the legislation when reading the LexisNexis text.’

This decision put LexisNexis in the anomalous position of having permission to reproduce certain WA legislation in an electronic form, but being restricted from providing that same content to hard copy customers of the same publication.

Since that time, extensive discussions have taken place. Currently we are meeting with a panel of advisors to the Attorney General to arrive at a definition of ‘value-add’. It is hoped that an amicable solution will be

reached in the near future. Discussions to date have been underway for over 12 months. During this time extensive staff time has been spent attempting to resolve the matter and costs in relation to the matter have been considerable including staff, legal and travel costs.

Footnotes

1. It should be noted that WA is the only jurisdiction which draws the distinction between formats for permission purposes.

2. Letter to LexisNexis from WA Senior Assistant Crown Solicitor dated 14 March 2003. Although LexisNexis has been publishing in Australia for over 92 years, we were unaware of the value-add policy in WA. This goes to the issue of transparency of policy and the associated compliance difficulties facing commercial publishers.

3 Attachment to letter to LexisNexis from the WA Attorney General dated 30 December 2003.

Although the above case study highlights a number of difficulties, it is clear that there is an inconsistency arising from the different treatment of the same material depending upon the format that it is to be reproduced in. We submit that if a licensing scheme is in place, it should be media neutral. This is in keeping with the amendments made to the Copyright Act that reflect media neutral reproduction. The case study also highlights the present lack of transparency in some jurisdictions in relation to licensing Government Legal Materials which, in turn, increases the transaction costs and imposes uncertain barriers to entry for non-government publishers.

All non-government publishers are faced with a myriad of situations relating to copyright permissions. This results in considerable resources being spent on administration and negotiation both on the publisher's part and the body responsible for granting permission.

1.2.3 Issues surrounding value-add model

LexisNexis makes the following submission in relation to the complexities of a value-add model in relation to the reproduction of materials. We respectfully submit that this model should not be adopted as a proposed outcome of the Review for the following reasons.

Any outcome which encompasses a value-add model is impracticable for a number of reasons, including:⁹

- Difficulties in defining the subjective nature of what is 'value-add' material (government view versus customer view)
- Potential for lengthy disputes over whether a particular publication adds value to the primary materials published by the Crown
- High level of administration surrounding publishing permissions - high volume of approval requests for government including pre-approval in relation to new publishing proposals
- Commercial publishing materials may no longer be comprehensive (for example, potential automatic exclusion of new Acts from services where there is no case law)
- Uncertainty for publishers.

⁹ In addition, a model that limits hard copy reproduction of materials to situations falling within the government-determined evaluation of 'value-add' has the potential to restrict the dissemination of materials. This is inconsistent with public policy arguments.

The uncertainty of the application of this policy is reflected in how 'value-add' might be defined. The UK previously had a value-add policy about five years ago prior to the most recent reforms in this area. LexisNexis has received advice by the HMSO that under the previous 'value-add' policy, the material we publish would have clearly fallen within the UK definition of 'value-add'. In contrast, a different definition of 'value-add' was applied in Western Australia.

All publishers require certainty in relation to copyright issues. The uncertainty that a subjective 'value-add' component brings would be a factor in assessing whether to develop new works for a market or to continue to publish existing works.

1.2.4 Compliance difficulties generally

Given the number of differences in approach both between and within jurisdictions, compliance with policies becomes a very difficult undertaking. It is difficult to know what policy is in place depending upon the type of material. It is also difficult to know when a policy in a particular jurisdiction might change. In addition, in some jurisdictions the policy is not clearly and transparently defined. These factors combine to make general compliance for publishers a very challenging and difficult task.

1.2.5 Compliance difficulties with impracticable licensing conditions

Where licensing agreements have been entered into, the inconsistency of conditions between agreements in different jurisdictions does cause practical issues to arise. Examples of certain problems are listed below. In some instances, the conditions imposed are restrictive in nature. This goes against public policy arguments and is in contrast to a recent EU Directive addressing this particular issue.¹⁰

- *Conditions relating to forms of copyright acknowledgement*

Crown copyright policy must take into account technological developments and restrictions. Commercial operators face difficulties in complying with licence terms that often vary enormously in scope. For example, some governments will require copyright to be acknowledged on the front page of a hard copy work; others on every page. In relation to electronic services, some agreements refer to copyright acknowledgement on the opening screen,¹¹ others require copyright acknowledgment on every hard copy output from an electronic source, others are more moderate and request a reasonable level of acknowledgment wherever 'practicable'. It is often technically impossible to accommodate the terms of different licences into works that are subject to a number of licences. Complying with differing terms is expensive and an impediment to publishing material widely and quickly.

This is particularly the case when publishing a multi-jurisdictional work when faced with different acknowledgment requirements for all jurisdictions.

- *Conditions restricting publication/sales to within Australia*

It is in the public interest for Australian legal material to be accessible to people in other jurisdictions who wish or need to do business in Australia. While free sites may provide access to primary material, many people require access to commentary and reference material that assists their understanding of Australian legislation, case law and other categories of material. As a result many commercial publishers now offer their material on platforms that are hosted overseas and which are available to customers in different jurisdictions. Licence terms that restrict the ability of commercial publishers to offer that material to overseas customers are not in the public interest.

10 Licences may impose conditions, but 'these conditions shall not unnecessarily restrict possibilities for re-use and shall not be used to restrict competition' (Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information; Article 8(1))

11 This is also problematic. For example, if a search engine is used, the user may not enter the product via the opening screen of the work.

- *Conditions restricting online linking to a product*

LexisNexis currently has a licence with a Council of Law Reporting that entitles LexisNexis to include an electronic version of the Council's data on LexisNexis' online service. LexisNexis pays significant fees for this licence and derives little profit from re-publishing this material, however, LexisNexis recognises the value of the content to our customers and the importance of making this case material available as part of a comprehensive legal database.

Within the licence agreement there is a condition that restricts the way in which LexisNexis is able to use the licensed material. This particular condition caps the number of LexisNexis online publications that may contain links to the licensed material to 60 products only. This means that, for example, if there are 180 products on the online database and all 180 contain reference to the licensed case material, only 60 products will be allowed to include hypertext links to the licensed material. Any linking over and above this 60 product limit attracts a commercially prohibitive premium.

This condition serves to inhibit access to licensed case material and has proven to be a frustration to customers.

In addition to the restrictive nature of the licensing condition, this term is difficult to comply with. A number of electronic processes need to be modified to prevent the links from generating from the various publications, a manual check has to be done to ensure that the condition has been complied with and a regular report must be supplied to the Council in relation to the matter. This report is compiled manually.

LexisNexis respectfully submits that it is not in the public interest for agreements to contain conditions that unnecessarily restrict the reuse of licensed data, inhibit access to licensed case material and are operationally difficult to comply with.

1.2.6 Delays in obtaining permission

Given the above inconsistencies in approach by the various jurisdictions as outlined in 1.2.2 above, it is often difficult to determine who is the copyright owner of particular material, the permitted purposes of the material and how to go about applying for permission to reproduce (if permission is required). This is particularly the case for government material found on the internet. This has the potential to cause considerable delay for inclusion of the material in our works thus delaying the service that we can provide to our customers and limiting the effective dissemination of information.

Extensive administrative delays may also occur when seeking permission from particular bodies to reproduce materials. In one instance permission to reproduce certain panel decisions took two years to obtain from the relevant body. During this period, consistent customer pressure and complaints were endured before we were able to successfully obtain formal permission to reproduce.

For the above reasons, copyright in legislative materials, case law and other associated government materials should be dealt with in such a way as to ease bureaucracy, streamline administration surrounding permissions, provide certainty and facilitate the goal of widespread dissemination of materials.

2 PREFERRED RESULT OF THE REVIEW

There is an important public interest in permitting full and free competition in the use, publication and distribution of Government Legal Materials.

On public policy grounds as outlined above, there should be the right for any publisher to reproduce Government Legal Materials for any purpose and in any medium, for no charge and with few administrative or compliance constraints.

Additional preferred outcomes are listed below.

Proposed checklist for review outcome based on public policy grounds

It is argued that any recommendation arising from the review should ensure that the outcomes listed below are achieved. The outcomes included in the list are supported on public policy grounds and overcome practical operation issues as set out in Part 1 of this submission.

- The right for any publisher to reproduce legislation, judgments and other associated materials for any purpose and in any medium, for no charge
- Increase access to and decrease cost of legal materials, and therefore, lower the cost of legal services
- Removal of current uncertainty
- Removal or streamlining of administrative process surrounding permissions / easing of bureaucracy
- Consistent approach by all jurisdictions that reflects public policy considerations
- Transparent approach by all jurisdictions
- Consistent application to all publishers
- Consistent application across jurisdictions
- Removal of current and inconsistent requirements imposed by government as to compliance issues, such as copyright notice and linking
- Fair, consistent and practicable conditions/guidelines to assist government in facilitating integrity of material.

Overall, the current system does not work. The current system increases the cost of legal materials, restricts the dissemination of some legal materials, and is applied by governments in an ad-hoc, often inefficient and non-transparent way.

Government Legal Materials are not an intellectual property right of government to commercialise or monopolise, but part of the fabric of a democratic society.

3 LEGAL MECHANISMS TO ACHIEVE RESULT

LexisNexis submits that Government Legal Materials should not be protected by copyright laws and should be part of the public domain. This is similar to the current position in the United States.

The Committee should keep in mind that ‘public domain’ is the rule; intellectual property is the exception which must constantly be reviewed to ensure that it is applied for the benefit of society as a whole. Copyright protection of Government Legal Materials does not benefit society in any way.

Crown copyright and Crown prerogative, if it still exists, as it relates to Government Legal Materials, should be clearly repealed by statute.

This outcome would best deal with the public policy goals and other objectives discussed above.

LexisNexis makes no submission in relation to Crown copyright issues generally. That is, this submission is limited to what this paper defines as Government Legal Materials ie legislative materials, case law and other associated materials (see footnote 1 and paragraph 4.4 below).

The Issues Paper sets out a number of constitutional matters that need consideration. These constitutional issues can be overcome if the Committee accepts the above recommendation. In relation to the scope of the copyright power (paragraph 59 of the Issues Paper), LexisNexis refers to *Victoria v The Commonwealth* (1937) 58 CLR 618 at 638 (referring to patents and trade marks; similar principles should apply to copyright). In relation to acquisition of property on just terms, LexisNexis refers to *Nintendo Co Ltd v Centronics Systems* (1994) 28 IPR 431 (High Court of Australia). LexisNexis also notes that public domain is the starting point, and that the Copyright Act keeps things out of the public domain. In relation to abolishing the Crown prerogative, if it still exists, LexisNexis refers to the recent High Court decision concerning judges’ superannuation *Austin v Commonwealth of Australia* (2003) 195 ALR 321 (the *Austin case*).

The Issues Paper sets out a number of options for reform at paragraph 124. LexisNexis makes the following comments in relation to some of these options, which are not preferred by LexisNexis:

- *Retaining Crown copyright but making a special exception to copyright infringement for government material*

In relation to judicial decisions, it is uncertain if the copyright in the judicial decision is owned by the Crown. See paragraphs 28 to 31 of the Issues Paper. If individual judges do own such copyright, then this option may not allow for the public dissemination of judgments.

- *Retaining Crown copyright and/or Crown prerogative, but waiving or licensing it in all circumstances*

This option has the same difficulties as the previous option. Moreover, this would only successfully meet the public policy goals and other objectives identified above if the licence was fee free, the government had no discretion, and no negotiation was required. In relation to this option, the Committee should also consider the extent to which the Commonwealth can pass laws to bind a State if the law places a disability or burden on the activities of a State (the *Melbourne Corporation* doctrine).

The last two options in paragraphs 124 of the Issues Paper are not supported by LexisNexis, as they do not meet the public policy goals and other objectives identified above.

4 OTHER

4.1 Publishing of authorised report series

The Committee may be aware that some Councils of Law Reporting self-publish, while others enter into contracts with commercial publishers to publish reports series on their behalf, granting the commercial publisher exclusive rights to publish authorised versions of decisions. LexisNexis is currently party to such a contract with the Council of Law Reporting in Victoria. This contract was awarded as an outcome of a formal tendering process. We note that, to date, the contracts between other Councils and commercial publishers have not been open to tender. We request that the Committee consider whether a tendering process for the right to publish all authorised series is appropriate in all jurisdictions in the interest of fair competition.

We submit that to encourage competition, where a commercial publisher is engaged to prepare the authorised series, the relevant Council of Law Reporting should put that authorised series out to tender in line with competition policy. This will also assist to ensure that practitioners and the public are receiving high quality materials at competitive rates.

4.2 Clarification of permission bodies

LexisNexis requests that the CLRC consider the role of Councils of Law Reporting in granting permission to reproduce judicial decisions. We note that in some jurisdictions permission to reproduce cases needs to be obtained from the relevant court (for the right to publish 'unreported and/or unauthorised decisions') and in other jurisdictions permission must be obtained from a Council of Law Reporting (for the right to publish 'authorised decisions'). We request the Committee consider the need for clarification of the appropriate body for administering permissions in each jurisdiction.

4.3 Consideration of licensing fees requested by Councils of Law Reporting

LexisNexis also asks the Committee to consider the appropriateness of the fees charged by some Councils of Law Reporting for the right to reproduce self-published decisions in electronic format. As noted above, in some cases the licensing fees are substantial / prohibitive.

4.4 Other materials

As mentioned in footnote 1 above, there are a number of different works that are created by third parties but should be considered to be of the same category as legislative materials or judgments created by a government. These associated works include:

- Materials created by third parties that are given legislative force
- Materials created by third parties due to a legislative requirement
- Materials created by third parties as part of the legislative or judicial process.

Examples of these types of documents include:

- ASX Listing Rules
- Industry Codes
- Reports commissioned by government, particularly reports required by law

- Written submissions made to courts
- Materials that appear on court files, such as pleadings and affidavits
- Plans registered with the Land Titles Offices
- Filings with the ASIC

By way of example, LexisNexis at one time published telecommunication industry codes. These codes are written by telecommunication industry participants. ACIF (Australian Communication Industry Forum) is compelled by section 117 of the Telecommunications Act (Cth) 1997 to provide codes to the ACA. ACA publishes the codes free of charge. ACIF claims copyright in these codes. Despite the public interest in having these codes made available, ACIF threatened LexisNexis with copyright infringement for including these codes in its publications. As a result, LexisNexis (without admitting liability or ACIF's ownership of copyright) removed these codes from its publications.

LexisNexis requests that the CLRC's proposed solution also should address this category of documents, and that they should be treated the same as other 'Crown' materials.