

**SUBMISSION BY THE QUEENSLAND DEPARTMENT OF NATURAL
RESOURCES, MINES AND ENERGY IN RESPONSE TO THE COPYRIGHT
LAW REVIEW COMMITTEE'S "CROWN COPYRIGHT" ISSUES PAPER
(2004)**

1. EXECUTIVE SUMMARY

This submission by the Queensland Department of Natural Resources, Mines and Energy (NRM&E) in response to the issues raised by the Copyright Law Review Committee (CLRC) in its *Crown Copyright Issues Paper* (February 2004) supports the retention of Crown copyright under the *Copyright Act 1968* and favours two of the options identified by the CLRC in the Issues Paper:

- the retention of Crown copyright with clarification by legislative amendment; or
- retention of Crown copyright subject to copyright being waived in certain materials or allowing licences over certain types of material.

There are two major bases to this submission:

- (1) The provisions of ss 176 – 178 of the *Copyright Act 1968* operate broadly to vest first ownership of copyright in copyright materials made “by, or under the direction or control, of” the Commonwealth or a State government. The operation of these provisions is intentionally broad and this broad scope of operation should be maintained. While the meaning of the phrase “under the direction or control” is not ambiguous, it would be advisable to amend the *Copyright Act 1968* to clarify the intended effect of ss 176 and 178. These provisions should be re-stated to make it clear that copyright in materials (such as documents containing literary or artistic works) which are produced pursuant to a legislative, regulatory or administrative requirement established by the Commonwealth or a State government and which are needed for an essential government function is owned by the Crown. For example, exploration reports (containing text, maps, graphs, bar codes and other data) which are produced pursuant to the requirements of the *Mineral Resources Act 1989* (Qld) and the *Petroleum Act 1929* (Qld) and survey plans produced pursuant to the requirements of the *Land Act 1994* (Qld) and the *Land Title Act 1994* (Qld) can be considered to be produced under the “direction or control” of the State for the purposes of Part VII, with the result that copyright in these documents belongs to the Crown.
- (2) The Commonwealth, in exercising its concurrent power to legislate on matters of copyright under s 51(xviii) of the Commonwealth Constitution may only enact legislation that does not limit or inhibit the State’s ability to exercise its exclusive constitutional power under s 69 of the Queensland *Constitution Act 2001* in relation to the management and control of lands vested in the State legislature.

The provisions of Part VII of the *Copyright Act 1968* in their current form operate to vest first ownership of copyright in the Crown in certain copyright materials (Part III works, sound recordings and cinematograph films) created “by, or under the direction or control, of” the Commonwealth or a State.

It is our submission that the phrase “by, or under the direction or control, of the Commonwealth or a State” is and, according to generally applicable principles of statutory interpretation, should be construed broadly. Sections 176 and 178 operate to vest the Crown with ownership of Part III works, sound recordings and films created not only by government employees or commissioned by the government from independent contractors but also those been produced by a non-government entity in fulfilment of a requirement imposed by legislation, regulations or administrative guidelines.

Since governments need to be able to exercise the full range of the exclusive rights conferred by copyright ownership, the Committee is urged not to recommend any changes to the *Copyright Act 1968* the effect of which would be to narrow the operation of Part VII in relation to copyright materials produced “by, or under the direction or control, of the Commonwealth or State” which are required for the effective functioning of government. While it is not suggested that ss 176 and 178 are ambiguous as currently drafted, there would be advantages in re-stating these provisions to ensure that their intended application is clearly and expressly stated. In particular, the provisions should be re-drafted to expressly state that where materials (such as literary and artistic works contained in documents) are created and lodged pursuant to governmental directions or orders contained in legislation, regulations or administrative guidelines, copyright in such materials vests in the government.

2. BACKGROUND TO THE CURRENT REVIEW – COMPETITION POLICY CONSIDERATIONS

At the beginning of the *Crown Copyright Issues Paper*¹ the Copyright Law Review Committee (CLRC) points out that this inquiry into ownership of copyright by governments is partially attributable to one of the recommendations made by the Intellectual Property and Competition Review Committee (IPCRC) in its final report, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (September 2000). The IPCRC recommended that s 176 of the *Copyright Act 1968*² should be amended so the Crown is in the same position as any private entity in relation to ownership of copyright in works that it commissions from another party.

¹ Para 1

² Section 176 of the *Copyright Act 1968* provides:

- (1) Where, apart from this section, copyright would not subsist in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the work by virtue of this subsection.
- (2) The Commonwealth or a State is, subject to this Part and to Part X, the owner of the copyright in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or the State, as the case may be.

Section 177 provides:

Subject to this Part and to Part X, the Commonwealth or a State is the owner of the copyright in an original literary, dramatic, musical or artistic work first published in Australia if first published by, or under the direction or control of, the Commonwealth or the State, as the case may be.

In responding to the IPCRC's recommendations in 2001 (see <http://www.ipaustralia.gov.au/pdfs/general/response1.PDF>) the federal government accepted the importance of ensuring that the government is not, simply because of the effect of s 176, placed in a preferred or advantaged position as any such preferential treatment is unjustifiable and would be inconsistent with s 3(1) of the *Competition Principles Agreement*.³ The federal government regarded the best way of pursuing this objective as being, not by amending the *Copyright Act 1968*⁴, but by the development of best practice guidelines for ownership of copyright in Commonwealth agencies, which may provide a model for the development of corresponding guidelines in other jurisdictions.

The issue of Crown ownership of copyright was considered only briefly – in little more than one page - by the IPCRC in its final report.⁵ The IPCRC's comments on Crown copyright were limited to considering whether the Crown should be in a more favourable position under the *Copyright Act 1968*, as compared with other parties, when it commissions the production of copyright material by a (non-employee) contractor, (such as an architect). It is important to keep in mind (as this is not evident from the CLRC's Terms of Reference) that the IPCRC's consideration of the effects and implications of s 176 did not venture beyond the situation where the Crown commissions a non-government entity to produce original copyright material. In this situation, the copyright material would be produced by the contractor pursuant to a contractual arrangement which would usually provide expressly for the terms of delivery of the work and payment and could be expected to deal with ownership and exercise of intellectual property rights (including copyright) in the commissioned material.

The competition policy implications of government ownership of copyright, as highlighted by the IPCRC, are a significant factor in the formulation of the terms of reference for this inquiry. The CLRC's consideration of the competition policy dimension of government ownership of copyright should be based on an appreciation of the fact that s 176 operates to vest first ownership of copyright in governments across a much broader range of circumstances than those considered by the IPCRC. The competition considerations arising in the circumstances on which the IPCRC based its recommendation cannot be assumed to be of equal relevance or significance – if indeed they are relevant or significant at all – across the wide range of circumstances in which governments may be vested with first ownership of copyright by virtue of s 176. Differing competition policy considerations arise depending on the context in which the copyright materials are produced by, on behalf of and for governments.

³ Section 3(1) of the *Competition Principles Agreement* provides:

“The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles apply only to the business activities of publicly owned entities, not to the non-business, non-profit activities of those entities.”

⁴ Government Response to Intellectual Property and Competition Review Committee Recommendations, 28 August 2001

⁵ At pp 113 - 114

In addressing the competition issues, the Committee should differentiate between the various circumstances in which government copyright may exist and address the competition issues which arise. A non-exhaustive categorisation of the circumstances in which copyright materials may be produced by, on behalf of and for governments includes the following:

- (a) *A government commissions the production and supply of the copyright material, under a contractual arrangement with an independent contractor:* This is the only situation considered by the IPCRC and would typically involve the commissioning of copyright materials such as a computer program, educational content, a training manual or building plans. The creation of the copyright material would generally be pursuant to a contract negotiated between the government and the external entity, providing for a range of matters including the terms of delivery of the work, payment, ownership of copyright and licensing of copyright and other intellectual property rights. In Queensland any substantial agreement between the government and an external contractor for the development and supply of information technology would be subject to the Government Information Technology and Communication Framework (GITC) a revised version of which (version 5) is currently nearing finalisation.
- (b) *A government, pursuant to legislation or regulations made under a constitutional power, requires a non-government entity to produce and lodge information and/or materials that are required for the performance of a governmental function:* In this situation, the non-governmental entity is typically required to produce and lodge documents expressing information that is essential to maintaining the accuracy and universality of a statute-based governmental function. The documents expressing information in the form of text, plans, maps, graphs, diagrams or photographs may, provided they meet the originality threshold, attract copyright as literary or artistic works under Part III of the *Copyright Act 1968* (or, less likely, as cinematograph films under Part IV of the Act). Documents of this kind, produced by non-government entities in accordance with detailed requirements prescribed by legislation, regulation and administrative guidelines are fundamental to the operation of the land titles system and the regimes established for the granting of rights to exploit State-owned minerals and other natural resources. For example, the production and lodgement of reports on mining and petroleum exploration tenures is regulated by the *Mineral Resources Act 1989* and the *Petroleum Act 1923* while the production and lodgement of plans of survey is regulated by the *Land Title Act 1994*, the *Land Act 1994*, the *Surveyors Act 1977*, the *Surveyors Regulation 1992* and the *Survey and Mapping Infrastructure Act 2003* (effective from May 2004). The principal distinction between material in this category and the material described in paragraph (a) is that the latter is produced pursuant to the requirements of the commissioning contract negotiated between the government and the independent contractor. For materials within the category described in this paragraph (b), the details of the nature of the material required and the precise form in which it is to be lodged are prescribed in the legislation, regulations or administrative guidelines and are not open to negotiation between the government and the party responsible for producing the copyright material.

(c) *A government creates a copyright work comprising either original copyright material produced by the government or compiled by the government from information and/or copyright materials derived from other sources:* Material in this category is produced by the government (through its employees) and may consist of original creations or be derived from pre-existing (non-copyright) data or copyright materials produced by a non-government entity. Such material may take the form of extensive, computerised databases which are collections made up of non-copyright data and copyright materials of the kind described in paragraph (b) which have been produced and lodged by a non-government entity pursuant to requirements set out in legislation, regulations or administrative guidelines. Under the principles set out in *Desktop Marketing Services v Telstra* [2002] FCAFC 112 these databases will frequently attract copyright protection as original literary works because their creation involves more than a threshold level of time, effort, money, skill or judgment. The Department of Natural Resources, Mines and Energy's Queensland Digital Exploration reports database (QDEX), consisting of mining exploration reports and data, and Digital Cadastral database (DCDB), consisting of land survey data, are examples of such databases which are developed from materials of the kind described in paragraph (b).

3. CONSIDERATION OF ISSUES RAISED BY THE CLRC FOR COMMENT

This Submission addresses a sub-set of the issues raised by the CLRC in the *Crown Copyright* Issues Paper, including Issues 4, 5 and 18 (marked with an asterisk below) which have been identified by the Committee as key issues.

ISSUE 1: Should government ownership of copyright material extend to all works and subject matter? Or should it apply only to literary works? Should artistic works (including plans) be excluded?

The issue raised by this inquiry is not whether governments may own copyright in any or all of the categories of material in which copyright may subsist but whether governments may be the *first* owner of copyright in such materials. Apart from the operation of any express provisions in the *Copyright Act* relating to the first ownership, by governments, of copyright in materials generated by or for them, governments may also be vested with copyright ownership by means of an assignment of interests from a previous owner.

As noted by the CLRC in the *Crown Copyright* Issues Paper,⁶ governments create and publish a wide range of materials falling within the various categories of Part III works and Part IV subject matter in which copyright may subsist. While it may be the case that the materials produced by or for governments would predominantly be protectable by copyright as Part III literary or artistic works, they are by no means limited to these categories. In considering the appropriate extent of government copyright ownership, little is to be gained by conducting a detailed examination of the suitability of the different kinds of materials produced by or for governments, to determine which should or should not be protected by copyright.

⁶ At para 5

Generally speaking, there would not seem to be an obvious basis on which to differentiate between the kinds of material which are - or are not - appropriate subject matter for government copyright ownership, and none is proposed by the Committee in the Issues Paper. Where works or other subject matter are produced by or for a government, there would not appear to be any basis for excluding material because of the form of its embodiment, eg, as text, a table, compilation or a computer program (literary work), a diagram or photograph (artistic work) or visual images produced by a software program (cinematograph film).

Sections 176 and 178 make no mention of government ownership of copyright in broadcasts or published editions (typographical layouts). However, the effect of ss 177 and 92 is that where a Part III work is first published “by, or under the direction or control” of the Commonwealth or a State government, then the government will own copyright not only in the Part III work but also in the published edition. Since, under s 91 of the *Copyright Act 1968* copyright only subsists in sound and television broadcasts made by the ABC, SBS or the holder of a licence under the *Broadcasting Services Act 1992*, as a practical matter the range of materials encompassed within government copyright will not include broadcasts.

ISSUE 2: Should the government enjoy all the exclusive rights of copyright?

Where materials are produced in the circumstances described in paragraphs (b) and (c) above, the government needs to be able to deal with them without restriction in the performance of its governmental functions. The range of dealings that governments need to be able to make in relation to such materials is at least as broad as that encompassed within the scope of the exclusive rights enjoyed by owners of copyright in works or subject matter of a similar nature.

Governments should be able to exercise the entire range of exclusive rights in relation to copyright materials produced in the circumstances described under paragraphs (b) and (c). Since copyright materials produced in the circumstances described in paragraph (a) will usually be produced subject to a contractual arrangement between the government and the contracted party, the extent of the rights owned or exercisable by the government should be addressed in the commissioning contract.

***ISSUE 4: Is the legislative scheme establishing government ownership of copyright appropriate? In particular, should the government acquire ownership of copyright material by virtue of ss 35(6), 176, 177 and 178?**

It is appropriate that first ownership of copyright should, in certain circumstances, be vested in the Commonwealth or a State or Territory government. As well as materials produced by governments, through their “employees”, government ownership should extend to copyright materials that they direct, require or order other persons or entities to produce, where the materials produced are essential for the performance of a governmental function.

The Committee has noted⁷ that “there is uncertainty about how the law operates” in relation to Crown copyright. While there is not necessarily any ambiguity in the

⁷ At para 120

provisions as currently expressed in the Act, difficulties arise because the provisions as expressed apply across the board and do not attempt to differentiate between the different circumstances (some of which are outlined above at (2)) in which copyright materials are produced by, on behalf of or for governments. The difficulties in understanding how the Crown copyright provisions in Part VII of the *Copyright Act 1968* are intended to operate are not lessened by the fact that they have rarely been subject to judicial interpretation.

Consequently, we submit that it would be appropriate if the legislative scheme under which first ownership of copyright vests in governments were to be reviewed. The intended operation of the provisions should be expressed in clearer and more specific terms.

The relationship between the general principles of copyright ownership in Parts III and IV and the specific government ownership provisions in Part VII should also be made more explicit. It is apparent from the relationship between Parts III, IV and VII of the *Copyright Act 1968* that the Crown copyright provisions in Part VII are intended to have a broader scope of operation than Parts III and IV. The specific provisions of Parts III and IV relating to ownership of copyright in works and other subject matter are expressly stated as taking effect subject to Part VII. While the primacy of Part VII is apparent from the individual provisions of Parts III and IV relating to copyright ownership (ss 35, 97, 98, 99 and 100) it is not apparent from the Crown copyright ownership provisions in Part VII. The intention that Part VII is to take precedence over Parts III and IV should be apparent from the provisions of Part VII itself.

The operation of the general provisions relating to ownership of Part III works and Part IV subject matter is subject to the specific provisions relating to Crown ownership set out in Part VII (ss 176 – 178) and any agreement made pursuant to s 179 under which it is agreed that copyright is to vest in a person or entity other than the Crown. Specifically, this means that the operation of ss 35(ownership of copyright in Part III works), 97 (ownership of copyright in sound recordings), 98 (ownership of copyright in films) and 100 (ownership of copyright in published editions) is subject to the Crown ownership provisions in Part VII. (Sections 176–178 are subject to any agreement between the Crown and the author of a work under s 176 or the maker of a sound recording or film under s 178, under which it is agreed that copyright is to belong, not to the Crown, but to the author of the work or the maker of the other subject matter or some other specified person: s 179).

The difficulties in understanding the operation of the Crown copyright ownership provisions in ss 176 – 178 stem largely from the use of the phrase “made by, or under the direction or control of, the Commonwealth or the State” to describe the group of original Part III works, sound recordings and cinematograph films in which the Crown owns copyright.

In the absence of statutory definition of the key words “by”, “direction” or “control” and with very little judicial consideration of the effect of their juxtaposition in the phrase as it appears in ss 176 – 178 of the *Copyright Act 1968*, it is necessary to apply the general principles of statutory interpretation to ascertain the meaning of the phrase. There are numerous situations where Part III works, sound recordings and

films may be made by or under the direction or control of a government. Works or other subject matter may be produced by:

- persons engaged by the Crown as employees, in the course of their employment;
- independent contractors who are commissioned to produce specified materials;
- persons who are required to produce copyright material (e.g. in the form of documents protected as literary and/or artistic works) pursuant to directions or orders set out in legislation, regulations or administrative guidelines issued by a Government department.

As noted by the Committee⁸, the phrase is broad enough to encompass copyright material created by employees of Commonwealth or State governments, acting in the course of their employment. The words would also be of sufficient breadth to include copyright materials created by an independent contractor who has been commissioned by the Crown to produce the work or subject matter, whether under the terms of a contract of service or some other arrangement. That this is an appropriate interpretation of ss 176 and 178 was assumed by the IPCRC in its final report, in which the IPCRC envisaged that s 176 would be effective to vest copyright in the Crown take effect where a government enters into a contract for the production of copyright materials by an external entity, such as an architect. The IPCRC considered that works such as architectural plans commissioned by a government would fall within the scope of “direction or control”.

The words “direction” and “control”, when given their ordinary and natural meaning are apparently broad enough to encompass a wide range of circumstances in which works or subject matter are produced at the behest of governments. The term “direction” is defined in the Shorter Oxford English Dictionary (1974) as meaning:

1. The action or function of directing, aiming, guiding, instructing, or administering: conduct; instruction; management; administration. ...
4. Arrangement, order.
5. An instruction how to proceed; an order.

The Macquarie Dictionary (Revised edition, 1985) defines “direct” as meaning:

1. To guide with advice; regulate the course of; conduct; manage; control.
2. To give authoritative instructions to; command; order or ordain something

It is acknowledged that the inclusion of the word “direction” in the phrase means that ss 176 and 178 operate across a wide range of situations in which works and other subject matter are produced for governments. For example, in *Government and Copyright* (2000) the Australian Copyright Council stated:

*“‘Direction’ is generally agreed to be very broad, probably even extending to situations of government control where no payment is received. The government body must show that it guided, managed, instructed or ordered the making of the work.”*⁹

⁸ At para 23

⁹ At p 33

“Control” is defined in the Macquarie Dictionary (Revised edition, 1985) as meaning:

1. to exercise restraint or direction over; dominate; command.
2. to hold in check; curb. ...
4. the act or power of controlling; regulation; domination or command.
5. check or restraint.

The Shorter Oxford English Dictionary (1979) defines “control” as meaning:

1. The fact of controlling, or of checking and directing action; domination, command, sway.
2. Restraint, check.
3. A method or means of restraint; a check.

The meaning of the word “control” in legislation has been the subject of judicial consideration, both of the word itself and in combination with other words. In *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 385 Dixon J commented that “control” is:

“an unfortunate word of such wide and ambiguous import that it has been taken to mean something weaker than “restraint,” something equivalent to “regulation.”

The conjunctive use of “control” with another word has been interpreted as indicating an intention that the words are intended to be used in a wide sense. In *Federal Commissioner of Taxation v ANZ Banking Group* (1979) 23 ALR 480 at 496 Mason J, addressing the meaning of “custody or control” in s 264 of the *Income Tax Assessment Act 1936* stated:

“Although the use of the composite expression “in his custody or under his control” does not assist us in determining the precise limits of the meaning of “control”, it does evidence a legislative intention to employ the words in their widest sense.”

Applying Mason J’s comments on the meaning of “control” to the interpretation of the words “possession, custody or control” in s 24(1)(c) of the *Australian Crime Commission Act 2002* in *Hannaford v Choi* [2004] FCA 246 Marshall J stated (at para [27]) that the “use of the word ‘control’ in its widest sense comprehends the concept of ‘effective control’.”

As noted above, the IPCRC accepted that s 176 has the effect of vesting copyright ownership in the Crown in circumstances where a government procures the production of copyright material by means of directions set out in or control exercised pursuant to a contract with an independent contractor. In Australian jurisprudence, directions or controls by governments are typically contained in legislation rather than contracts. If a negotiated contractual arrangement under which an independent contractor undertakes to produce copyright material for a government can be conceptualised as governmental “direction or control”, there would appear to be no objection to regarding the much more typical form of regulation, by means provisions contained in legislation, regulations or administrative guidelines to fall within the meaning of “direction or control” in ss 176 – 178 of the *Copyright Act 1968*.

Most of the commentary on the meaning of the words “direction or control” in ss 176 - 178 has focused on contractual directions or controls by governments. However, it is clear, both from the application of general principles of statutory construction and from the single decided case in which the meaning of the phrase in s 176(2) has been considered that it must be interpreted as including directions or controls set out in legislative or regulatory provisions.

It is stated in the Issues Paper (in footnote 27, para 23) that “the phrase ‘direction or control’ ... has not been judicially interpreted in the context of the Act.” The Committee’s attention is drawn to the recent decision in *Linter Group Ltd (in liq) v Price Waterhouse* [2000] VSC 90, the only decided case in which the meaning of “under the direction” of the State in s 176(2) of the *Copyright Act 1968* has been directly addressed. *Linter* involved an application by the Australian Financial Review newspaper, which was not a party to the matter before the court, seeking to have access to the transcript of the trial which was expected to continue for a considerable period of time. The judgment deals with how and on what terms the transcript was to be made available to the Australian Financial Review. Harper J had invited the parties to negotiate with the Australian Financial Review with a view to reaching suitable arrangements which would involve the AFR contributing a fair proportion of the cost of the transcript. However, Harper J acknowledged that he had erred in doing so as the only entity with the legal right to determine the conditions of access to the transcript was the State of Victoria, because it owned copyright in the transcript.

Harper J explained (at paras [6] and [7]):

“[6] ... As the owner of the copyright in the transcript, it is the State of Victoria or, by legislative authority, the Court, which must decide to whom and on what terms the transcript should be provided. So much is inherent in the very concept of copyright, which carries with it the exclusive right of reproducing copies of a published original literary work.

[7] As I understand it, it is common ground that the State of Victoria is the owner of the copyright in such transcript as is produced following a direction made pursuant to s 130 of the Evidence Act 1958. That section empowers a person acting judicially to direct, in circumstances that apply to this litigation, that any evidence to be given in the proceeding be transcribed in any manner that the judicial officer directs. Every person who thereafter transcribes the evidence shall, in doing so, be under the direction of the Court: s 134. That position obtains here. By s 176 of the Copyright Act, the ownership of the copyright in an original literary work produced under the direction of a State shall inure to that State. As one of the three arms of government of the State of Victoria, the Supreme Court is, for the purposes of this provision, the State.”

Harper J’s interpretation of the meaning of “under the direction” of the State in s 176(2) indicates that:

- where there is a statutory provision empowering an officer of the State to issue a direction to a person to do an act; and
- the officer of the State who is so empowered acts in exercise of that power

by issuing a relevant direction to another person;

then, a person who produces material which is capable of attracting copyright protection as a Part III work will be regarded as acting “under the direction” of the State in doing so. Having been produced “under the direction” of the State, copyright in the Part III work belongs to the State by virtue of s 176(2).

While the meaning of “direction” in s 176(2) was dealt with only briefly in *Linter Group Ltd (in liq) v Price Waterhouse*, having examined the position in relation to ownership of copyright, Harper J did not hesitate to hold that s 176 applied to vest copyright in the Crown where the copyright work was the consequence of a direction made under a statutory power.

For a work or subject matter to be considered to be one produced under the direction or control of the Crown, the work or subject matter “must of itself be the central object of the direction or contemplated by the parties as necessarily arising from that direction”.¹⁰ It would appear to be unexceptional to view the application of ss 176 and 178 as entirely appropriate where copyright works or other subject matter are produced as a result of a direction made or control exercised under a statutory or regulatory power. An even stronger case can be made for interpreting ss 176 and 178 as having the effect of vesting copyright in the Crown where the work or other subject matter is made pursuant to directions contained in legislation or regulations supplemented by detailed administrative guidelines.

It is submitted that, in reviewing the operation of the Crown copyright provisions of the *Copyright Act 1968* the meaning of “under the direction or control of, the Commonwealth or the State” be re-stated so that it expressly applies to the situation where copyright materials which are essential for the performance of a key governmental function are produced in response to a direction or order by a government set out in legislation or regulations and further elaborated in administrative guidelines. Such copyright materials will usually take the form of documents which attract copyright as either literary or artistic works.

In this respect, the Committee’s attention is drawn to the statutory, regulatory and administrative guidelines which regulate:

- the production and lodgement of reports on exploration tenures granted under the *Mineral Resources Act 1989* and the *Petroleum Act 1923*; and
- the production and lodgement of plans of survey under the *Land Title Act 1994*, the *Land Act 1994*, the *Surveyors Act 1977*, the *Surveyors Regulation 1992* and the *Survey and Mapping Infrastructure Act 2003* (to take effect in May 2004) .

The following discussion of the operation of s 176(2) to vest copyright in the Crown is based on the requirements to produce and lodge reports on exploration tenures under the *Mineral Resources Act 1989* and the *Petroleum Act 1923*. A parallel analysis of the provisions of the *Land Act 1994*, the *Surveyors Act 1977*, the *Surveyors Regulation 1992* and the *Survey and Mapping Infrastructure Act 2003*

¹⁰ J Gilchrist, *Crown Copyright: An analysis of rights vesting in the Crown under statute and common law and their interrelationship*, LLM Thesis, Monash University, 1983 at 110.

could be carried out to illustrate the operation of s 176 (2) in relation to plans of survey.

Since the 1950s, the Department of Natural Resources, Mines and Energy (and its predecessors) has required the holders of exploration tenements for minerals, coal and petroleum to lodge reports on exploration activities conducted on their tenures. Holders of Exploration Permits (for minerals or coal) and Mineral Development Licences granted under the *Mineral Resources Act 1989* are required to submit reports to the Department in relation to the areas held under the permit or licence. The reporting requirements are based on the standard conditions of permits and licences set out in the *Mineral Resources Act 1989* (Exploration Permits: s 141(1)(f)(i); Mineral Development Licences: s 194(1)(f)(i)). Exploration Permit holders (for minerals or coal) are required to submit annual, relinquishment and final reports; holders of Mineral Development Licences are required to submit annual and final reports. The submission of reports (when and in the way the Minister requires) accompanied by maps, sections, charts and other data giving full particulars and results of the exploration program or activities carried out on the area specified by the Minister is a standard condition of all Exploration Permits and Mineral Development Licences granted under the *Mineral Resources Act*. The statutory reporting requirements are supplemented by detailed guidelines on the form and contents of the reports required under the *Mineral Resources Act* which have been developed by the Department, set out as Appendix II of the *Schedule of General Exclusions and Conditions - Exploration Permits*.

Holders of Authorities to Prospect granted under the *Petroleum Act 1923* are required to report to the Department on numerous matters. The Minister's general power under s 18(2) of the Act to fix the terms and conditions on which an Authority to Prospect is granted is exercised in Clause 11 of the Authority to Prospect which makes the obligation to report on particular matters a condition of the tenure. Detailed reporting requirements are set out in the *Petroleum Regulation 1966* (Part 4, "Exploration", Regs 68-70A and Part 6, "Drilling"). The reporting obligations under Clause 11 of the Authority to Prospect and the *Petroleum Regulation* are explained in guidelines on the form and content of the reports in the *Queensland Petroleum Explorers' Handbook*.

Exploration Reports are literary works in the form of compilations within the meaning of s 10 of the *Copyright Act 1968*. They consist of data in various forms, including:

- text;
- graphs;
- maps; and
- bar codes.

On the approach towards originality taken by the Full Court of the Federal Court in *Desktop Marketing Services v Telstra* [2002] FCAFC 112, the exploration reports would be considered to be sufficiently original to qualify for copyright protection as original literary works under s 32 of the *Copyright Act 1968*. Compiling the exploration reports requires the expenditure of sufficient time, effort or money or the exercise of sufficient skill and judgment to render them original for the purposes of attracting copyright.

The *Mineral Resources Act 1989*, the *Petroleum Act 1923*, the respective regulations, administrative guidelines and conditions of tenure have the effect of aiming, guiding, instructing and administering the form of expression to be used in the Exploration Reports. They do so both in terms of the information that is required to be included in the reports (or its substance) and the order and form in which information appears in the reports.

The exploration reports are, in the terms of Part VII of the *Copyright Act 1968*, made “under the direction” of the State, with the consequence that copyright in the exploration reports as literary compilations is vested in the ownership of copyright in the compilations is vested in the State by virtue of the operation of s 176(2) of the *Copyright Act*.

***ISSUE 5: Should the Copyright Act make express provision with respect to copyright in materials produced by the executive?**

On this issue, this submission addresses only the appropriateness of copyright being owned by the executive arm of government.

We submit that the *Copyright Act 1968* should expressly provide for the ownership of copyright materials produced by or for the purposes of the executive arm of government. It is of crucial importance that the executive is the owner of copyright in materials that are produced by or for the executive and which are essential to the performance of governmental functions involving the exercise of legislative or regulatory powers pursuant to the Constitution. In particular, the executive should continue to own copyright in all materials lodged pursuant to the requirements of State legislation or regulations relating to management and control of lands and resources vested in the State under its Constitution. If the Committee considers there to be any doubt about whether the existing provisions of Part VII do in fact vest copyright ownership in such documents in the Crown, the *Copyright Act* should be amended to ensure that copyright in documents relating to the exercise of core governmental functions belongs to the Crown.

In the context of the activities of the Department of Natural Resources, Mines and Energy, copyright confers the kinds of rights which the government needs to be able to exercise in order to effectively manage land use and natural resource exploitation in the State. As copyright owner of the various materials which it requires to be lodged, the State can control the hard copy and electronic reproduction of such materials, as well as the publication, electronic transmission of digital copies (eg as attached digital files) and online distribution of the materials. As copyright owner of the QDEX and Digital Cadastral databases compiled from materials lodged under the statutory and regulatory requirements the State can, by exercising the exclusive rights, control the dissemination of information on land use and natural resources. The State needs to be able to exercise all the exclusive rights of copyright in relation to both the materials it requires to be lodged and the comprehensive databases it develops incorporating those materials.

In the absence of statutory provisions vesting copyright in such materials in the State, it would be necessary to enter into contractual arrangements with every person or

entity lodging such documents under which the required rights are assigned or licensed to the State. It is accepted that, by operation of s 109 of the Constitution, the State is precluded from enacting legislation vesting copyright in materials such as mining exploration reports and survey plans in the State.

The Department requires the data included in the copyright documents which are filed with it, in order to be able to develop and maintain comprehensive, accurate and up to date databases of information on the State's exploitable mineral and petroleum reserves and the allocation of freehold and other interests in land. Protection of the accuracy and integrity of databases of land registration systems and mining exploration data is an important rationale for the vesting of copyright in these documents in the State.

If copyright in these documents does not vest in the State, it would be cumbersome (and potentially expensive) for the State to obtain the rights it needs to be able exercise in order use the documents as it requires for the purposes of the minerals, petroleum and land titles databases. The State could seek to obtain the necessary rights by means of assignment or licensing, in one of the following ways:

- procuring a voluntary assignment of copyright from the person and/or entity which owns copyright, pursuant to a contractual arrangement;
- entering into a voluntary licence with the copyright owner/s under which the State is granted all the rights it requires to use the documents for the purpose of the resources and land management databases; or
- participating in a system under s 183A of the *Copyright Act* requiring payments to be made to the copyright collecting society which has been declared to be the collecting society for government copies of Part III works in order to be able to use the documents.

There are numerous practical difficulties with voluntary assignment or licensing of copyright in this situation which, taken together, significantly restrict its usefulness to the State. If copyright in materials is to be assigned to the State, the problem arises of ensuring that all relevant interests have in fact been identified and assigned and that there are no third party owners or exclusive licensees. This problem would be particularly apparent if it were necessary to assign copyright in materials such as mining exploration reports which are compiled from a disparate range of literary and artistic works, each of which will typically be independently authored. Any assignment of copyright will not affect a transfer of moral rights which are not transferable and will continue to be exercisable by the copyright owner unless he or she has agreed to waive them. If the Crown obtains the rights it requires by means of voluntary licences, any such licence would need to be wide in scope and very favourable to the Crown. Essentially, the Crown would require an irrevocable, perpetual and royalty-free licence to use the material, to re-use it in new products and to licence its re-use by third parties.

ISSUE 7: Should all material produced as part of a government function be deemed to have been created by the government? If so, in whom should copyright vest?

Where copyright material is produced for the purpose of enabling the performance of key government functions, copyright should vest in the Crown. In particular, copyright should vest in the Crown where copyright materials (such as documents consisting of literary and artistic works) are produced specifically for the purpose of carrying out government functions pursuant to statutory regimes enacted by the States on the basis of their Constitutional powers to regulate the management and control of Crown lands.

The rule of Crown ownership should apply to all categories of copyright works and other subject matter created for the purpose of key government functions, irrespective of whether the copyright material is created by the government itself - through its employees, volunteers or persons it has commissioned to produce the material - or by non-government entities which have been required, directed or ordered by the government to do so.

ISSUE 12: Views are sought on any issues arising under the Commonwealth Constitution and how these may affect the possible options for reform.

Since federation, the Commonwealth has had primary responsibility for intellectual property laws. The Commonwealth parliament has a concurrent power under s 51(xviii) of the Constitution to make laws for the peace, order and good government of the Commonwealth with respect to “copyrights, patents of inventions and designs, and trade marks”. On the basis of this constitutional power, the Commonwealth parliament has enacted various statutory forms of intellectual property rights, including the *Copyright Act 1968*.

The operation of s 51(xviii) was considered by the High Court in *The Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, in the context of determining whether the head of power supported the enactment of the *Plant Variety Rights Act 1987* (Cth) and the *Plant Breeder’s Rights Act 1994* (Cth). The majority judges in *Grain Pool* held (at para [19]) that an appropriate approach to the interpretation of s 51(xviii) was that of Higgins J in *Attorney-General for NSW v Brewery Employees Union* (1908) 6 CLR 469 at 610–611 (“the *Union Label* case”):

“[W]hilst ‘we are to ascertain the meaning of “trade marks” as in 1900’, trade marks usage in 1900 ‘gives us the central type; it does not give us the circumference of the power’ with respect to trade marks provided for by s 51(xviii). The centre of the thing named — trade marks — was to be taken with the meaning as in 1900 to find the circumference of the power. However it would be ‘a mistake to treat the centre as the radius’.”

Applying the terminology of Higgins J in the *Union Label* case, the majority held that the legislative grant of monopoly rights in new plant varieties could not be regarded as being, in 1900, outside the “central type” of the subject of patents of inventions.

In a footnote in *Grain Pool*, the relevance of which is not lessened by the fact that Kirby J adopted a different approach towards the interpretation of the Constitutional intellectual property power to that favoured by the majority, Kirby J considered the application of limits to the Commonwealth’s power, on the basis of fundamental principles of constitutional law. Kirby J commented (at footnote [218]):

“The protection of intellectual property rights must be afforded in a constitutional setting which upholds other values of public good in a representative democracy. In the United States the relevant head of constitutional power has been viewed as containing in-built limitations many of which are derived from the competing constitutional objective of public access to information: Graham v John Deere Co 383 US 1 at 6 (1966); Feist Publications, Inc v Rural Telephone Service Co, Inc. 499 US 340 at 348 (1991). In Australia, the constitutional setting is different but the existence of competing constitutional objectives, express and implied, is undoubted. See generally, Lessig, Code and Other Laws of Cyberspace, (1999) at 131, 133-134.”

Kirby J’s caution about the importance of taking other constitutional considerations into account is of relevance in the present context. As noted by the Committee¹¹, it must not be forgotten that ss 176 – 178 deal with ownership of copyright material by the States as well as the Commonwealth and it is relevant to consider the extent to which the Commonwealth can legislate in relation to State ownership of copyright material.

Careful consideration needs to be given by the Committee to the relationship between the Commonwealth’s exercise of the concurrent power under s 51(xviii) in respect of copyright, on the one hand, and the States’ exercise of powers vested in them under their respective Constitutions, on the other.

Continuing with the example on which this submission is based, the Committee is requested to consider the relationship between the Commonwealth’s exercise of the copyright power and the exercise by the States of the power to manage and control land and natural resources which is vested in the legislature of each of the States under their Constitutions. Further, each of the States has been vested with ownership of virtually all subsurface minerals.

Under ss 30 and 40 of the Queensland *Constitution Act 1867* (the continued application of which is confirmed by s 69 of the *Constitution of Queensland 2001*), the management and control of Crown lands is vested in the Parliament and the Parliament is empowered to make laws regulating the sale, disposal and occupation of Crown lands. Section 40 of the *Constitution Act 1867* provides, the “entire management and control of the waste lands belonging to the Crown ... and also the appropriation of the gross Proceeds of the sales of such lands and all other proceeds and revenues of the same from whatever source arising within the said State including all royalties mines and minerals shall be vested in the legislature of the said State.” Section 30 of the *Constitution Act 1867* declares the Parliament’s law-making power in relation to Crown lands, stating that the legislature may “make laws for regulating the sale letting disposal and occupation” of Crown lands within the State. Effective public control has been established over all mineral resources in Queensland, irrespective of ownership of beneficial interests in the land, through a series of legislative enactments.

Since the State legislatures are vested with the power to control and manage all lands and resources within their borders, the creation of rights in land and State-owned natural resources can only occur pursuant to statute. Each of the States has enacted

¹¹ At para 59

statutory regimes regulating the allocation of interests in land and mineral resources. The *Minerals Resources Act 1989* (Qld) provides the legal framework for obtaining access to land in Queensland to explore for and exploit mineral resources (including coal).

In Queensland, key enactments in the legislative framework under which rights to explore for and exploit mineral and petroleum resources are granted are the *Mineral Resources Act 1989* and the *Petroleum Act 1923* while interests in land are granted under the *Land Act 1994* and the *Land Title Act 1994*. Under these statutes, rights in land and natural resources are allocated, conditional upon compliance with a range of statutory and regulatory requirements, including the production and lodgment of documents which are essential for the maintaining the comprehensiveness, accuracy and integrity of the statute-based land title or resource tenure regime. The Committee is referred to the discussion under Issue 4, which describes the various reports containing information gained through exploration activity and which are required to be produced and lodged by holders of exploration tenures under the *Mineral Resources Act 1989*. Such reports which - if they meet the originality requirement - attract copyright as literary works (and may contain maps and plans which would individually be protected as artistic works) are essential to the operation of the statutory regime under which interests in State-owned mineral resources are granted pursuant to the Constitutional power vested in the State legislature.

In the exercise of the powers vested in the State legislature, the State needs to be able to require the production and lodgment of documents containing information such as that contained in the Exploration Resources, which add to the State's knowledge about the extent of its mineral resources. As well as requiring the production and lodgment of such information in documentary form, the State needs to be able to deal with those documents as it sees fit in the administration of the statute-based mineral resources regime. In particular, the State needs to be able to reproduce the Exploration Reports (in whole and in part) including producing a digital copy from a hard copy and vice versa, to publish the reports as part of the publicly available body of information on the State's mineral resources (after the expiration of the established confidentiality period) and communicate the reports to the public in electronic form by making them available as part of internet-based, searchable databases such as QDEX.

Under the government ownership regime as it currently applies to documents such as mining Exploration Reports produced under a statutory direction, by virtue of the vesting in the State of copyright in the reports, the State has the exclusive rights to deal with the Exploration Reports as it sees fit in the administration of the mineral resources regime. While the present position in relation to State ownership of copyright in Exploration Reports aligns with the needs of the State in terms of its dealing with such documents as required for the administration of the mineral resources regime, the Committee must ensure that any amendments to the government copyright provisions do not alter the effective balance which has been achieved between the exercise of Commonwealth and State constitutional powers.

ISSUE 13: Views are sought on the practical operation of the law relating to the administration or licensing of copyright material. In particular, should government practice be uniform throughout the various Australian jurisdictions?

While there is no need for uniformity throughout the various Australian jurisdictions in relation to the administration and licensing of government copyright, government practice should be based on the following principles:

- It is not possible to establish uniform access and licensing conditions for all copyright materials owned by governments. The range of copyright materials owned by governments is broad and the basis on which copyright has vested in the government varies according to the circumstances. In this respect, the Committee's attention is drawn to the differences between the materials described in paragraphs (b) and (c) in (2) above. These differences have consequences for the access and pricing regimes for such materials, as has been acknowledged in the *Queensland Public Sector Intellectual Property Guidelines* (September 2003), the relevant provisions of which are set out below. Where governments expend time, energy and innovation in developing copyright materials of the kind described in paragraph (c) (such as the NRM&E's databases), that expenditure should be able to be reflected in the access and licensing arrangements for that copyright material. In the case of copyright materials such as the QDEX and Digital Cadastral databases (which fall into the category described in paragraph (c) and have been developed by the Department of Natural Resources, Mines and Energy from materials in paragraph (b)), governments should be able to apply a more commercially-based pricing regime which reflects the substantial, ongoing investment of time and money involved in developing and maintaining such materials. A survey of access and pricing practices in other jurisdictions shows that land information is almost universally licensed on a commercial basis.
- Certain materials in which governments own copyright – such as the QDEX and Digital Cadastral databases - serve a core governmental function (here, the management and control of the State's land and resources) and the administration of, or licensing of, copyright in such materials should not diminish the government's ability to exercise control over them.
- The practical operation of the administration and licensing of government copyright should be based on a recognition that there are different market and competitive conditions in each jurisdiction and among different classes of copyright material. There should be scope for flexibility of licensing practices to enable governments to respond to local market conditions/needs and circumstances.

On the issue of the cost of access to government copyright materials, the Committee's attention is drawn to the approach adopted in the *Queensland Public Sector Intellectual Property Guidelines* (September 2003) which set out the Queensland government's policies in relation to ownership, management and commercialization of government-owned copyright. The *Queensland Public Sector Intellectual Property Guidelines* incorporate *Information Standard 33: Information Access and Pricing*

(IS33)¹². IS33, which governs access to information within the custody of Queensland government agencies that is the property of the government and is intended to be publicly available, distinguishes between “government information” and “information products”. IS33 recognises that the government may also set information pricing and access arrangements by statute (section 2).

“Government information” is defined in IS33 (at page 10) as:

[I]nformation that is the property of the Queensland Government or the Parliament of Queensland and is intended to be made available to citizens or it could be anticipated would be reasonably requested by citizens.

“Information products” are defined in IS33 (at page 10) as:

[A]n alternative, enhanced means of accessing Government information. They are generally produced to satisfy a market want rather than a direct service delivery responsibility. An information product cannot be the only means of accessing the Government information on which it is based.

Whilst copyright material which is embodied in “government information” should be either freely available or at no more than the cost of production, copyright material embodied in “information products” may be “competitively priced at full cost recovery as a minimum”.

IS33 States (at page 3) that where “government information” is being provided, it should be done

“at no cost to the citizen or at a price not exceeding what is necessary to recover the cost of provision unless there is a statutory charge applying to the provision of the information.”

IS33 does not prohibit charging a price for access to government information but makes it clear that some classes of government information relating to the processes of government must be freely accessible. The classes of government information that are to be freely accessible are set out in Appendix A to IS33. IS33 describes the kinds of government information that should be made freely available as follows:

“(a) Citizens have a right to expect that government information concerning regulation and other aspects of government intervention in their lives will be freely accessible providing it does not interfere with the proper administration of justice, including the enforcement of the criminal law.

(b) Citizens have a right to expect government information relating to the business of Parliament will be freely accessible.

(c) Citizens have a right to expect government information will be freely accessible when government is seeking broad community consultation on an issue and access to that information is necessary for citizens to be able to make informed comments.”

¹² Available at <http://www.iie.qld.gov.au/informationstandards/current.asp> <05/03/04>

IS33 (at page 5) states that government agencies may choose to produce an information product in a situation where an agency “identifies an opportunity for an information product or products based on government information within its custody and no similar products exist to meet citizens’ wants.” It goes on to address the pricing of “information products”:

“2. Agencies producing information products must not derive unfair commercial advantage from their custody of governmental information on which those products are based. Private sector and public sector information providers must be allowed access to the same information on terms and conditions aimed at neutralising any competitive advantage the information custodian might otherwise have had.

3. Information products may be competitively priced at full cost recovery as a minimum.”

An example of the application of IS33 is the Department of Natural Resources, Mines and Energy’s Digital Cadastral database which would be classified as an “information product” derived from “government information” can be licensed by third parties for competitive re-use¹³ and licence fees are set according to market rates.

ISSUE 16: As a matter of public policy, should the government own copyright in materials produced by the executive arm of government?

The CLRC has not presented any compelling public policy reasons as to why the government should not own copyright in materials produced by the executive arm of government. To the contrary, the subsistence and ownership of Crown copyright may promote the dissemination of government information and materials to the broader community at less cost, faster and in a more comprehensive and reliable manner than would otherwise be the case.

The Committee has raised the question of the appropriateness, from the perspective of competition policy, of the law relating to Crown ownership of copyright. On this issue, the Committee¹⁴ has drawn on the conclusion of the Prices Surveillance Authority in 1992 in its *Inquiry into the publications pricing policy of the Australian Government Publishing Service*¹⁵ when considering Crown ownership of copyright in legislation and related materials. The Prices Surveillance Authority recommended the abolition of Crown copyright because “[c]opyright monopoly rights are not necessary to ensure incentive for adequate development of such information.”¹⁶

However, while the advantages offered by copyright’s exclusive rights may not act as an incentive for the production of certain categories of governmental material in which copyright may subsist (e.g. legislation), this certainly is not the case for all kinds of government materials which are protectable by copyright. An example of the latter category is the extensive, computerised, searchable, internet-accessible

¹³ See <http://www.nrm.qld.gov.au/products/distributors.php?type=Digital+Data> <22/03/04>

¹⁴ At para 85

¹⁵ Prices Surveillance Authority, *Inquiry into the publications pricing policy of the Australian Government Publishing Service*, 1992

¹⁶ At pp 91 - 92

databases of land titles and mineral resources data such as the Department of Natural Resources, Mines and Energy's QDEX and Digital Cadastral databases.

Where material is produced primarily because it is essential to the proper administration of the State (as is the case with legislation) or the management of the State's land and resources (eg mining exploration reports and survey plans), it clearly would have been produced irrespective of the copyright rights that come into existence when it is made. However, in many situations what is of value to the community at large is not the discrete examples of copyright material produced by or for the government in the administration of the State's functions or the management of its resources but the collection of those materials into publicly accessible databases. Here, the availability of the exclusive rights of copyright (especially the rights to reproduce in a material form, publish and electronically communicate to the public) provide the State with an incentive to put in the effort, planning, skill and (often considerable) resources required to create the databases which will enable widespread accessibility of the compiled material by members of the public. While the government's performance of its essential functions requires it to receive and collate documents essential to those functions, copyright operates to provide an incentive for governments to develop the complex, computerised, searchable, internet-accessible databases.

The production of creative output often occurs only through the expenditure of considerable resources (financial and/or intellectual) but, ironically, can be readily copied or used by others at little or no cost. In the absence of rights over the results produced through investment in creative effort, it would be difficult to prevent "free riding" by others who have made no contribution to the creative product. Without the possibility of some return on their investment of time and resources, creators would lack economic incentives to engage in creative effort. By providing creators with exclusive property rights which they can use to control the exploitation of their output, thereby recouping their investment or obtaining an economic return on it, the intellectual property systems act as an incentive to engage in innovative activities.

The existence of intellectual property rights encourages the disclosure and dissemination of information and widens the store of knowledge available in the community.

***ISSUE 18: What are the options for reform, legislative or otherwise, and the costs and benefits of the options?**

The Committee has set out, at paragraph 123 of the *Crown Copyright* Issues Paper, various options, ranging from abolition of statutory government copyright and prerogative rights to the retention of both kinds of rights, subject to improved administration. Of the suggested options, NRM&E supports either of the following:

- retaining Crown copyright and/or Crown prerogative but clarifying it through legislative amendment; or
- retaining Crown copyright and/or Crown prerogative but waiving copyright in, or allowing licences over, certain types of material.

The abolition of statutory government copyright and the Crown prerogatives in the nature of copyright either entirely or in specific kinds of material produced by governments (both of which are set out as options for consideration in paragraph 124) has not previously been seriously proposed by a copyright law review body in Australia. The IPCRC did not recommend the repeal of the government copyright provision in s 176 of the *Copyright Act 1968* but instead proposed that s 176 be amended so that governments are “in the same position as any other contracting party” in relation to copyright ownership of *commissioned works*. In effect, the IPCRC advocated the application of the general rules of first ownership of copyright as stated in s 35 of the *Copyright Act 1968* which, subject to the exceptions set out in that section, take as their starting point the premise that “the author of a literary, dramatic, musical or artistic work is the owner of any copyright subsisting in the work”. The application of this rule in circumstances where governments enter into contractual arrangements with independent contractors for the production of copyright materials would place governments in the same position as non-government entities when they commission the production of copyright materials. For ownership of copyright to be transferred from the first owner of copyright (as determined under s 35 of the *Copyright Act 1968*) to the Crown, there would have to be an assignment (whether total or partial) in writing and signed by the entity assigning copyright (s 196).

It is important to note that the IPCRC’s recommendation concerning s 176 of the *Copyright Act 1968* related only to copyright materials contractually commissioned by governments from independent contractors. The IPCRC made no recommendation – and indeed did not address – the situation where copyright materials are produced “by” the Commonwealth or State governments through the efforts of their employees or volunteers or where copyright materials are produced by non-government entities pursuant to governmental “direction or control” exercised in a form other than a commissioning agreement. In light of the fact that the IPCRC’s brief was to specifically consider restrictions on competition which are attributable to the operation of Australia’s intellectual property laws, it can hardly be an oversight that it did not identify any competition concerns arising out of Crown ownership of copyright in materials created by government employees/volunteers or produced by non-government entities under non-contractual means of governmental “direction or control”.

Since governments need to be able to exercise the full range of the exclusive rights conferred by copyright ownership, the Committee is urged not to recommend any narrowing of the operation of Part VII in relation to copyright materials produced “by, or under the direction or control, of the Commonwealth or State” which are required for the effective performance of governmental functions. To overcome uncertainty about the operation of ss 176 – 178, the provisions should be re-drafted to make it clear that they are intended to apply to copyright materials created by government employees and volunteers as well as to copyright materials produced by a non-government entity, pursuant to statutory, regulatory or administrative directions or orders in circumstances where the non-government entity is required or obliged to comply with those directions or orders.

It is submitted that the current operation of the provisions in Part VII of the *Copyright Act 1968* (particularly ss 176 and 178) vesting first ownership of copyright in the

Crown should be preserved. However, if it is considered necessary to set restrictions or limits on the ability of governments to exercise their rights as copyright owners (in the interests of achieving an appropriate balance between the rights of the government as copyright owner and the interests of members of the general public and private sector entities in obtaining access to and use of government copyright materials), such balance should be achieved in a manner which is consistent with the long-established means of achieving such balance and which is inherent in the structure of the *Copyright Act 1968*. The approach used under Australian copyright law to achieve a balance between the interests of copyright owners and users is to provide generally for subsistence and ownership of copyright and then to create exceptions or limits to the exercise of the exclusive rights, whether in specific situations or more generally. The *Copyright Act 1968* should continue to provide for Crown ownership of copyright in a broad range of materials produced by, on behalf of governments. Where the balance of interest demands that the exercise by the Crown of the exclusive rights should be limited or curtailed, the *Copyright Act* could provide for the exclusive rights to be waived in specific circumstances, specific exceptions to the exclusive rights or establish standard (statutory) licensing conditions applicable to certain uses of particular categories of government copyright material.

As acknowledged by the CLRC, the federal government's Terms of Reference for the *Crown Copyright* inquiry are partly due to the competition policy considerations raised by the IPCRC about the effect of s 176 of the *Copyright Act 1968* in relation to copyright materials commissioned by governments from independent contractors. The Committee should be careful to differentiate between the different competition policy issues arising in the circumstances addressed by the IPCRC and those which arise in other circumstances in which copyright materials are produced by, on behalf of or for governments. The Committee is referred to the non-exhaustive categorisation of such circumstances outlined above under heading (2) of this Submission.

Paragraph (a):

The IPCRC considered the competitive neutrality principle stated in clause 3(1) of the *Competition Principles Agreement* to be relevant in circumstances where a government contractually commissions the production and supply of copyright material by an independent contractor. Under the National Competition Policy, the competitive neutrality principle applies where publicly owned entities engage in business activities (but not when they engage in non-business, non-profit activities), with the objective of eliminating resource allocation distortions arising out of the public ownership of entities engaged in "significant business activities". In fact, the competitive neutrality principle will apply in only a very small proportion of the instances where governments commission the production of copyright material by independent contractors. Of considerably greater practical relevance are the guidelines on intellectual property ownership in the public sector that have been developed by the Commonwealth and State governments, e.g. the *Queensland Public Sector Intellectual Property Guidelines* (September 2003). These guidelines have addressed the competition policy concerns arising from the default operation of ss 176 and 178 to vest first ownership of copyright in the Crown by providing that copyright in commissioned copyright materials need not vest in the Crown but may belong to the non-government entity which has been commissioned to produce the copyright

material. Under the *Queensland Public Sector Intellectual Property Guidelines*, copyright ownership is a matter for negotiation between the government and the commercial supplier of the copyright material and is dealt with expressly in the commissioning agreement. The *Queensland Public Sector Intellectual Property Guidelines* state, at pages 19 – 20:

“ Contracts must address IP issues

All contracts in which IP might be created (including outsourcing, consulting and contracting agreements) should specifically address the issues of pre-existing IP and IP to be created during the contract.

Procurement of IP by Agencies

When procuring an IP asset (whether such asset is already in existence or yet to be created) an agency should endeavour to obtain such ownership or licensing rights as are consistent with its procurement objectives.

Ownership of IP created by a consultant

When engaging a consultant, agencies should explore whether ownership of copyright material developed by a contractor/consultant on behalf of the Queensland Government (“the default position”) is the best option for maximizing the benefits to Queensland. An agency may agree to a consultant engaged by the agency retaining the ownership of some or all of the IP rights created by the consultant during the course of the contract if other public interests, such as supporting Queensland industry or enabling or facilitating the more efficient delivery of services to the Queensland taxpayer, are considered to be of greater benefit to the public than the ownership of IP by the agency or the State.

However, where an agency agrees to a consultant/contractor retaining ownership of some or all of the IP rights created by the consultant during the course of the contract, the agency must ensure that Queensland Government retains access to the IP that it has paid for.

The *Queensland Public Sector Intellectual Property Guidelines* are reflected in the Government Information Technology and Communication Framework (GITC version 5) being developed by the Queensland government. GITC v 5 is at the consultation phase at present. The various models of ownership of intellectual property available under GITC v 5 facilitate the adoption by the parties (government and external contractor) of the most appropriate outcome in each case and do not favour the default position of copyright position automatically vesting in the Queensland government by virtue of the operation of s 176 of the *Copyright Act 1968*.

Paragraph (b):

The kind of competition policy considerations which led the IPCRC to recommend the amendment of s 176 are not relevant where copyright materials are generated by the means described in paragraph (b). Any attempt, based on competition policy, to put the Crown in the same position as the non-government entity which has produced

the copyright material is inappropriate where the copyright materials take the form of documents (such as mining exploration reports and survey plans) that are required to be filed in accordance with directions set out in legislation, regulations and administrative guidelines is inappropriate. Competition policy considerations are not relevant here because:

- it is not possible for there to be competing parties (the Crown and one or more non-government entities) in the performance of fundamental governmental roles such as the registration of dealings in interests in land and the granting of rights in State-owned natural resources and the maintenance of accurate and comprehensive databases of information about such dealings;
- there is no competition between external suppliers of the copyright material which is required to be produced and filed; rather, the obligation to produce and file the specific documents in which copyright subsists is imposed on the particular individual or entity; and
- lodgement of the specified copyright material in the prescribed form is a condition of the validity of a title or interest granted by the Crown.

In particular, the principle of competitive neutrality set out in clause 3(1) of the *Competition Principles Agreement*, which was referred to by the IPCRC as relevant to its recommendation that s 176 of the *Copyright Act 1968* should be amended so that the Crown is in the same position as any other contracting party when it commissions the production of copyright material from an independent contractor, does not apply in this context. Firstly, the competitive neutrality policy and principles apply “only to the business activities of publicly owned entities, not to the non-business, non-profit activities of those entities”. Secondly, the competitive neutrality policy is directed towards the elimination of resource allocation distortions arising out of the public ownership of entities engaged in “significant business activities.” Where the State, under the provisions of legislation such as the *Land Title Act 1994*, the *Land Act 1994*, the *Mineral Resources Act 1989* and the *Petroleum Act 1923* requires non-government entities to produce and lodge documents in which copyright may subsist, it is engaging in a governmental function in the exercise of its powers under those enactments and cannot be considered to be in any way involved in business or profit-making activities.

Paragraph (c):

The existence of intellectual property rights and competition policy are not necessarily in conflict. Indeed, the IPCRC considered the purposes of the two systems to be “largely complementary”. Competition policies adopted by the Commonwealth and State governments operate as an effective balance against the monopolistic exercise by governments of copyright vested in them under Part VII of the *Copyright Act 1968*.

The *Trade Practices Act 1974* (Cth) recognises that that intellectual property has important features that differentiate it from other kinds of property or assets. Consequently, s 51(3) of the *Trade Practices Act 1974* specifically exempts certain conditions in licenses and assignments of statutory intellectual property rights from the operation of Part IV of the Act. However, the scope of the exemptions in s 51(3) of the *Trade Practices Act* is unclear (not having been judicially considered) and in any case they do not apply to licences or assignments which infringe s 46 (misuse of

market power), s 46A (misuse of market power in a trans-Tasman market) or s 48 (resale price maintenance). The *Trade Practices Act 1974* therefore provides a mechanism available to a third party to effectively ensure that it is not excluded from the market which could be relied upon in relation to a (government or non-government) owner of intellectual property to ensure the rights owner does not restrict price competition for the resale of its intellectual property products.

Other balances are provided by State competition policy. In Queensland, a government conducting a “significant business activity”¹⁷ may be subject to the competitive neutrality principles¹⁸ which are designed to ensure that “a government agency carrying on a significant business activity should not enjoy a competitive advantage over competitors or potential competitors in a particular market.” The competition policy principles are administered by the Queensland Competition Authority¹⁹. The QCA also reviews pricing and availability of government information. Access to and pricing of government information and information products derived from it are addressed in *Information Standard 33: Information Access and Pricing* and the *Queensland Public Sector Intellectual Property Guidelines* (September 2003).

¹⁷ *Queensland Competition Authority Act 1997* (Qld) s 39

¹⁸ Note 5 s 38

¹⁹ Queensland Competition Authority (QCA) was established by the *Queensland Competition Authority Act 1997* available at <http://www.qca.org.au/www/welcome.cfm> <07/04/04>