

## STATE OF VICTORIA

### SUBMISSIONS TO COPYRIGHT LAW REFORM COMMITTEE ON 'CROWN COPYRIGHT ISSUES PAPER'

APRIL 2004

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#### **Background**

The Copyright Law Review Committee prepared an Issues Paper in February 2004 on Crown Copyright (the "Issues Paper"). The State of Victoria ("the State") was invited to comment on the Issues Paper. The State welcomes the opportunity to make comments concerning the Issues Paper. The State in its submission has provided both general comments and specific comments on those issues that the State seeks to address.

#### **General Comments**

Copyright is an increasingly important asset of the State. The proper management of that asset is an essential part of contemporary financial and risk management. The State supports the retention of Crown Copyright as important to achieving a number of economic and non-economic objectives including:

##### ***(a) Ensuring continued access to and control over State copyright***

Continued access to and control over State copyright by the State is important to enable the State to carry out its functions and activities. This objective will in most instances be best secured by arrangements where the State body owns the copyright. In some circumstances it is important for a State body to continue to exercise control over State copyright, to ensure confidentiality or quality or consistency with other Government publications or outputs. The State must ensure the continued integrity and authenticity of official government publications so that the public can be aware of the status of each publication. Continuing to maintain Crown Copyright is essential to achieving these outcomes.

The State's policy guidelines in relation to Crown Copyright are based upon the essential premise that the Crown owns Copyright in all works that are produced on its behalf,

notwithstanding that the information or works once published may be freely available in the public domain.

Particular scenarios where considerations of access and control will be dominant include:

- where the copyright forms a part of a larger bundle of State copyright; for example, where the copyright is one part of a series of Government publications;
- where the copyright is a crucial part of a much larger system; for example, where the copyright is a piece of software that allows many other pieces of software to function properly;
- where the copyright is likely to be reworked or re-published by the State body or by other State bodies;
- where the copyright is of potential use only to the State body or is confidential; and
- where access or exploitation by third parties would otherwise be undesirable (for example, artwork forming part of a Department's logo).

***(b) Supporting industry development***

In some cases, support of industry development can be effectively maximised through the use of State copyright as a form of in-kind sponsorship.

For example, a State body may decide to assist in the establishment of a foundation carrying out research and education activities. Instead of promising ongoing funding, the State body might agree on an arrangement whereby the State body retains copyright in the materials created by the foundation, but where the foundation is given a licence to market that copyright (for example, research tools or educational materials). The ability to negotiate over State copyright facilitates greater flexibility in government support of industry development.

***(c) Maximising non-economic values derivable from State copyright***

It is important to bear in mind that maximising the economic value of State copyright can involve a loss of other values of importance to Government. A license or transfer of State copyright to the non-government or private sectors might lead to a market failure or other loss of public good. An example would be through excessive pricing of publications relevant to Government programs due to monopoly of market power, or loss of access to Government information by poorer citizens or those without access to particular technologies. For these

reasons, in most circumstances, non-exclusive licences over State copyright are granted rather than exclusive licences.

***(d) Ensuring an appropriate return on State investment***

Where the State has expended considerable public moneys to acquire copyright in certain materials then it is in the public interest Crown Copyright should be retained. Copyright is an asset with similarities to physical assets, such as buildings and equipment. Just as the Government does not give free access to its physical assets without careful consideration, a State body should not give access to its copyright without remuneration unless it has made a decision in line with the State's policy and other applicable considerations. Where a State body licences another party to use State copyright, it should strike a royalty at a commercial market rate unless there is a valid reason for a less-than-market rate to be struck. Moreover, the State commissions certain works, such as government information technology projects, with the intention that the costs of procurement may be offset by the capacity for the commercial exploitation of those works.

***(e) Fostering a competitive market for information***

Another objective of the management of State copyright is to foster competitive markets for information. Such markets tend to arise where government information is licensed to a number of operators, each of whom is free to value-add and repackage that information in the way thought most desirable. The grant of non-exclusive licences over State copyright facilitates a more competitive market and is consistent with the State's policy that public access is given to a wide variety of materials and documents of the State at little or no cost.

For example, the non-exclusive licensing arrangements that the Government Printer has with legal publishers in relation to legislation facilitates the broad dissemination of this material in a value added format without infringing Crown Copyright.

## Specific comments

**Issue 1: The Committee seeks your views as to whether government ownership of copyright material should extend to all works and subject matter. For example, should it only apply to literary works? Should artistic works such as architectural plans be excluded?**

Government ownership of Copyright should extend to all works and subject matter. Application of copyright ownership should be consistent. It is impractical that some types of Copyright should be excluded in principle or in practice. For example, Land Victoria registers plans prepared by surveyors in creating new land parcels. These plans contain works part of which could be regarded as “artistic” (such as diagrams) and part of which could be regarded as “literary”(such as explanatory details or comments) in the one document. Unrestricted access to both types of content is necessary to properly interpret these plans.

**Issue 2: The Committee seeks your views as to whether the Government should enjoy all the exclusive rights of copyright.**

The State agrees with the comments made in the Issues Paper at paragraph 78, which states:

*Part of the original rationale for Government ownership of Copyright material was a need to ensure the integrity and authenticity for official Government publications ... Copyright ownership has the further benefit of allowing Government to regulate the dissemination use of Government material ... providing a potential revenue stream.*

The State supports the views outlined above that it is important for the integrity and authenticity of official government publications for Crown Copyright to continue to exist. The State takes the view that government should enjoy the exclusive right of copyright. As an owner of copyright the government should enjoy the same rights of copyright as other persons. However, these rights should be exploited for the public good. Government ownership of any asset is due to expenditure of public funds, therefore works in which the government owns copyright are effectively held in trust on behalf of the public. Crown ownership of copyright coupled with prerogative rights is important in the context of being

able to ensure publication of information for the public good. Crown Copyright is essential for the continued integrity and authenticity of official government publications and for the public to be aware of the status of each such publication.

***Issue 3: The Committee seeks your views as to whether moral rights should apply in the context of government copyright.***

The State recognises that moral rights are inalienable to individual authors and considers that moral rights should apply in the context of government copyright. However, whilst recognising that creators of copyright material retain moral rights in their work, the State supports further investigation into the development of legislation or guidelines clarifying situations where the State is not obliged to attribute the rights associated within any works to the creator(s).

The State as an employer should be subject to the same obligations as other employers in relation to moral rights and copyright. However, moral rights are not well understood within the context of government copyright. The State supports the need for further education of Crown servants and agents to allow the issue of moral rights to be addressed with certainty within employment or other contracts.

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

- (a) sections 176 and 178.**
- (b) section 177.**
- (c) section 35(6).**

The State's view is that the present legislative scheme establishing government ownership of copyright material is appropriate and accordingly, all these sections should be retained. However, consideration should be given to the reforms effected in the United Kingdom by the

*Copyright, Designs and Patents Act 1988*. The State is of the view that section 176 – 178 could be improved by:

- the abolition of the direction and control test, focusing instead on whether the work was made by an officer or servant of the Crown in the course of their duties;
- providing specifically that Crown Copyright subsists in Acts of Parliament; and
- the establishment of the concept of Parliamentary copyright for Bills and other Parliamentary documents.

The State also supports consideration of amendments to the *Copyright Act 1968* to clarify that judgments issued by Courts and Tribunals are protected by Crown Copyright.

Subject to our comments on moral rights, there is no reason in principle why section 35(6) should not apply to government as it does to the rest of the community. Section 35(6) provides a clear statement of the rights of the Crown as an employer with respect to the material created by its servants and agents and complements sections 176 – 178.

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

- (a) the executive;
- (b) the judiciary; and
- (c) the legislature.

Refer to the comments set out in respect of issue 4.

**Issue 6: The Committee seeks your views as to what entities should be included as part of 'the Commonwealth or a State' for the purposes of the Copyright Act and how this should be determined.**

The State has already indicated support for consideration of amendments to clarify the application of copyright to material created by Parliament and Courts and Tribunals.

The state recognises the difficulties associated with what constitutes the State in an environment of corporatisation and outsourcing. However, the State is of the view that this problem should not be the subject of legislation given that the courts, over a considerable period of time, have evolved a series of tests which define what or what is not part of the State, see in particular *Townsville Hospital Board v the City of Townsville* [149] CLR 282 and Hogg and Monahan, *Liability of the Crown*, 3<sup>rd</sup> Edition, Carswell 2000.

The extent of the problem is demonstrated with the classification of public entities under the *Public Sector Management and Employment Act 1998* (Vic). The Office of Public Employment lists 245 organisations which are subject to this Act. These are organisations that employ “public servants.” This is far short of the approximately 560 organisations registered on the Victorian Department of Treasury and Finance’s database of public sector entities. The database does not list schools, Municipal Councils, land management councils or cemeteries individually. If these are included, the number of public sector organisations rises to approximately 3000.

Clearly, there are a large number of organisations of government which do not employ public servants as defined by the *Public Sector Management and Employment Act 1998* (Vic). Even within what could be defined as central government agencies there are organisations that do not employ people through that Act. For example, the Chief Commissioner of Police, the Victorian Privacy Commissioner and Victorian Electoral Commissioners all employ staff under powers granted within their establishing Acts.

Attempts to define the public service in the context of the legal forms which organisations may take are problematic. Within the *Public Records Act 1973* (Vic) the term “public statutory body” is used. This is a body established by or under statute, for a public purpose. However, it has been noticed that a number of charitable organisations which are clearly private organisations (such as some private hospitals) fall within this definition.

The notion of a statutory body does not include organisations created under the *Corporations Act 2001* (Cth) or the *Associations Incorporation Act 1981* (Vic). Nor does it include organisations established by Ministers and other agencies that are not incorporated. Many statutory bodies in Victoria have created subsidiary organisations or corporations. These organisations are clearly part of government, yet do not fall within the definition of “public statutory body.”

Thus, attempting to provide an exhaustive list of what constitutes 'the State' for copyright purposes may lead to the loss of statutory protection and prerogative rights in instances where an agency is not properly identified. This is especially the case where name changes (such as Corporations Law companies or Government agencies) are relatively common. Furthermore, the inclusion of any list of agencies in legislation or regulations will require constant revision and is administratively unwieldy.

***Issue 7: The Committee seeks your views as to whether 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?***

As a general principle the copyright of material produced as part of a government function should be deemed to have been created by the government and therefore vest in the Crown. This general principle stems from three considerations:

- (a) that which has been paid for by the people, should be available for their use in whatever form at the time of purchase and should not have to be repurchased at some later time for the use by the people for another purpose; and
- (b) the deeming of ownership of copyright enables more cost effective dissemination of information held by the government which in turn assists in facilitating transparency and accountability; and
- (c) a deeming provision would provide greater clarity of copyright ownership and is more readily defined than a public interest test.

At present, if there is uncertainty as to where copyright vests, the general practice is for ownership to be clarified by contractual terms between the respective parties. A deeming provision could be restricted to situations where the work is created by an officer or servant of the Crown in the course of their duties or as part of their functions. See comments on Issue 4.

**Issue 8: The Committee seeks your views as to the appropriate duration of government copyright. Should it be the same as for non-government copyright material?**

The duration of Crown Copyright should remain unaltered. However, in addressing public records, the State submits that **unpublished** non-government copyright material in its custody (through the Public Record Office Victoria and the State Library) and which is open to public inspection should either:

- (a) have a limited duration; or
- (b) for records over a certain vintage (such as one hundred years), pass into the public domain, as is the practice in the United Kingdom.

Alternatively, where the doing of a particular act is specifically authorised by a State archives or library Act, (such as where the Keeper is authorised to arrange for publication of records under his control), then the doing of that act should not be considered an infringement of copyright.

**Issue 9: The Committee seeks your views as to the application of the exceptions to government copyright material. Should the exceptions apply to government copyright material in the same way as they do to non-government copyright material? Should there be a special exception for copyright material owned by the government?**

The State considers that the present exception scheme in relation to government copyright should remain unaltered except for the exception that relates to archives. The State is of the view that this exception should permit copying or reproduction of records held by archives and libraries for non-commercial use. Otherwise publicly available records held by government archives should be made available for all users in the public domain so long as the moral rights are recognised as discussed above.

***Issue 10: The Committee seeks your views as to whether the licence in s.182A to reproduce legislative materials and the decision of Courts and Tribunals should be expanded to allow multiple copies? Alternatively, is a blanket licence scheme an appropriate model?***

The State is opposed to any amendment to section 182A and views the current single copy licensing arrangements as appropriate for the purposes of protecting legislative materials and decisions of Courts and Tribunals. There are licence agreements in place between the State and commercial publishing companies covering electronic databases as well as printed publications. Versions of Bills, Acts of Parliament, Statutory Rules, Hansard and Parliamentary documents are freely available to the public on line. The accuracy of on-line versions is clearly indicated as not being warranted by the State. The existence of these licences allows the State to maintain a degree of control over the dissemination of public information regarding legislation, whilst not restricting public access to such information. Accordingly, the State does not view the adoption of a blanket licence model as appropriate.

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

The State supports further investigation of the UK legislation which preserves prerogative rights as a safety net but specifically excludes prerogative rights in relation to certain works. The State is concerned that to completely replace the prerogative with legislation may inadvertently reduce the protection available to the State over copyright material.

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

It is fundamental to a federation that States and the Commonwealth are entitled to adopt differing positions. However the State would support the Commonwealth referring this issue to the Standing Committee of Attorneys General to consider the feasibility of uniform guidelines for the administration or licensing of copyright material.

**Issue 15: The Committee seeks your views as to the effect of new technologies on government ownership of copyright material. In particular:**

- (a) does copyright continue to be relevant?**
- (b) How does one safeguard against the distortion or inappropriate use of government material made available through new technologies?**
- (c) Is facilitating government information on-line inconsistent with the policy objectives behind government ownership of copyright?**

Copyright is a technology neutral right and remains relevant irrespective of technologies and formats. While there may at times be problems associated with safeguarding against the distortion or inappropriate use of material made available on-line this applies to all on-line materials whether they are produced in the public or private sector. Public promotion and education about copyright should be undertaken as a priority preventative measure against inappropriate use of on-line materials. Facilitating government information on-line is not inconsistent with the policy objectives behind government ownership of copyright; it meets expectations for government information to be freely and easily available whilst protecting the integrity and authenticity of the material through copyright, licensing and warranties.

To illustrate, as a result of Land Victoria increasing the availability of its records electronically and the appointment of eight information brokers following a national competition policy review, 75% of the 1.6 million per annum title searches that are delivered electronically are delivered by the information brokers. Accordingly, while there is a contractual relationship between Land Victoria and the brokers (especially in relation to the use and dissemination of the records) this protection does not extend to the brokers' customers. Copyright protection plays an important role in allowing the State to require that electronically delivered materials remain in unaltered form. This reinforces the policy objectives discussed above; especially the need to ensure the integrity and authenticity of the

information the State provides, as there is a State guarantee over the accuracy of land titles information.

***Issue 16: The Committee seeks your views as to whether, as a matter of public policy, the government should own copyright in materials produced by the:***

- (a) executive arm of government?**
- (b) legislative arm of government?**
- (c) judicial arm of government?**

Previous comments support clarification that materials produced by the three arms of government be protected by Crown or Parliamentary Copyright (in the case of Bills). The public policy reasons have already been set out above.

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

The State has already made references to the UK model in its comments to specific issues. The State also supports further investigation and consideration of the Canadian model, given that Canada is also a Federal State and has a shared legal history with Australia.

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