



**Issues Paper
February 2004**

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Copyright Law Review Committee

Crown Copyright



COPYRIGHT LAW REVIEW COMMITTEE

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Overview

The Copyright Law Review Committee was established in 1983 by the Attorney-General as a specialist advisory body to report to the Government on specific copyright law issues referred to it for consideration. Since then, the Committee has reported on eleven separate references. This twelfth reference was referred to the Committee on 4 December 2003. The Committee's terms of reference are at Appendix A.

The purpose of this paper is to invite submissions on the matters raised in the Committee's terms of reference. In particular, information is sought regarding the appropriateness of the law relating to government ownership of copyright material in Australia. This paper seeks views on whether copyright should subsist in government material, and if so, in whom it should vest and in what circumstances. No particular view or course of action is endorsed. Rather, the Committee seeks the views of interested parties on the issues raised.

Submissions should be made by 26 March 2004, and should be addressed to:

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Submissions will be placed on the Committee's website unless marked confidential. Guidelines for the format of submissions can be found on the Committee's website at <http://www.law.gov.au/clrc>. Submitters not having access to Internet facilities may contact the Committee's Secretariat on (02) 6250 6076 for a copy of the Guidelines and any additional information they require.

Introduction

Competition policy

1. In part, this reference came about because of the effect of government ownership of copyright material on competition policy. This is explicit in the terms of reference (see Appendix A), which refer to the *Review of Intellectual Property Legislation under the Competition Principles Agreement* (the Ergas Committee) recommendation that the government should not be provided with preferential treatment under the *Copyright Act 1968*.¹ The effect of government ownership on competition policy is discussed further below (paras 85-86).

Key issues

2. In this Issues Paper, the Committee seeks your views on a number of key issues, as well as more specific issues. The key issues include:

- whether the legislative scheme establishing government ownership of copyright is appropriate (Issue 4),
- whether, as a matter of public policy, the government should own copyright in material produced by the executive, judicial and legislative arms of government (Issue 5), and
- what are options for reform, legislative or otherwise, and the costs and benefits of those options (Issue 18).

'[T]he Commonwealth or a State'

3. The provisions in the Copyright Act relating to government ownership of copyright refer to ownership of copyright by the 'Commonwealth or a State'. This phrase encompasses the Commonwealth Government, and the

¹ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement*, September 2000, p.114.

government in each State and in the Territories.² In this Issues Paper, the Committee refers generally to ‘the government’ to refer to the governments in these Australian jurisdictions. A reference to ‘the government’ includes the executive, judicial and legislative arms of government, except where otherwise apparent. This includes, for example, government departments, courts and parliaments in each Australian jurisdiction.

4. In addition, the Copyright Act refers to ‘Crown’ copyright. The prerogative rights in the nature of copyright are generally referred to as ‘Crown’ prerogatives. The term ‘Crown’ generally refers to the executive arm of a government, and stems from Australia’s historical ties with the British Crown (see further below at paras 54-56).³

Scope of government ownership of copyright

5. Australian governments, like most of their overseas counterparts, create and disseminate a wide range of material. This ranges from public announcements and media releases, legislation and other legal and parliamentary materials, reports, directories, guides and educational material, photographs, to specialised historical works, maps, plans and commissioned works such as biographies and art works. Under Australian copyright law, the respective government normally owns copyright in those materials where they are the creators of those materials.

6. In some of the material published by these governments there is a strong and identifiable public interest in ensuring its widest dissemination. In other material, such as general historical works, this interest is not as strong. The Committee also notes that the government owns copyright in a wide range of unpublished materials. Such materials would include submissions to Ministers, some databases and computer software.

² The phrase ‘Commonwealth or State’ extends to Territories by virtue of s 10(3)(e) of the Copyright Act and the definitions of ‘the Crown’ and ‘the Commonwealth’ in s 10(1) of the Copyright Act.

³ Section 16 of the *Acts Interpretation Act 1901* (Cth) states that references to the Crown ‘shall unless the contrary intention appears be construed as references to the Sovereign for the time being’.

Summary of options for reform

7. The Committee notes that there are a number of options for reform, both legislative and otherwise. The options range from the abolition of statutory copyright and crown prerogative (vesting copyright either privately or in the public domain), to the retention of statutory copyright and crown prerogative but with improved administration. The government could also adopt licensing practices or waive copyright in certain circumstances, over certain types of material. Alternatively, the government could retain copyright but create a special exception to copyright infringement for government material. The Committee seeks your views as to options for reform which are set out at the end of this Issues Paper (see paras 121-125).

History of government ownership of copyright

8. Australian copyright law has its foundations in English law.⁴ Under this system, the Crown regulated copyright for the purposes of censorship and control of the printing industry and as a means of reward and a source of revenue. It was also the owner and disseminator of the law and works of the established religion, as well as other government material. Prior to the enactment of the Statute of Anne in 1709, any copyright rights in government material were founded upon the common law.⁵ The Statute of Anne did not deal with the Crown specifically. However, the Crown was entitled to own copyright material under general copyright principles.

⁴ Australia's history as a British colony is reflected in its establishment as a federal constitutional monarchy. In relation to constitutional issues, see further below at para 53.

⁵ For the history and scope of the common law prerogative right in the nature of copyright, see: A Monotti, 'Nature and basis of Crown copyright in official publications', *European Intellectual Property Review*, vol. 14, no. 9, 1992, pp. 305-316; 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.

9. The *Copyright Act 1911* (UK) provided the Crown with its first specific statutory copyright rights. Under s 18 of the Act, copyright subsisted in any work 'prepared or published by or under the direction or control of His Majesty or any Government department'. The 1911 UK Act, including this provision, was adopted in Australia by the *Copyright Act 1912* (Cth).

10. Section 18 of the 1911 UK Act was modified by the *Copyright Act 1956* (UK) which provided, under s 39, that the Crown owned copyright in works 'made by or under the direction or control of Her Majesty or a Government department' and 'first published in the United Kingdom by Her Majesty or a Government department'.

11. In 1959 the *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth* (the Spicer Committee) recommended that a provision similar to s 39 of the 1956 UK Act be enacted in new Commonwealth legislation.⁶ In 1968 this recommendation was implemented by the *Copyright Act 1968* (Cth) (the Copyright Act) which established the current legal framework in Australia.

The Copyright Act

General ownership of copyright

12. Under Parts III and IV of the Copyright Act, copyright subsists in literary, dramatic, musical and artistic works ('works'), and sound recordings, cinematograph films, television and sound broadcasts, and published editions of works ('subject-matter other than works').⁷ It is important to note that the subsistence of copyright in works and other subject-matter under ss176 and

⁶ Copyright Law Review Committee, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth*, Commonwealth Government Printer, Canberra, 1959, para 403.

⁷ Sections 32, 89-92 of the Copyright Act.

178 of the Act is stated to subsist only where, apart from those sections, copyright would not subsist in the relevant material.

13. In relation to works, the owner of copyright is usually the author.⁸ However, this is subject to several exceptions. One of the main exceptions is for works made during the course of employment.⁹ Section 35(6) of the Copyright Act provides that, subject to Part VII of the Act (Crown Copyright), copyright in works created by an author pursuant to the author's terms of employment under a contract of service or apprenticeship is owned by the employer.¹⁰ This provision may be excluded or modified by agreement.¹¹

14. In relation to sound recordings and films, the owner of copyright is generally the maker.¹² The owner of copyright in television broadcasts and sound broadcasts is the maker.¹³ The owner of copyright in published editions of works is also the publisher.¹⁴

Moral Rights

15. Under Part IX of the Copyright Act, the authors of works and cinematograph films have moral rights in material they create. These rights are:

- the right of attribution of authorship,¹⁵
- the right not to have authorship falsely attributed,¹⁶ and
- the right of integrity of authorship.¹⁷

⁸ Section 35(2) of the Copyright Act.

⁹ Other exceptions include certain commissioned artistic works, and certain works made by employees of newspapers, magazines or similar periodicals (s 35(4) and (5) of the Copyright Act).

¹⁰ Note in *Director General of Education v Public Service Association of NSW* (1985) 4 IPR 552, the Court simply stated in relation to a Departmental Committee report of the NSW Department of Education that the State of NSW was the owner of copyright in the report 'pursuant either to s 35(6) or to s 176' of the Copyright Act. Thus it is clear that the provisions overlap.

¹¹ Section 35(3) of the Copyright Act.

¹² In the case of commissioned films and sound recordings, the commissioning party generally owns copyright (sections 97-98 of the Copyright Act).

¹³ Section 99 of the Copyright Act.

¹⁴ Section 100 of the Copyright Act.

¹⁵ Section 194 of the Copyright Act.

¹⁶ Section 195AC of the Copyright Act.

¹⁷ Section 195AI of the Copyright Act.

16. Moral rights apply to individual authors of copyright material even where the copyright is owned by the government.¹⁸ This means, for example, that if an employee writes a report for a government department, or if the government commissions an art work, where reasonable, the work should be attributed to the employee, must not be falsely attributed to someone else, and must not be subject to derogatory treatment. However, moral rights are not infringed where the author provides a written consent, or where an otherwise infringing act is reasonable in all the circumstances.

Government ownership of copyright

17. Ownership of copyright by the Commonwealth or a State¹⁹ (referred to here interchangeably as ‘the government’) is dealt with in Part VII, Division 1 of the Copyright Act. In addition, the provisions of Parts III and IV (other than the provisions relating to subsistence, ownership and duration of copyright) apply to works, and sound recordings and cinematograph films, owned by the government.²⁰

18. Ownership of copyright by the government is dealt with in ss 176-179 of the Copyright Act which provide as follows:

176 Crown copyright in original works made under direction of Crown

- (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.

¹⁸ Moral rights cannot be owned by corporations or governments, only individuals- s 190 of the Copyright Act.

¹⁹ The phrase ‘Commonwealth or State’ extends to Territories by virtue of s 10(3)(e) of the Copyright Act and the definitions of ‘the Crown’ and ‘the Commonwealth’ in s 10(1) of the Copyright Act.

²⁰ Section 182 of the Copyright Act.

177 Crown copyright in original works first published in Australia under direction of Crown

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.

178 Crown copyright in recordings and films made under direction of Crown

- (1) Where, apart from this section, copyright would not subsist in a sound recording or cinematograph film made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the recording or film 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 a sound recording or cinematograph film made by, or under the direction or control of, the Commonwealth or the State, as the case may be.

179 Provisions relating to ownership of copyright may be modified by agreement

The last three preceding sections have effect subject to any agreement made by, or on behalf of, the Commonwealth or a State with the author of the work or with the maker of the sound recording or cinematograph film, as the case may be, by which it is agreed that the copyright in the work, recording or film is to vest in the author or maker, or in another person specified in the agreement.

19. In summary, subject to any agreement to the contrary, under ss 176 and 178 of the Copyright Act the government is the owner of copyright in any work, film or sound recording made by, or under the direction or control of, the government. This occurs when the government does not already own copyright.²¹ There is no express provision for government ownership of copyright in broadcasts and published editions. However, the government may own copyright in such material under other provisions of the general copyright law.²²

20. Under s 177 of the Copyright Act, subject to any agreement to the contrary, the government is the owner of copyright in any work first published

²¹ This is due to the opening words of ss 176 and 178 which state ‘Where, apart from this section, copyright would not subsist ...’.

²² For example, the Department of the Parliamentary Reporting Staff owns copyright in broadcasts of parliamentary proceedings under s 99 of the Copyright Act.

by, or under the direction or control of, the government. This means that if the government is the first to publish material created by a non-government entity, copyright will vest in the government. This would occur, for example, where the CLRC publishes a submission on its website before it has been published elsewhere.

21. The range of materials in which the government owns copyright pursuant to ss 176-178 of the Copyright Act is broad. Sections 176 and 177 of the Act provide protection for literary, dramatic, musical or artistic works. Given the wide range of government functions, this can include maps, architectural plans, scientific research,²³ brochures, coin designs,²⁴ computer programs, statistics,²⁵ forms and exhibition displays. It also includes unpublished works. Section 178 of the Act provides protection for sound recordings and cinematograph films. This might include recordings made by the Australian Defence Force band, and educational videos made by, or under the direction or control of, a State government education department.

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?

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

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

²³ For example, scientific research conducted by the CSIRO and Geoscience Australia.

²⁴ For example, artistic works created by, or under the direction or control of, the Australian Mint.

²⁵ For example, material collated by the Australian Bureau of Statistics.

Application of government ownership provisions

22. The doctrine of separation of powers enshrined in the Commonwealth Constitution provides that executive, judicial and legislative powers are exercised independently by three distinct arms of government.²⁶ This means that the application of ss 176-179 of the Copyright Act varies in relation to executive, judicial and legislative materials, as set out below.

Executive material

23. Copyright in material created by government bodies is vested in the government. The phrase 'made by, or under the direction or control of, the Commonwealth or a State' extends to material created by officers of the Commonwealth or a State in the course of their employment and appears to extend to material created by a contractor under the direction of the Commonwealth or a State. The phrase is also capable of wide interpretation in its application to government instrumentalities.²⁷ It encompasses material created by government departments and extends to material created by some government agencies and statutory bodies.²⁸ Additionally, the phrase may encompass material created by local councils, depending on the terms of the legislation establishing local government in each State and Territory.²⁹

24. Factors used to determine the statutory bodies to which the government ownership provisions of the Act may apply include:³⁰

²⁶ See further below at para 57.

²⁷ Note, the phrase 'direction or control' is not defined in the Copyright Act and it has not been judicially interpreted in the context of the Act.

²⁸ See *Re Australasian Performing Right Association Limited's Reference; Re Australian Broadcasting Commission* (1982) 45 ALR 153 for a useful survey of cases where the High Court has determined, in various contexts, whether an instrumentality falls within the Commonwealth.

²⁹ See *Local Government Act 1993* (NSW); *Local Government Act 1989* (Vic); *Local Government Act 1993* (Qld); *Local Government Act 1999* (SA); *Local Government Act 1993* (Tas); *Local Government Act 1995* (WA); *Local Government Act 1993* (NT).

³⁰ See, by analogy, *Re Australasian Performing Right Limited's Reference; Re Australian Broadcasting Commission* (1982) 45 ALR 153 (whether the ABC falls within the Commonwealth for the purposes of s 183 of the Copyright Act which deals with Crown use of copyright material). In that case the Federal Court cited with approval the Copyright Tribunal's statement that 'matters to be considered include the

- the terms and intention of the legislation establishing the body,
- the terms of any relevant contract,
- the nature and purpose of the body,
- the powers and functions of the body,
- the extent of ministerial direction and control over the body,
- the way in which the body is funded, and
- whether the body can hold and dispose of property on behalf of the government.

25. It is clear that the Act encompasses material created by government departments. Such bodies are controlled by the government, are funded by the government and exist for government purposes. However, the extent to which the Act applies to material created by government agencies, statutory corporations and independent contractors is less clear. The application of the Act to these bodies will depend upon the factors listed above and the individual circumstances of each body.

26. The Committee notes that the issue of who is the government under ss 176-179 of the Copyright Act can create a level of uncertainty for these entities, and for parties dealing with them. It is difficult to determine who owns copyright in material created by such entities and whether express contractual terms assigning copyright are required. The Committee notes that this issue is particularly important where there is privatisation of government entities and outsourcing of government functions. In light of this uncertainty, some Australian governments have issued guidelines specifying the circumstances

question whether the corporation fulfils a governmental or non-governmental function; the capacity of the government to control its activities; financial autonomy; the right of appointment and dismissal of the members of the body and of its staff by the Government; whether it has duties to furnish information or accounts to the Government; and its power over assets in its ownership or control' ((1982) 42 ALR 153, 158, 167). The Court considered these matters as an exhaustive list (although deliberately refrained from classifying it as a 'test'), in addition to whether or not property of the body is held for the Commonwealth. See also *Stack & GS Technology Pty Ltd v Brisbane City Council* (1995) 131 ALR 333.

in which contracts should be used to ensure that the government owns copyright.³¹

27. In 2001 the Australian Copyright Council suggested that to overcome the difficulties in determining what bodies are covered by the Copyright Act, a list of such bodies could be contained in Regulations to the Act.³² A similar approach has been taken in the United Kingdom where bodies to which the UK Act applies are listed on the Her Majesty's Stationery Office (HMSO) website.³³

Judicial material

28. The Committee notes that the extent to which the Act applies to judicial material is also unclear. It is arguable (based on statutory interpretation and case law) that the phrase 'Commonwealth or a State' refers to the Crown in right of the Commonwealth or State and thus applies only to the executive arm of government, not the legislative or judicial arms.³⁴ If so, copyright does not subsist in legislation or judgments under the Act by virtue of being made 'by' the 'Commonwealth or a State'.

³¹ See for example, Department of Communications, Information Technology and the Arts, *The Commonwealth IT IP Guidelines: Management and commercialisation of Commonwealth intellectual property in the field of information technology*, Department of Communications, Information Technology and the Arts, Canberra, 2000; Queensland Government, *Queensland Public Sector Intellectual Property Principles*, August 2003, available at: http://www.ipe.qld.gov.au/publications/ip/ip_principles.pdf.

³² Australian Copyright Council, *Submission to the Government's response to the report of the Intellectual Property and Competition Committee*, 2001, available at <http://www.copyright.org.au/PDF/Submissions/X0106.pdf>.

³³ See http://www.hmso.gov.uk/copyright/policy/c_copyright/crown_bodies.htm.

³⁴ See A Monotti, 'Nature and basis of Crown copyright in official publications', *European Intellectual Property Review*, vol. 14, no. 9, 1992, pp. 305-316, 312-313 where she argues that based upon the heading to Pt VII 'The Crown', and case law (*Director General of Education v Public Service Association of NSW* (1985) AIPC 90-244 at 36,392; *Re Australasian Performing Right Association Ltd's Reference*; *Re Australian Broadcasting Commission* (1982) 45 ALR 153; *Bank of NSW v Cth* (1948) 76 CLR 1), the Act should apply only to ownership by the Crown in right of the Commonwealth (and the Crown in right of the State). See also Australian Copyright Council, 'Government and copyright: A practical guide', *Australian Copyright Council Bulletin*, vol. 5. 2002, pp.1-56, where it is argued that as the Act binds 'the Crown' (s 7 of the Copyright Act) it applies only to the executive branch of government. See also section 10(1) of the Copyright Act which defines 'the Crown' to include 'the Crown in right of a State and the Crown in right of the Northern Territory...'. For the alternative view, see 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, p. 116

29. It is also arguable that judges are not ‘under the direction or control’ of the government and thus that the government does not own copyright in judgments by virtue of s 176(2) of the Copyright Act. The separation of powers doctrine supports this argument: the judiciary is independent and separate from the executive.³⁵ However, factors such as the method of appointment and dismissal of judges (including the judicial oath) and the payment of judicial salaries by the government may mean that the judiciary is under the direction of the government.³⁶

30. Section 177 of the Copyright Act may apply to vest ownership of judgments in the government where they are published by, or under the direction or control of, the government. For example, the government would own copyright in judgments if first published on government websites. Similarly, Councils of Law Reporting could be considered to publish judgments under the direction or control of the government, depending on the terms of the legislation establishing the Councils.³⁷

31. If the government does not own copyright in judgments, copyright may vest in the individual judges. In any event, publishers of judgments, which are largely in the private sector, do not own copyright in the judgments themselves, although they will own copyright in headnotes and typographical layouts which meet the threshold required for published edition copyright.³⁸

where it is argued that the use of the words ‘Commonwealth’ and ‘State’ in the text of Part VII suggest that the provisions should not be limited to the executive government.

³⁵ Section 72 of the Commonwealth Constitution provides for judicial tenure.

³⁶ See A Monotti, ‘Nature and basis of Crown copyright in official publications’, *European Intellectual Property Review*, vol. 14, no. 9, 1992, pp. 305-316, 313.

³⁷ See J Lahore, *Copyright and designs*, Butterworths, 1996, Vol 1, 20,220 and A Monotti, ‘Nature and basis of Crown copyright in official publications’, *European Intellectual Property Review*, vol. 14, no. 9, 1992, pp. 305-316, fn 116 & 117. See also CJ Bannon QC, ‘Copyright in reasons for judgment and law reporting’ *Australian Law Journal*, vol. 56, no. 7, 1982, p. 59 where Bannon states that the NSW Council of Law Reporting is an authority of the State and that material produced by it is protected by VII of the Copyright Act.

³⁸ *Butterworths v Robinson* (1801) 5 Ves Jun 709; 31 ER 817; *Sweet v Benning* (1855) 16 CB 459; 139 ER 838.

Legislative material

32. The Committee notes that there is also uncertainty about the extent to which the Act applies to legislative materials. As noted above (at para 28), it is arguable that the phrase 'Commonwealth or a State' does not extend to materials produced by the legislative arm of government by virtue of them being made 'by' the government. However, Bills prepared by the Office of Parliamentary Counsel, delegated legislation and explanatory memoranda may fall within the executive arm of government (where they are reduced to material form by executive agencies) and thus be covered by s 176 of the Act.³⁹ This may also be the case with Hansard, given that it is the executive government that reduces it to material form.⁴⁰

33. In relation to statutes, it is arguable that they are either made by the government or first published under the direction or control of the government, in which case copyright vests in the government. This is because they are drafted by parliamentary counsel and the official version is considered and passed by both Houses of Parliament and then it is approved by the Governor-General.⁴¹ Section 177 of the Copyright Act may also apply to legislative materials in the same way that it applies to judicial materials (see para 30).

Issue 4: The Committee seeks your views as to whether the legislative scheme establishing government ownership of copyright material is appropriate. In particular, should the government acquire ownership of copyright material by virtue of:

³⁹ A Monotti, 'Nature and basis of Crown copyright in official publications', *European Intellectual Property Review*, vol. 14, no. 9, 1992, pp. 305-316, 313.

⁴⁰ The Department of the Parliamentary Reporting Staff (soon to be the Department of Parliamentary Services) is responsible for making Hansard reports of proceedings in the House of Representatives, the Senate and Parliamentary Committees. The position is less clear in the case of written speeches, where it may be the politician who owns copyright if they were the first to reduce it to material form.

⁴¹ A Monotti, 'Nature and basis of Crown copyright in official publications', *European Intellectual Property Review*, vol. 14, no. 9, 1992, pp. 305-316, 313. Note, under s 61 of the Constitution, the Governor-General exercises the executive power of the Commonwealth as the Queen's representative.

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

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 legislative.**

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.

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?

Duration of copyright

34. Section 180 of the Copyright Act deals with the duration of copyright in original works of which the government is the owner, or would be the owner but for an agreement made under s 179 of the Act. Under s 180 of the Act, copyright in literary, dramatic or musical works subsists for a term of 50 years from the expiration of the calendar year in which it was first published. If the work is unpublished, copyright continues to subsist so long as it remains unpublished. Copyright in an artistic work, other than an engraving or photograph, subsists for a term of 50 years from the expiration of the calendar

year in which it was made. Copyright in an engraving or photograph subsists for a term of 50 years from the expiration of the calendar year in which it was first published.

35. Under s 33(2) of the Copyright Act, the duration of copyright protection in non-government works, that are published, other than photographs, is the life of the author plus 50 years from the end of the year in which the author of the work died. The result is that copyright in these non-government works may subsist for a longer term than it does for government works.

36. For photographs, the term of copyright, under s 33(6), is 50 years from the end of the year of first publication. However, in the case of photographs taken before 1 May 1969 (when the Copyright Act came into operation) the term, under s 212, is 50 years from the end of the calendar year in which the photograph was taken. The same term applies to government copyright in photographs taken before that date under s 233 of the Act.⁴²

37. In the case of non-government works not published before the author's death, other than computer programs and artistic works, the 50 year term, under s 33(3), runs from the end of the year of first publication. This provision opens the possibility of a perpetual copyright if the work is never published. The same possibility exists for similar government works under s 180(1)(a) of the Act, and also for unpublished engravings and photographs under s 33(5) and (6) and s180(3) of the Act.

38. Section 181 of the Copyright Act provides that the copyright in a sound recording or cinematograph film of which the government is the owner, or would be the owner but for an agreement made under s 179, subsists for a term of 50 years from the expiration of the calendar year in which it was first

⁴² The Committee understands that the Government is working on amendments to the term of protection for photographs- See The Howard Government, *Our future action plan: Arts for all*, 2001, available at: <http://www.liberal.org.au/archive/2001%20election/policy/arts.pdf>. See also the Hon Philip Ruddock MP, Attorney-General, 'The Government's copyright policy agenda', Speech to the 11th Biennial Copyright Law and Practice Symposium, Sydney, 20 November 2003.

published. This term is the same as that provided under ss 93 and 94 of the Copyright Act for non-government sound recordings and films.⁴³

39. The duration of copyright in broadcasts and published editions, which may be owned by the government other than by virtue of Part VII of the Copyright Act, is that which applies to copyright in such material generally. Under s 95 of the Copyright Act, copyright in television and sound broadcasts subsists for a term of 50 years from the expiration of the calendar year in which the broadcast was first made. Under s 96 of the Copyright Act, copyright subsists in published editions of works for a term of 25 years from the expiration of the calendar year in which it was first published.

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?

Exceptions

40. There is a range of exceptions to copyright infringement under the Copyright Act. For example, exceptions, known as 'fair dealing' exceptions, apply where the use of the copyright material is for the purpose of:

- research or study,
- criticism or review,
- reporting news, or
- judicial proceedings and professional advice.⁴⁴

41. There are also exceptions relating to library and archives, temporary reproductions and computer programs, and a range of miscellaneous

⁴³ Under ss 93 and 94 of the Copyright Act, the duration of copyright protection in non-government owned sound recordings and cinematograph films is also 50 years from the end of the year in which it was first published.

⁴⁴ See ss 40-43 and 103A-103C of the Copyright Act.

exceptions, including s 182A of the Copyright Act (discussed below at para 43).⁴⁵

42. The exceptions to copyright infringement apply equally to government and non-government owned copyright.⁴⁶

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?

Single copies of a prescribed work

43. In addition to the general exceptions, s 182A of the Copyright Act operates specifically to permit reproductions of certain primary legal materials.⁴⁷ Section 182A(1) provides that:

The copyright, including any prerogative right or privilege of the Crown in the nature of copyright, in a prescribed work is not infringed by the making, by reprographic reproduction, of one copy of the whole or of a part of that work by or on behalf of a person and for a particular purpose.

44. This section does not apply where a charge is made for making and supplying that copy, unless the charge does not exceed the cost of making

⁴⁵ See further, Copyright Law Review Committee, *Copyright and Contract*, Canberra, 2002, Appendix D. As the CLRC noted in that Report (at para 7.32), the statutory licences in Parts VA, VB, VC and s 183 of the Copyright Act 'are not true exceptions to the extent that the copyright owner's exclusive right is affirmed, and might more properly be referred to as limitations. Each provides for the equitable remuneration of copyright owners in a situation where individual licensing would be impractical. As such, the statutory licence schemes are an efficient means of overcoming market failure.'

⁴⁶ See section 182 of the Copyright Act. For further information on the exceptions to copyright infringement see Copyright Law Review Committee, *Copyright and Contract*, Canberra, 2002, Chapter 3.

⁴⁷ Section 182A of the Copyright Act was inserted into the Copyright Act by s 23 of the *Copyright Amendment Act 1980* (Cth). It is based upon the recommendation of the *Copyright Law Committee on Reprographic Reproduction*, AGPS, Canberra, 1976, pp. 59, 144.

and supplying that copy.⁴⁸ Subsection 182A(3) of the Act defines 'prescribed work': generally the definition incorporates legislative and judicial material. The effect of s 182A of the Copyright Act is that any person may make one exact copy of a prescribed work, but that a publisher may not commercially reproduce and distribute such copies.⁴⁹ The Committee is aware that in 1983 the Commonwealth issued blanket licences to educational institutions and publishers for multiple reproductions of Commonwealth legislative materials such as Bills, Explanatory Memoranda, Acts, Statutory Rules and other delegated legislation. As far as the Committee is aware, these licences and the policy that relatively free access be provided to Commonwealth legislative materials is still current. This is consistent with the policy behind the recent *Legislative Instruments Act 2003* (Cth) which provides for the registration of, and hence access to, all Commonwealth legislative instruments.

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

Crown prerogative

Overview

45. The government has a prerogative right in the nature of copyright, which is preserved under s 8A of the Act and is not affected by other provisions of the Act.⁵⁰ Historically, the prerogative right was the exclusive right of the

⁴⁸ Section 182A(2) of the Copyright Act.

⁴⁹ In *Baillieu v Australian Electoral Commission* (1996) 63 FCR 210, Sundberg J held that s 182A applies only to the making of exact copies (due to s 10(3)(g) of the Act and the definition of 'facsimile'). Furthermore (in obiter), the person for whom the copy is made must be known at the time at copying, thus a publisher cannot make multiple copies of a prescribed work for persons to be determined at a later date.

⁵⁰ Section 8A was inserted into the Copyright Act in 1980 by the *Copyright Amendment Act 1980* (Cth). Note, s 61 of the Constitution (the executive power of the Commonwealth) includes common law prerogatives that are 'appropriate to the position of the Commonwealth under the Constitution and

Crown to print and publish material of a public nature. The prerogative right arose by virtue of the government's role as disseminator of the law and, in England, authorised works of the established religion. The prerogative right was seen as necessary to ensure the authenticity and accuracy of government material or other material of a public nature.⁵¹ The prerogative right was inherited by the Crown in right of the Commonwealth and States from the British Crown as a consequence of the application of English law on the settlement of Australian colonies.⁵² As such, the prerogative right is exercised by the executive arm of government.

46. The prerogative right is part of the common law⁵³ and it subsists alongside statutory copyright.⁵⁴ The right, as it applies to a particular emanation of the Crown, can be modified by statute in the relevant jurisdiction.⁵⁵

47. Under s 8A(2) of the Copyright Act, in order for the prerogative right to be infringed, the conduct in question must be an infringement under the Copyright Act. This means that the general defences under the Copyright Act apply in a like manner to the prerogative right.

48. Prerogative rights are of an indefinite duration.⁵⁶ This is in contrast to statutory copyright rights which have limited terms of protection (as outlined at paras 34-39).

to the spheres of responsibility vested in it by the Constitution' (*Barton v Commonwealth* (1974) 131 CLR 477, 498 per Mason J).

⁵¹ See further, A Monotti, 'Nature and basis of Crown copyright in official publications', *European Intellectual Property Review*, vol. 14, no. 9, 1992, pp. 305-316 for the history and scope of the prerogative right in the nature of copyright; 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.

⁵² 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.

⁵³ *Attorney-General (NSW) v Butterworth & Co (Australia) Ltd* (1937) 38 SR (NSW) 195, 239.

⁵⁴ See further, A Monotti, 'Nature and basis of Crown copyright in official publications', *European Intellectual Property Review*, vol. 14, no. 9, 1992, pp. 305-316, 311-312.

⁵⁵ In *Attorney-General (NSW) v Butterworth & Co (Australia) Ltd* (1937) 38 SR (NSW) 195, Long Innes CJ held (at 225) that the prerogative right can only be legislatively curtailed by express words or necessary implication. Note, in that case the Court held that s 18 of the Copyright Act 1911 (UK) did not curtail the Crown's prerogative rights.

⁵⁶ A Monotti, 'Nature and basis of Crown copyright in official publications', *European Intellectual Property Review*, vol. 14, no. 9, 1992, pp. 305-316, 311.

49. The application of the prerogative right to legislative and judicial materials is discussed below.

Legislative Materials

50. In *Attorney-General (NSW) v Butterworth & Co (Australia) Ltd*,⁵⁷ Long Innes CJ held that the NSW government possessed a prerogative right in the nature of copyright in NSW legislation. The Committee understands that it is widely considered that the relevant government possesses a prerogative right in the nature of copyright over legislation in that jurisdiction.

Judicial Materials

51. As with statutory copyright, the Committee notes that it is also unclear whether the prerogative right applies to judgments. A number of early English cases support the existence of the government's prerogative right in judgments.⁵⁸ However, in *Millar v Taylor*⁵⁹ the majority of the Court of King's Bench expressed doubt as to whether the prerogative extended to judgments.⁶⁰ This issue was not considered in *Attorney-General (NSW) v Butterworth*. As such, the existence of the prerogative right in judicial materials remains unsettled.⁶¹

⁵⁷ (1937) 38 SR (NSW) 195.

⁵⁸ *Stationers v The Patentees about the Printing of Rolls Abridgement* (1666) Carter 189; 124 ER 842; *Roper v Streater* (1672) Bac Abr 7th ed Vol VI 507.

⁵⁹ (1769) 98 ER 201; (1769) 4 Burr 2303 at 2329 (Willes J) and at 2404 (Lord Mansfield CJ).

⁶⁰ S Ricketson & C Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, Law Book Co, Sydney, vol 1, 2002, 14.200.

⁶¹ Ricketson et al argue that on the basis of *Attorney-General v Butterworth*, and in the absence of legislative authority expressly or implicitly negating the prerogative, the prerogative in judgments has not been lost by desuetude. He concludes that the best view of the nature of prerogative in judgments is that it provides the sole right to print judgments, as distinct from statutory copyright subsisting in material created by reporters. However, this is not reflected in the practice of most Australian jurisdictions where Councils of Law Reporting continue to grant licences over judgments to private publishers on behalf of the government- S Ricketson & C Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, Law Book Co, Sydney, vol 1, 2002, 14.200.

Application to new technologies

52. The Committee notes that it is unclear whether the prerogative, derived from the Crown's traditional role in the printing and publishing industries, extends to materials contained in new media such as CD-ROMs and online services. Some commentators have argued that the prerogative is flexible and can be adapted to new technologies.⁶² However others are doubtful that it extends to anything other than printing and publishing.⁶³

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?

Constitutional issues

53. The Committee's terms of reference require it to consider any constitutional issues that may arise. The following discussion highlights some of the matters that the Committee considers may be relevant to its inquiry.

The Crown

54. A convenient starting point is the question of what is meant by 'the Crown'.⁶⁴ Australia is a federal monarchy. The Queen or her representative forms part of each Australian Parliament, the Queen or her representative assents to legislation, law courts administer justice in the name of the Queen and the Queen or her representative is the formal head of both

⁶² S Ricketson & C Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, Law Book Co, Sydney, vol 1, 2002, 14.205; A Monotti, 'Nature and basis of Crown copyright in official publications', *European Intellectual Property Review*, vol. 14, no. 9, 1992, pp. 305-316.

⁶³ J Gilchrist, 'The role of government as proprietor and disseminator of information', *Australian Journal of Corporate Law*, vol. 7, no. 1, 1996, p. 62-79.

⁶⁴ This is also briefly discussed in paras 4 and 23-26.

Commonwealth and State executive governments.⁶⁵ It is in relation to this last role that the term ‘the Crown’ is normally used.

55. Section 61 of the Commonwealth Constitution provides:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.⁶⁶

56. The Crown is treated as a legal person, capable of owning property and subject to other rights and liabilities. This term is not taken to refer to the monarch personally, but rather to refer to individuals and institutions exercising the executive functions of government. As discussed in paragraphs 23-26, the scope of what is meant by ‘the Crown’ is somewhat uncertain. In order to distinguish between the various governments in our federal system, executive power is often referred to as being exercised by the ‘Crown in right of the Commonwealth’ or a particular State or Territory.

Separation of Powers

57. The Commonwealth Constitution is based on the doctrine of separation of powers which divides the functions of government between three distinct arms: the legislature, the executive and the judiciary. This is reflected in the drafting of the Commonwealth Constitution: Chapter I deals with the Parliament, Chapter II deals with the Executive Government and Chapter III deals with the Judicature. As discussed elsewhere in this Issues Paper (para 22), this doctrine is important in considering the scope of material in which the Crown (the executive government) may own copyright. The Committee understands that the doctrine is more flexible at State level.⁶⁷

⁶⁵ See generally, PJ Hanks, *Constitutional Law in Australia*, Butterworths, Australia, 1991, p. 124.

⁶⁶ See also s 2 of the Commonwealth Constitution. See s 7 of the Australia Act 1986 in relation to the States.

⁶⁷ See Hanks, *op cit*, p. 397.

The Copyright Power

58. The Commonwealth Constitution stipulates matters in relation to which the Commonwealth has power to legislate. Section 51 (xviii) provides that:

The Parliament shall subject to this Constitution, have power 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.

59. The extent of the copyright power may have a bearing on any recommendations for reform the Committee may make. For example, ss 176-179 of the Copyright Act deal with ownership of copyright material by both the Commonwealth and States. A relevant consideration may be the extent to which the Commonwealth can make amendments affecting State ownership of copyright material. Although on a practical level, copyright in Australia is regulated by Commonwealth legislation, the Committee is aware that there is nothing in the Constitution to suggest that this power is exclusive to the Commonwealth.⁶⁸

Acquisition of Property on Just Terms

60. There are certain limits on Commonwealth legislative power. One such limit is in s 51(xxxi) of the Commonwealth Constitution which provides:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... the acquisition of property on just terms from any State

⁶⁸ Section 107 of the Commonwealth Constitution.

or person for any purpose in respect of which the Parliament has power to make laws.

61. The Committee is aware that amendments it may recommend could amount to an 'acquisition of property' and therefore would need to be 'on just terms'.

Intergovernmental relations

62. As discussed elsewhere in this Issues Paper (paras 65-76), there is no uniform policy in relation to government ownership of copyright material in Australia. The Committee notes that this necessarily raises issues about the interaction between the Commonwealth and State and Territory governments. If a State or Territory did enact legislation, in relation to copyright the Commonwealth Constitution provides a mechanism for resolving inconsistencies between Commonwealth and State legislation.

63. Section 109 of the Commonwealth Constitution provides:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

64. The Committee is aware that this may also influence what the Commonwealth is empowered to do in the context of both Commonwealth and State and Territory ownership of copyright material.

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

Practical operation

65. Notwithstanding the lack of clear authority as to the ownership of copyright, governments in each Australian jurisdiction assume some element of copyright ownership over these materials. The treatment of copyright in these materials varies in each jurisdiction.

Commonwealth

66. The Commonwealth Copyright Administration (CCA), a body within the Department of Communications, Information Technology and the Arts, administers copyright in Commonwealth publications, including legislation (but excluding judgments).⁶⁹ Its main function is to grant permission to reproduce Commonwealth copyright materials. In general, permission is granted and no fees are charged where the use of Commonwealth material is not for profit. If the use is for profit the permission will be granted subject to a fee. All permissions granted are subject to acknowledgement of Commonwealth copyright. The CCA does not administer copyright in unpublished material: the body which created the unpublished material administers such copyright.

67. As explained in paragraph 44 above, in the case of legislative material the Commonwealth has issued blanket licences to publishers and educational institutions which the Committee understands are still current. In the case of judicial material, the courts administer copyright in their own judgments. For example, the High Court administers copyright in High Court judgments.

68. The Department of Communications, Information Technology and the Arts has issued guidelines for the management of Commonwealth intellectual

⁶⁹ Unpublished material is dealt with by the individual agency. In addition, some agencies have made arrangements with CCA to manage the copyright in their own published material.

property in the field of information technology (IT).⁷⁰ The guidelines provide practical guidance to decision makers in Commonwealth bodies to enable the Commonwealth to maximise the benefits from IT related intellectual property. The Committee understands that further work is being undertaken on the management of Commonwealth intellectual property.

States

69. At the State level there is a variety of practices. Licences are generally used to authorise the private use of government owned copyright. Copyright is either administered by a central body,⁷¹ by each individual body, or a combination of both.⁷² Some States have also issued policies and guidelines as to how government owned copyright should be managed.⁷³

70. In addition, most Australian States have established a Council of Law Reporting. Each Council is constituted by State legislation which varies between jurisdictions.⁷⁴ Generally, the role of the Councils is to prepare, publish and sell, or arrange for the preparation, publication and sale of, reports of judicial decisions.

⁷⁰ Department of Communications, Information Technology and the Arts, *The Commonwealth IT IP guidelines: Management and commercialisation of Commonwealth intellectual property in the field of information technology*, Department of Communications, Information Technology and the Arts, Canberra, 2000.

⁷¹ For example, ACT: Department of Urban Services; NT: Attorney-General's Department; Qld: Department of Innovation and Information Economy; WA: Department of Premier and Cabinet.

⁷² For example, in NSW, each government body administers copyright in the material they create themselves, in collaboration with the Attorney General's Department. In SA, the Attorney-General's Department administers copyright in legislation and judgments. However, each individual body administers copyright in other material. In Tasmania, each government body administers copyright in material produced by it, under the direction of the Department of Justice. In Victoria, the Office of Chief Parliamentary Counsel administers copyright in legislation and judgments and each individual body administers copyright in other material.

⁷³ For example, see Queensland Government, *Queensland Public Sector Intellectual Property Principles*, August 2003, available at: http://www.iie.qld.gov.au/publications/ip/ip_principles.pdf; Tasmanian Government, *Guidelines for the administration of Crown copyright*, available at: <http://www.go.tas.gov.au/standards/copyright.htm>; Western Australian Government, *Government Intellectual Property Policy and Best Practice Guidelines*, 2003, available at [http://www.doir.wa.gov.au/documents/businessandindustry/IPpolicy_may2003\(1\).pdf](http://www.doir.wa.gov.au/documents/businessandindustry/IPpolicy_may2003(1).pdf).

⁷⁴ See *Council of Law Reporting Act 1969* (NSW); *Council of Law Reporting Act 1990* (Tas); *Council of Law Reporting in Victoria Act 1967* (Vic); *Law Reporting Act 1981* (WA). Note, Qld and NT have

71. The following discusses the regimes in NSW and Victoria as examples of different State practices.

NSW

72. In NSW, the use of executive material is subject to the permission of the NSW Government. Applications are made to the NSW Attorney General's Department, and the body which created and controls the copyright will settle the terms on which a licence or agreement is made for the use of copyright material.⁷⁵

73. The NSW Government has issued express waivers over copyright in legislative materials and judicial decisions.⁷⁶ The waivers are subject to the following conditions:

- that copyright continues to reside in the State of NSW,
- that the waiver may be revoked, varied or withdrawn if the conditions are breached, or otherwise on reasonable notice,
- that publication of material must not purport to be an official version,
- that, in the case of judicial decisions, the material must not reproduce any headnotes or editorial material prepared by the Council of Law Reporting or other agency without their further authority,
- that the arms of the State must not be used in connection with publication of material without authority, and
- that material must be accurately reproduced in proper context and be of an appropriate standard.

established Councils of Law Reporting which began as voluntary associations and were incorporated in 1907 and 1991 respectively.

⁷⁵ See:

<http://www.lawlink.nsw.gov.au/4a2565d200027216/90d1516cf12ab8ba4a256652001973c3/0be8a29b9f216a69ca256b17001ac0ed?OpenDocument>

⁷⁶ The Hon John Hannaford MLC, Attorney-General, 'Notice: Copyright in Legislation' *NSW Government Gazette* No.94 (27 August 1993) p. 5115; The Hon John Hannaford MLC, Attorney-General, 'Notice: Copyright in Judicial Decisions' *NSW Government Gazette* No.23 (3 March 1995) p. 1087; The Hon JW Shaw QC, MLC, Attorney-General, 'Notice: Copyright in legislation and other material' *NSW Government Gazette* No. 110 (27 September 1996) p. 6611 (extending the 1993 waiver to include a broader range of legislative materials).

74. See Appendix B for the full text of the NSW waivers.

75. The NSW Council of Law Reporting has the power to prepare, publish and sell, or arrange for the preparation, publication and sale of judicial decisions.

Victoria

76. Victoria on the other hand has issued guidelines for the administration of Crown copyright in Victoria.⁷⁷ The Guidelines provide that a fee or royalty should be charged for the right to reproduce government owned material. However, this may be waived or reduced where reproduction is for 'professional technical or scientific purposes where profit is not a primary purpose of reproduction' and for educational purposes or where dissemination of official material is paramount and commercial considerations are relatively unimportant. In relation to legislative and judicial material, the guidelines provide that 'relatively wide access to State legislative materials should be allowed by means of licences to publishers and educational institutions'. The publication of judicial decisions is governed by the *Council of Law Reporting in Victoria Act 1967* (Vic). This Act provides the Victorian Council of Law Reporting with similar powers to the NSW Council of Law Reporting.

Issue 13: The Committee seeks your views as to the practical operation of the 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?

⁷⁷ Jan Wade MP, Attorney-General (Vic) *Guidelines relating to Victorian Crown copyright* (August 1991, endorsed by the Attorney-General in December 1992).

Public policy

77. Copyright law is traditionally described as striking a balance between two different objectives: the encouragement of creativity through reward of effort and investment, and the dissemination of its products. This balance is achieved through the grant of exclusive rights in copyright material subject to certain limitations and exceptions. The Committee notes that in the case of the government, it is difficult to see how copyright provides an incentive for creation. The government is bound to carry out its functions regardless of benefits it may gain under copyright law.⁷⁸ In these circumstances, one may think that the government's interest in public administration would shift the balance in favour of free access to government materials.

78. If the traditional copyright balance does not apply to the government, what is the policy basis for government ownership of copyright material? As discussed previously, part of the original rationale for government ownership of copyright material was the need to ensure the integrity and authenticity of official government publications. Copyright ownership also eases the administrative burden on governments by reducing the need to make arrangements for the use of third party copyright material, while at the same time providing a potential revenue stream. Copyright ownership has the further benefit of allowing the government to regulate the dissemination and use of government material. The Committee notes that developments in information law, technology, and competition policy may now raise questions about the policy behind government ownership of copyright material.

⁷⁸ The Committee notes that this argument may also be applied to many copyright authors.

Access to information

79. Freedom of information laws govern the public's right of access to government information in each Australian jurisdiction.⁷⁹ The object of freedom of information laws is to provide the Australian community with access to information in possession of the government.⁸⁰ However, certain exemptions limit such access, including exemptions relating to documents affecting national security, defence, international relations, documents subject to legal professional privilege and so forth (see Part IV of the *Freedom of Information Act 1982* (Cth)). Therefore, freedom of information laws provide a framework of regulation in relation to access to and use of government information.

80. The *Privacy Act 1988* (Cth) also regulates public access to, and use of, personal information held by the Government. The Information Privacy Principles provide that government agencies shall not disclose a record containing personal information unless certain circumstances exist (such as individual consent etc). Similarly, personal information should not be used or disclosed for a purpose which is secondary to the primary purpose of collection unless certain circumstances exist.⁸¹

81. Freedom of information and privacy laws now provide the government with a means of regulating the appropriate use of, and access to, information held by the government. Similarly, the common law duty of confidentiality regulates the use of confidential government information.⁸² Whilst these laws

⁷⁹ *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 1989* (NSW); *Freedom of Information Act 1992* (Qld); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1991* (Tas); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1992* (WA); *Freedom of Information Act 1989* (ACT); *Information Act 2002* (NT).

⁸⁰ *Freedom of Information Act 1982* (Cth), s 3.

⁸¹ See s 14 of the *Privacy Act 1988* (Cth).

⁸² See, for example, *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39. Notably, however, in that case Mason J noted (at 52) that the government's claim to confidentiality will only be upheld where disclosure is 'likely to injure the public interest'. As noted by Finn J in *Bennett v President, Human Rights and Equal Opportunity Commission* [2003] FCA 1433 at [127], there is a significant range of government material which, whilst being 'confidential', is unlikely to be protected

have different rationales, they may affect the original policy justification for government ownership of copyright.⁸³

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

New technologies

82. The Committee is aware that technological advances in the electronic storage and dissemination of information impacts upon government material. In Australia, the Internet and electronic databases have been utilised by governments in order to facilitate more efficient and lower cost access to government information. For example, the Commonwealth Government has developed *Scaleplus* to provide access to Commonwealth and Territory legislation. Further the Legislative Instruments Act 2003 provides for the establishment of a register of all Commonwealth legislative instruments by January 2005. The *Australasian Legal Information Institute* (AustLII) also provides free online access to primary legal sources in all Australian jurisdictions.⁸⁴ This model is viewed favourably overseas.⁸⁵

at common law or in equity because of this requirement. See also *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

⁸³ For example, in relation to the use of copyright law in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 ('the *Fairfax* case'), Gilchrist argues that: 'The *Fairfax* case arguably was a poor exercise of government copyright because it was essentially used for an ulterior purpose, that of preserving the confidentiality of documents. In the governmental sphere this is more appropriately dealt with by specific laws dealing with disclosure and not by copyright which has a limited scope to protect the confidentiality of information because it only subsists in the written expression of ideas and not ideas themselves.' J Gilchrist, 'The role of government as proprietor and disseminator of information' *Australian Journal of Corporate Law*, vol. 7, 1996, p. 62.

⁸⁴ Available at <http://www.austlii.edu.au>. Note, AustLII is a joint facility of the University of Technology Sydney and University of New South Wales Faculties of Law which is part privately funded and part publicly funded.

⁸⁵ See for example, T McMahon, 'Public policy issues in electronic access to the law in Canada', *University of Technology Sydney Law Review*, 2000, p. 11; D Harvey, 'A judicial perspective on public access to case law on the internet', *University of Technology Sydney Law Review* 2000, p. 7; M Perry, 'Literary work or mechanical commonplace', *European Intellectual Property Review*, vol. 22, no. 5, 2000, pp. 237-241.

83. The development of *Scaleplus* and AustLII is consistent with the increased expectations of the public to have free and easy access to information. Nevertheless, the Committee notes that this practice has the potential to conflict with one of the principal rationales for government ownership of copyright material, namely, ensuring the accuracy and authenticity of government information. It is in this context that the Legislative Instruments Act, with its registration system, may have an important role to play.

84. The Committee notes that the National Office of the Information Economy (NOIE) has developed an 'e-government' strategy for Commonwealth agencies. The strategy is designed to achieve the 'era of fully-fledged e-government – in which the application of new technologies to government services, information and administration demonstrates sustained benefits to citizens, business and government itself.'⁸⁶ The strategy has six key objectives:

1. achieve greater efficiency and a return on investments,
2. ensure convenient access to government services and information,
3. deliver services that are responsive to client needs,
4. integrate related services,
5. build user trust and confidence, and
6. enhance closer citizen engagement.

The Committee notes that these objectives appear to encompass both continued government ownership of copyright material and greater access to government information.

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

⁸⁶ National Office of the Information Economy, *Better services, better government: The Federal Government's e-Government strategy*, Canberra, 2002.

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

Competition policy

85. The Committee is aware that competition policy places stress on the policy justifications for government ownership of copyright. In 1992 the Prices Surveillance Authority recommended that Crown copyright in legislation and related materials be abolished.⁸⁷ A key reason for this recommendation was that:

Copyright monopoly rights are not necessary to ensure incentive for adequate development of such information. It is information produced using public money to facilitate government. Such information should be freely available.⁸⁸

86. In 2000 the *Review of Intellectual Property Legislation under the Competition Principles Agreement* (the Ergas Committee) noted that given the operation of s 176 of the Copyright Act, the government is in a more favourable position than other contractors or employers as it is not subject to normal contractual negotiations. The Ergas Committee noted that this was inconsistent with the principle of competitive neutrality set out in s 3(1) of the Competition Principles Agreement.⁸⁹ The Ergas Committee recommended

⁸⁷ Prices Surveillance Authority, *Inquiry into the publications pricing policy of the Australian Government Publishing Service*, 1992, p. 91-92.

⁸⁸ *Ibid.*, p. 92.

⁸⁹ 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

that the government should not be provided preferential treatment under the Copyright Act compared with other parties,⁹⁰ and, accordingly, that s 176 of the Act be amended. The Government's response to this recommendation supported the objective of eliminating unjustified preferential treatment, but opted to develop best practice policy guidelines rather than amend the Act.⁹¹

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?***

International treaty provisions

87. There are no international obligations in relation to government ownership of copyright; governments retain discretion in relation to these matters. Article 2(4) of the *Berne Convention for the Protection of Literary and Artistic Works* 1886 (the Berne Convention) provides:

It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of those texts.

to the business activities of publicly owned entities, not to the non-business, non-profit activities of those entities.⁷ See National Competition Council, *Compendium of National Competition Policy Agreements*, 2nd ed, June 1998, p.17.

⁹⁰ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement*, September 2000, p. 114.

⁹¹ Government Response to Intellectual Property and Competition Review Committee Recommendations, 28 August 2001.

88. Article 2bis(1) of the Berne Convention provides States with discretion as to whether they, by legislation, exclude wholly or in part, 'speeches delivered in the course of legal proceedings'.

International examples

89. The Committee is aware that, unlike Australia, many other countries provide little or no protection for material produced by governments. In addition, the management of government information differs in many jurisdictions. The following surveys the position in the European Union (EU), the United Kingdom (UK), and other common law countries such as New Zealand (NZ), Canada and the United States (US).⁹²

European Union

90. As far as the Committee is aware, there is no law at the European Union level providing for the ownership or subsistence of copyright in government information.⁹³ However, recently the EU passed a Directive establishing standards for the re-use of government information where information is made publicly available.

91. On 31 December 2003 the EU Directive on the re-use of public sector information entered into force.⁹⁴ The Directive provides a framework for conditions governing the re-use of public sector documents. The Directive applies to documents held by 'public sector bodies', which includes State,

⁹² For a useful survey of copyright protection in a number of Asian countries, see J Gilchrist, 'The role of government as proprietor and disseminator of information', *Australian Journal of Corporate Law*, vol. 7, no. 1, 1996, pp. 62-79.

⁹³ Note, the European Union 'Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society' provides that Member States may provide for exceptions or limitations to the reproduction right and the right of communication to the public of works and right of making available to the public other subject-matter 'to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings' (Article 5(3)(e)).

⁹⁴ Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (the Directive).

regional and local authorities, bodies governed by public law, and associations of such bodies.⁹⁵

92. The Directive does not impose an obligation on Member States in relation to allowing the re-use of documents; the decision to authorise the re-use of documents is left to the discretion of Member States. The Directive applies only to ‘documents that are made accessible for re-use when public sector bodies licence, sell, disseminate, exchange or give out information’.⁹⁶ Therefore, the Directive applies in circumstances where copyright has already been waived or licensed by the government of the Member State. (The Directive is expressed not to affect the intellectual property rights of public sector bodies.⁹⁷)

93. The main features of the Directive are as follows:

- public sector bodies shall make documents available in ‘any pre-existing format or language, through electronic means where possible and appropriate’,⁹⁸
- where charges are made, ‘the total income from supplying and allowing re-use of documents shall not exceed the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment’,⁹⁹
- conditions and charges on the re-use of documents must be transparent,¹⁰⁰
- public sector bodies may impose conditions on the re-use of documents in the form of a licence, and licences should be standardised,¹⁰¹

⁹⁵ The terms ‘public sector body’ and ‘body governed by public law’ are defined in Article 2 of the Directive.

⁹⁶ Recital 9 of the Directive.

⁹⁷ Recital 22 of the Directive.

⁹⁸ Article 5 of the Directive.

⁹⁹ Article 6 of the Directive.

¹⁰⁰ Article 7 of the Directive.

¹⁰¹ Article 8 of the Directive.

- practical arrangements must be in place to facilitate the search for documents available for re-use,¹⁰²
- any conditions on the re-use of documents must be ‘non-discriminatory for comparable categories of re-use’,¹⁰³ and
- no contract can grant exclusive rights to third parties – the re-use of documents shall be open to all.¹⁰⁴

94. Member States must implement the Directive by 1 July 2005. As at February 2004 no country has yet implemented the Directive.

United Kingdom

The law

95. In the UK, government ownership of copyright is dealt with in ss 163-167 of the *Copyright Designs and Patents Act 1988* (CDPA). The Crown copyright provisions in the CDPA differ from those in the Copyright Act 1956 (UK), and thus the Australian Copyright Act (which was modelled on the 1956 Act). The CDPA altered the nature of Crown copyright by removing the phrase ‘by or under the direction or control’, as well as rights based on first publication.

96. Section 163 provides that ‘Her Majesty’ owns copyright in a work made by ‘Her Majesty or by an officer or servant of the Crown in the course of his duties’.¹⁰⁵ Copyright in these works, known as ‘Crown copyright’, subsists for a term of 125 years from the end of the calendar year in which it was made or, where the work is published commercially within 75 years from which it was made, for a term of 50 years from the end of the calendar year in which it was

¹⁰² Article 9 of the Directive.

¹⁰³ Article 10 of the Directive.

¹⁰⁴ Article 11 of the Directive. Note, there is a public interest exception to this prohibition in Article 11(2).

¹⁰⁵ Note, a list of crown bodies is contained on the HMSO website for ease in determining to which bodies s 163 applies, at http://www.hmso.gov.uk/copyright/policy/c_copyright/crown_bodies.htm.

published.¹⁰⁶ This section does not apply to a work in which Parliamentary copyright subsists under ss 165-166.

97. Section 164 entitles Her Majesty to copyright in every Act of Parliament or Measure of the General Synod of the Church of England. Copyright subsists from Royal Assent for a period of 50 years from the end of the calendar year in which Royal Assent was given. Section 164(4) specifically excludes prerogative rights from subsisting in Acts of Parliament or Measures.

98. Section 165 establishes Parliamentary copyright in works made by or under the direction of control of the House of Commons or the House of Lords.¹⁰⁷ Works made by or under the direction or control of either House include any work made by an officer or employee of that House in the course of his duties or any sound recording, film, live broadcast or live cable programme of proceedings. It does not include works simply commissioned by or on behalf of a House of Parliament. Parliamentary copyright vests in the relevant House or can be vested in both Houses jointly. Parliamentary copyright subsists for a period of 50 years from the end of the calendar year in which the work was made.

99. Section 166 establishes copyright in Parliamentary Bills. Copyright can vest in either House or both Houses jointly, depending on where it was introduced and by whom. Copyright under s 166 ceases on Royal Assent or on the withdrawal or rejection of the Bill (unless, after rejection, it remains possible for the Bill to be re-presented in that session). Section 166(7) specifically excludes any other copyright, or right in the nature of copyright, from subsisting in Bills in which copyright had subsisted under the section (without prejudice to their re-introduction into Parliament).

¹⁰⁶ The term of protection for Crown copyright and Parliamentary copyright was not affected by the *Duration of copyright and rights in performances regulations* (UK) 1995/3927, which extended the term of copyright protection generally. This means that the term of protection for Crown copyright and Parliamentary copyright is generally shorter than that for other copyright.

¹⁰⁷ See also s 165(7), which provides that s 165 applies equally to any other legislative body of a country to which the Part extends (subject to an Order in Council providing otherwise).

100. Section 171 preserves the Crown prerogative, subject to ss 164(4) and 166(7). The Act specifically covers executive and legislative materials, but it does not address judicial material. Given that Crown prerogative is preserved under s 171 of the Act it is arguable that judgments are protected in this manner. Alternatively, the Crown may own copyright in judgments by virtue of s 163 (if judges can be considered as officers or servants of the Crown). Where the Crown does not own copyright, copyright may vest in individual judges.

Management of copyright

101. Crown copyright in the UK is managed by Her Majesty's Stationery Office (HMSO), which is part of the UK Cabinet Office. The management of Crown copyright was recently considered in the White Paper 'Future Management of Crown Copyright'.¹⁰⁸ The White Paper established a framework for effectively managing Crown copyright based upon eight guiding principles:¹⁰⁹

- coherent application for the re-use and licensing of government materials and information,
- transparent licensing and charging terms,
- consistency of approach across central government, extending the principles as appropriate, to all public sector information,
- establishing routes and finding guides enabling users to locate material,
- increasing use of waiver of copyright liberalising broad categories of information with the lightest of management,
- a streamlined administrative process, where licensing control is required, making maximum use of new technology,
- accountability will be strengthened by the Controller of HMSO with close supervision and regulation of the delegated exercise of her

¹⁰⁸ (1999). Available at http://www.hmso.gov.uk/archives/copyright/future_management_cc.doc.

¹⁰⁹ See Chapter 3, 'Framework for the future'.

authority as Queen's Printer regulating standards across government, and

- clear co-ordination and control by HMSO providing a central one-stop shop approach to combat fragmentation and loss of coherence in exercising these principles.

102. The framework included the establishment of an 'Information Asset Register' to enhance the accessibility and availability of official information,¹¹⁰ and the establishment of HMSO guidance principles outlining how Crown copyright is to be managed.¹¹¹ Chapter Five of the White Paper listed categories of material in which Crown copyright should be waived, including legislation: Guidance Notes have been issued to this effect, which outline the nature and conditions of such waivers.¹¹²

103. An Advisory Panel on Crown Copyright was established on 14 April 2003 to advise the UK government on issues relating to Crown copyright. Its role is, amongst other things to:

- advise Ministers on how to encourage and create opportunities in the information industry for greater re-use of government information, and
- advise the Controller of HMSO about changes and opportunities in the information industry, so that the licensing of Crown copyright information is aligned with current and emerging developments.¹¹³

104. In relation to the EU Directive on the re-use of public sector information, HMSO and the UK Department of Trade and Industry have jointly issued a Consultation Document seeking views on how the Directive may be most appropriately implemented in the UK. The Advisory Panel on Crown

¹¹⁰ For further information on the Information Asset Register see:

http://www.inforoute.hmso.gov.uk/inforoute/about_iar.htm.

¹¹¹ A current list of guidance notes is available from the HMSO website at:

http://www.hmso.gov.uk/copyright/guidance/guidance_notes.htm.

¹¹² See, for example, Guidance Note 6: *Reproduction of United Kingdom, England, Wales and Northern Ireland Primary and Secondary Legislation* at:

http://www.hmso.gov.uk/copyright/guidance/gn_06.htm, revised 7 Oct 2002.

¹¹³ Further information is available on the Advisory Panel on Crown Copyright's website at

<http://www.hmso.gov.uk/apcc/index.htm>.

Copyright has made a submission about this.¹¹⁴ As at the time of writing, a government response had yet to be published.

New Zealand

The law

105. Like Australian copyright law, New Zealand law also derived from the English system. Section 26 of the *Copyright Act 1994* (NZ Act) provides that the Crown owns copyright in a work ‘made by a person employed or engaged by the Crown under a contract of service, a contract of apprenticeship, or a contract for services’ (subject to any agreement otherwise). Copyright under this section subsists for a period of:

- 25 years from the end of the calendar year in which it was made in the case of typographical arrangements of a published edition, and
- 100 years from the end of the calendar year in which it was made in the case of all other works.

106. Under s 27 of the NZ Act, copyright does not subsist in: Bills; legislation; regulations; bylaws; parliamentary debates; reports of select committees; judgments of any court or tribunal; and reports of commissions or inquiries. These works are in the public domain.¹¹⁵

107. Section 225(1)(b) of the Act provides that nothing in the Act affects any right or privilege of the Crown existing otherwise than under an enactment.

¹¹⁴ Available at: http://www.hms0.gov.uk/apcc/reports/RIA_response.pdf

¹¹⁵ In addition, the NZ Parliamentary Counsel Office has established a Public Access to Legislation Project which is designed to improve the public’s access to NZ legislation, see further: <http://www.pco.parliament.govt.nz/pal/>.

108. The Committee understands that, as at February 2004, the New Zealand Government had no plans to review the Crown copyright provisions in the Copyright Act 1994.

Management of copyright

109. In New Zealand there is no central agency administering Crown copyright; each individual government body manages its own copyright. For example, the NZ Department of Justice requires copyright requests to be made to the Chief Information Officer of the Department of Justice. The Committee understands that it is common practice for government departments in New Zealand to include a notice on Crown copyright materials such as the following:

The copyright owner authorises reproduction of this work, in whole or in part, so long as no charge is made for the supply of copies, and the integrity and attribution of the work as a publication of [*the relevant department*] is not interfered with in any way.

Canada

The law

110. Canadian law also has its origins in the English system. Section 12 of the *Copyright Act 1985* provides that 'Her Majesty' owns copyright in any work 'prepared or published by or under the direction or control of her Majesty or any government department' (subject to any agreement with the author). Copyright under this section subsists for a period of 50 years from the end of the calendar year of first publication. Section 12 is expressed to be 'without prejudice to any rights or privileges of the Crown'.¹¹⁶

¹¹⁶ Section 12 of the Copyright Act 1985 was reviewed as part of the Copyright Reform Process being undertaken in Canada. It was classified as on the 'medium term reform agenda', to be addressed within two to four years, in the Industry Canada Section 92 Report *Supporting culture and innovation: Report on the provisions and operation of the Copyright Act*, 2002. The response to this report has been delayed until June 2004.

111. In 1995, the Information Highway Advisory Council (IHAC) considered whether Crown copyright in Canada was appropriate in light of the principle of ensuring that the Internet provides universal and easy access to information.¹¹⁷ The Council recommended that Crown copyright should not be abolished, but that a 'more liberal approach' should be taken to making works of the Crown available to the public.¹¹⁸ In particular, the IHAC recommended that:

- Crown copyright should be maintained,¹¹⁹
- the Crown in Right of Canada should, as a rule, place federal government information and data in the public domain,¹²⁰
- where Crown copyright is asserted for generating revenue, licensing should be based on the principles of non-exclusivity and the recovery of no more than the marginal costs incurred in the reproduction of the information or data,¹²¹ and
- the Federal Government should create and maintain an inventory of Crown works, and negotiate non-exclusive licences for its use on the basis of cost recovery (and also invite provincial and territorial governments to provide similar services).¹²²

112. In relation to legislative and judicial materials, a Federal Law Order was issued in 1997 which provides that anyone can reproduce federal legislative and judicial materials provided that 'due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version'.¹²³

¹¹⁷ Information Highway Advisory Council, *The challenge of the information highway*, Industry Canada, Ottawa, 1995, p. 37.

¹¹⁸ *Ibid.*, p.116.

¹¹⁹ *Ibid.*, Recommendation 6.7(a).

¹²⁰ *Ibid.*, Recommendation 6.7(b).

¹²¹ *Ibid.*, Recommendation 6.7(c).

¹²² *Ibid.*, Recommendation 6.8.

¹²³ Canada Federal Law Order SI/97-5, 8 January 1997.

Management of copyright

113. In Canada, government copyright is administered by Canadian Government Publishing (CGP), which is a body within Communication Canada. CGP is responsible for granting permission and/or issuing licence agreements to reproduce Canadian government material. Requests are made either to the author department or directly to CGP. CGP grants permissions/ licences with the authorisation of the author department.¹²⁴

United States

The law

114. Section 105 of the US Copyright Act provides that copyright protection is 'not available for any work of the United States Government'. This means that neither the US government, nor the government employee creator, can own copyright. With limited exception,¹²⁵ the section places all federal government material in the public domain. However, the Act does not apply to US State governments.

115. The phrase 'work of the United States Government' is defined in s 101 to mean 'a work prepared by an officer or employee of the United States Government as part of that person's official duties'. The Act is deliberately silent on whether copyright subsists in works prepared under government grant or contract; this is to be determined in particular circumstances by specific legislation, agency regulations or contractual restrictions.¹²⁶

Section 105 specifically states that 'the United States Government is not precluded from receiving or holding copyrights transferred to it by assignment, bequest, or otherwise'.

¹²⁴ See further, <http://cgp-egc.gc.ca/copyright/agreement-e.html>.

¹²⁵ Section 105 does not apply to works of the United States Postal Service: see *Legislative history for Copyright Act of 1976: Notes of the Committee on the Judiciary*, House Report No 94-1476 (1994).

¹²⁶ *Notes of the Committee on the Judiciary*, House Report No 94-1476 (1994).

116. The United States Supreme Court has held that copyright does not subsist in primary legal materials based on public policy reasons. For example, in *Banks v Manchester*¹²⁷ the Court held that copyright does not subsist in judgments as they are ‘the authentic exposition and interpretation of the law’. The Court held that given that the law is binding on citizens, and that citizens are presumed to know the law, everyone should have free access to the law. Federal legislative and judicial materials are in the public domain.¹²⁸

117. The Committee notes that the treatment of primary legal materials in US States is far from uniform. Each US State deals with copyright in primary legal materials individually. Many US States claim copyright in primary materials, but the scope of protection varies dramatically. For example, many States protect copyright in compilations of statutes, others claim copyright in statutory codes, one State, Virginia, expressly claims copyright in statutes, and one State, Illinois, expressly places statutes in the public domain.¹²⁹

Other countries

118. The Committee understands that a number of other countries provide protection for various works of their governments, including Belgium,¹³⁰ India,¹³¹ Thailand,¹³² Spain, Israel and Greece.¹³³

119. The Committee understands that in Nordic countries Crown copyright is not recognised.¹³⁴

¹²⁷ 128 US 244 (1888).

¹²⁸ Judgments: *Wheaton v Peters* (1834) 33 US 591. Legislation: *Building Officials & Code Administration v Code Technology* 628 F 2d 730 (1980).

¹²⁹ See further, I Dmitrieva, ‘State ownership of copyrights in primary law materials’ *Hastings Communications and Entertainment Law Journal* vol. 23, 2000, p. 81.

¹³⁰ Belgian Copyright Act 1994, art 8(2).

¹³¹ Indian Copyright Act 1957, art 2k.

¹³² Thailand Copyright Act 1994, s 14.

¹³³ William Patry, ‘Choice of law and international copyright’ *American Journal of Comparative Law* vol. 48, 2000, fn 71.

¹³⁴ Peter Blume, ‘Danish data protection with respect to law libraries’ *International Journal of Legal Information* vol. 31, 2003, p.452.

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 appropriateness of the law

120. This examination of the appropriateness of the law relating to government ownership of copyright material stems from a number of factors:

- there is uncertainty as to how the law operates,
- there is a lack of consistency in policy and practice across Australian jurisdictions,
- the historical basis for government ownership of copyright material has changed,¹³⁵
- competition policy,
- the nature of government operations has changed, with an increase in privatisation and outsourcing, and
- the UK Act on which the Copyright Act is based has been amended to provide a different legal framework.¹³⁶

Options for reform

121. As the Committee has observed elsewhere in this Issues Paper, the approaches to government ownership of copyright material vary widely both in Australia, and overseas. The particular model of administration will influence the effect of government ownership of copyright material.

¹³⁵ See S Ricketson & C Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, Law Book Co, Sydney, vol 1, 2002, 14.215.

¹³⁶ In 1977 the Whitford Committee, *Copyright and designs law: Report of the Committee to consider the law on copyright and designs* recommended the UK crown copyright provisions be repealed (para 600). Legislative amendments were made in 1988.

122. There is a number of factors to take into account when considering who should own copyright in government material, and how it should be exercised. For example:

- the accuracy, integrity and quality of government material,
- the authenticity of official versions of government material,
- the ability of governments to fulfil their responsibilities efficiently and effectively,
- government accountability,
- access to justice,
- the principles of open government, the rule of law and democracy,
- administrative and financial burdens on the government and on taxpayers, and
- competition principles and economic factors.¹³⁷

123. The Committee is aware that when considering these factors in the context of determining who should own copyright in government material, it is important to consider how the copyright owner will manage and control the copyright rights. For example, if the government owns copyright, the weight placed on each factor will vary in accordance with whether the government issues a blanket licence to use the copyright, or requires permission to be sought to use the copyright. If the government issued a blanket licence, the information would be readily available, enhancing access to justice. However, government revenue would be lost. Alternatively, if the government granted access on a permissions basis, administrative and financial burdens would be increased. However, the accuracy and integrity of the information would be more readily ensured. Therefore, it is important to consider how these factors will operate on a practical level.

¹³⁷ See further, Prices Surveillance Authority, *Inquiry into the publications pricing policy of the Australian Government Publishing Service*, Report no. 47, Prices Surveillance Authority, Canberra, 1992, p. 91.

124. As part of its examination of the appropriateness of government ownership of copyright material in Australia, the Committee is interested in exploring options for reform. There are many options for reform, including:

- abolishing crown copyright, and/or crown prerogative, in all circumstances (either vesting copyright privately or placing all material in the public domain),
- abolishing crown copyright, and/or crown prerogative, in different types of material by distinguishing between material produced by the different arms of government,
- retaining crown copyright but making a special exception to copyright infringement for government material,
- retaining crown copyright, and/or crown prerogative, but waiving or licensing it in all circumstances,
- retaining crown copyright, and/or crown prerogative, but waiving copyright in, or allow licences over, certain types of material,
- retaining crown copyright, and/or crown prerogative, but clarifying it through legislative amendment, and
- retaining the current legislation but improving the administration of crown copyright, and/or crown prerogative.

125. In addition, factors from the models found in other jurisdictions could be incorporated into Australia law (see above paras 89-119).

Issue 18: The Committee seeks your view as to options for reform, legislative or otherwise, and the costs and benefits of those options.

Issue 19: The Committee seeks your views as to any transitional issues arising out of the options for reform.

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

Appendix A- Terms of reference

Ownership of copyright by the Commonwealth, States and Territories ('the Government') is dealt with in Part VII of the *Copyright Act 1968* (Cth).

Under this Part, the Government is the owner of copyright in any work, film or sound recording made by, or under the direction or control of, the Government. The Government is also the owner of copyright in any work first published by, or under the direction or control of, the Government. In addition, copyright subsists in material which would not otherwise be copyright by virtue of it being made by, or under the direction or control of, the Government. These provisions are subject to any agreement with the author or maker of the copyright material otherwise assigning copyright.

The Government also has a prerogative right in the nature of copyright, which is preserved under s 8A of the Act and is not affected by other provisions of the Act.

Other countries take widely differing approaches to protection of material produced by governments. Within Australia there is a variety of States' practices in relation to management and control of copyright material.

In 2000 the Review of Intellectual Property Legislation under the Competition Principles Agreement (the Ergas Committee) recommended that s 176 of the Copyright Act be amended to ensure that the Government is not provided with preferential treatment compared with other parties.¹³⁸ The Government's response to this recommendation supported the objective of eliminating unjustified preferential treatment, but opted to develop best practice policy guidelines rather than amend the Act. In addition, calls have been made for the amendment of s 177 of the Act. This section vests copyright ownership in the Government if it is the first to publish, or if first publication occurs under the direction or control of the Government.

1. Against that background, the Copyright Law Review Committee (the Committee) is to inquire into and report on the appropriateness of the law in Australia in relation to government ownership of copyright material, with particular regard to:
 - (a) the appropriate scope and definition of 'the Commonwealth or a State' and whether statutory bodies established indirectly under the legislation of the Commonwealth, States and Territories that have legal capacity to acquire, hold and dispose of real or personal property should be treated differently to those that do not, for the purposes of copyright ownership,
 - (b) the extent to which statutory bodies that are emanations or agencies of government have entered into agreements with the government for

¹³⁸ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement*, September 2000, p. 114.

assignment to them of copyright in existing and future materials produced by them,

- (c) whether the Copyright Act should make express provision vesting copyright in materials made by, or under the direction or control of, the Parliament of the Commonwealth, a State or Territory in that Parliament,
- (d) whether the prerogative rights in the nature of copyright subsisting in legislation should be clarified or replaced by legislation defining the nature of copyright in such materials and vesting it in the Government, and
- (e) whether the licence in s 182A to reproduce legislative materials and the decisions of courts and tribunals should be expanded to allow multiple reproduction.

2. In doing so the Committee will consider:

- (a) the extent and appropriateness of reliance by government on copyright to control access to, and/ or use of, information,
- (b) the underlying social and economic problems government ownership of copyright seeks to address,
- (c) the social and economic objectives of government ownership of copyright material,
- (d) the implications of privatisation of government bodies/agencies, and outsourcing of government functions, for ownership and public right of access to copyright material produced as part of a government function,
- (e) international comparisons,
- (f) the effect of new technologies,
- (g) constitutional issues, if any,
- (h) legislative and non-legislative options for reform,
- (i) the costs and benefits of the options for reform on the different groups affected,
- (j) a preferred arrangement for government ownership of copyright material, if any, in light of the objectives set out in (c),
- (k) a strategy to implement and review the Committee's preferred option, and

- (l) any other incidental matters which are able to be addressed within the time frame for the reference.
3. In undertaking the inquiry the Committee will have regard to:
 - (a) any amendments to the Copyright Act that are introduced into Parliament, or which the Commonwealth announces are proposed to be introduced or are being considered,
 - (b) the recommendations and findings of relevant Government reviews or inquiries and any reports by or views of relevant expert advisory bodies and other interests,
 - (c) Australia's relevant international obligations, including those in treaties and other agreements to which Australia is considering becoming a party,
 - (d) the role and nature of government and the need for government to be able to be accountable and fulfil its responsibilities efficiently and effectively,
 - (e) the approach of each Australian government to ownership of copyright material,
 - (f) the role of councils of law reporting in the exercise of copyright in judgments and decisions of courts and tribunals,
 - (g) the need to analyse and, as far as practicable, quantify the benefits, costs and overall effects of the options identified by the Committee in light of the principle that legislation which restricts competition should be retained or enacted only if the benefits to the community as a whole outweigh the costs, and if the objectives of the legislation can be achieved only by restricting competition,
 - (h) the effect on the operation and complexity of any future copyright legislation, including any transitional provisions, and
 - (i) the policy that the compliance cost and paperwork burden on small business should be reduced where feasible.
4. In undertaking the review, the Committee is to advertise widely and consult with key interest groups and affected parties.
5. In undertaking the review and preparing its report and associated recommendations, the Committee is to report to the Attorney-General by 4 December 2004.

Appendix B- NSW Waivers

The Hon John Hannaford MLC, Attorney General, 'Notice: Copyright in judicial decisions' *NSW Government Gazette* No.23 (3 March 1995) p. 1087

Notice: Copyright in judicial decisions

Recognising that the Crown has copyright in decisions of the courts and tribunals of New South Wales, including but not limited to prerogative rights and privileges of the Crown in the nature of copyright, and that it is desirable in the interests of the people of New South Wales that access to such decisions should not be impeded except in limited special circumstances:

I, The Honourable John Hannaford, Attorney General for the State of New South Wales, make and publish this instrument on behalf of the State of New South Wales.

Definitions

1. In this instrument:

- “authorisation” means the authorisation granted by this instrument;
- “copyright” includes any prerogative right or privilege of the Crown in the nature of copyright;
- “Council” means the Council of Law Reporting established by the Council of Law Reporting Act 1969 of New South Wales;
- “judicial decision” means:
 - (a) a judgment, order or award of a State court; or
 - (b) the reasons for any judgment, order or award given by the State court or a member of the State court, that has or have been publicly delivered, made or given;
- “State” means the State of New South Wales, and includes the Crown in right of the State of New South Wales;
- “State court” means:
 - (a) any court constituted or continued by or under a law of New South Wales; or
 - (b) any tribunal or other body constituted or continued by or under a law of New South Wales and exercising judicial or industrial arbitration functions.

Authorisation

2. Any publisher is by this instrument authorised to publish and otherwise deal with any judicial decision, subject to the following conditions:
- (a) copyright in judicial decisions continues to reside in the State;
 - (b) the State reserves the right at any time to revoke, vary or withdraw the authorisation if the conditions of its grant are breached and otherwise on reasonable notice;
 - (c) any publication of material pursuant to the authorisation must not indicate directly or indirectly that it is an official version of the

- material or that it is a version of the material published by or for the Council or any other law reporting agency of the State;
- (d) any publication of material pursuant to the authorisation must not:
- include any headnote or other summary of a judicial decision (or any summary of submissions) prepared by or for the Council or other law report agency, except with the further authority of the Council or agency; or
 - reproduce any footnotes, comments, case lists, cross-references or other editorial material in any report of a judicial decision prepared by or for the Council or agency, except with the further authority of the Council or agency;
- (e) the arms of the State must not be used in connection with the publication of material pursuant to the authorisation, except with the further authority of the Governor (acting with the advice of the Executive Council) or of the Attorney General;
- (f) any publication of material pursuant to the authorisation is required to be accurately reproduced in proper context and to be of an appropriate standard.

Non-enforcement of copyright

3. The State will not enforce copyright in any judicial decision to the extent that it is published or otherwise dealt with in accordance with the authorisation. For this purpose, the authorisation has effect as a licence binding on the State.

Revocation, variation or withdrawal of authorisation

4. Any revocation, variation or withdrawal of the authorisation may be effected generally or in relation to specified publishers or specified classes of publishers. The authorisation may also be revoked, varied or withdrawn in relation to specified judicial decisions or specified classes of judicial decisions. Any such revocation, variation or withdrawal may be by notice in the New South Wales Government Gazette, or by notice to any particular publisher, or in any other way as determined from time to time by the Attorney General.

Unauthorised Documents Act 1922

5. Attention is drawn to the Unauthorised Documents Act 1922 of New South Wales, which restricts the use of the State coat of arms.

Copyright Act 1968 of the Commonwealth

6. Nothing in this instrument affects the rights of any person (other than the State) under the Copyright Act 1968 of the Commonwealth. In particular, attention is drawn to section 182A of that Act, which gives any person the right to make one copy, by reprographic reproduction, of a judicial decision.

Dated at Sydney this 28th day of February, 1995.

The Hon John Hannaford
Attorney General

The Hon JW Shaw QC, MLC, Attorney-General, 'Notice: Copyright in legislation and other material' *NSW Government Gazette* No. 110 (27 September 1996) p. 6611

Waiver of Crown Copyright in NSW

Notice: Copyright in legislation and other material

Whereas:

- (1) it is recognised that the Crown has copyright in the legislation of New South Wales and in certain other material, including but not limited to prerogative rights and privileges of the Crown in the nature of copyright, and that it is desirable in the interests of the people of New South Wales that access to such legislation and material should not be impeded except in limited special circumstances, and
- (2) a notice relating to such copyright was published in Government Gazette No 94 of 27 August 1993, and
- (3) it is expedient to extend the authorisation to publish and otherwise deal with such legislation and material, as provided for in that notice:

I, The Honourable J W Shaw QC, MLC, Attorney General for the State of New South Wales, make and publish this instrument on behalf of the State of New South Wales.

Definitions

1 In this instrument:

“authorisation” means the authorisation granted by this instrument.

“copyright” includes any prerogative right or privilege of the Crown in the nature of copyright.

“legislative material” means:

- (a) Acts of the Parliament of New South Wales, and
- (b) statutory rules within the meaning of the Interpretation Act 1987, and
- (c) environmental planning instruments within the meaning of the Environmental Planning and Assessment Act 1979, and
- (d) proclamations or orders made under an Act of the Parliament of New South Wales and published in the Government Gazette, and
- (e) admission rules made under the Legal Profession Act 1987 and rules made by the costs assessors' rules committee under section 208R of that Act, and
- (f) any other instruments that are required under any law to be made, approved, or confirmed by the Governor or a Minister of State for New South Wales and that are published in the Government Gazette, and
- (g) provisions applying as a law of New South Wales, by virtue of an Act of the Parliament of New South Wales, and
- (h) any of the above in the form in which they are officially printed or reprinted, and with or without the inclusion of further amendments duly made, and
- (i) official explanatory notes and memoranda published in connection with any of the above, and
- (j) tables of provisions, indexes or notes published with any of the above.

“State” means the State of New South Wales, and includes the Crown in right of the State of New South Wales.

Authorisation

- 2 Any publisher is by this instrument authorised to publish and otherwise deal with any legislative material, subject to the following conditions:
- (a) copyright in the legislative material continues to reside in the State,
 - (b) State reserves the right at any time to revoke, vary or withdraw the authorisation if the conditions of its grant are breached and otherwise on reasonable notice,
 - (c) Any publication of material pursuant to the authorisation must not indicate directly or indirectly that it is an official version of the material,
 - (d) the arms of the State must not be used in connection with the publication of material pursuant to the authorisation, except with the further authority of the Governor (acting with the advice of the Executive Council) or of the Attorney General,
 - (e) any publication of material pursuant to the authorisation is required to be accurately reproduced in proper context and to be of appropriate standard.

Non-enforcement of copyright

- 3 The State will not enforce copyright in legislative material to the extent that it is published or otherwise dealt with in accordance with the authorisation. For this purpose, the authorisation has effect as a licence binding on the State

Revocation, variation or withdrawal of authorisation

- 4 Any revocation, variation or withdrawal of the authorisation may be effected generally or in relation to specified publishers or specified classes of publishers. The authorisation may also be revoked, varied or withdrawn in relation to specified legislative material or specified classes of legislative material. Any such revocation, variation or withdrawal may be by notice in the Government Gazette, or by notice to any particular publisher, or in any other way as determined from time to time by the Attorney General.

Unauthorised Documents Act 1922

- 5 Attention is drawn to the Unauthorised Documents Act 1922, which restricts use of the State coat of arms.

Copyright Act 1968 of the Commonwealth

- 6 Nothing in this instrument affects the rights of any person (other than the State) under the Copyright Act 1968 of the Commonwealth.

Previous instrument

7 This instrument is intended to replace the instrument published in Gazette No 94 of 27 August 1993 in relation to copyright, and accordingly the authorisation granted by the previous instrument is subsumed by the authorisation granted by this instrument. However, this instrument does not affect any rights or liabilities accrued or accruing under the previous instrument.

Dated at Sydney this 17th day of September 1996

The Hon J W Shaw QC, MLC
Attorney General