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***Response to  
Copyright Law Review Committee  
Issues Paper on Crown Copyright***

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**March 2004**

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## Australian Copyright Council

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1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policy.
2. Some of the organisations affiliated with the Australian Copyright Council have made separate submissions responding to the Issues Paper on Crown Copyright.

## Summary of our position

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3. In summary, our position is as follows:
  - for material created in the future:
    - ss 176(2), 177 and 178(2), which grant preferential treatment in relation to first ownership of copyright to the Commonwealth and State governments, should be repealed;
    - first ownership of copyright should be determined by the same provisions as determine first ownership of copyright in materials not connected to a government;
    - it may, however, be necessary to specific provisions relating to:
      - material created by officers of governments in the course of their duties, but not covered by s35(6);
      - parliamentary material (such as legislation and parliamentary reports), and judgments of courts;
    - the statutory provisions and common law relating to Crown prerogative could be repealed;
  - the application of ss176 to 178 to existing material should be clarified, particularly in relation to which entities form part of the Commonwealth and State governments.
  - ss 176(1) and 178(1), which relate to subsistence of copyright, would appear to be no longer necessary and, if so, should be repealed;
  - material in which governments own copyright should be protected for the same periods as material in which copyright is owned by others (this could apply to both existing material in which copyright subsists and to future material);
  - if materials such as legislation and judgments are to be protected by copyright, s182A should be extended to allow the making of multiple copies and other uses of legislation and judgments, subject to conditions relating to maintenance of the accuracy and integrity of the material;
  - it may also be appropriate for s182A to apply to other government material such as public records, national curriculum material and parliamentary reports.

## Reasons for position

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### Preferential treatment in relation to first ownership

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4. The original justification for Crown copyright appears to be that copyright subsist in, and the Crown control the use of, materials which were “governmental” in nature. It appears that the original provision dealing with Crown ownership, introduced in 1911, was intended to be limited in scope, applying to material such as reports of Parliament and Royal Commissions, reports of government inspectors, Acts of Parliament, charts and ordnance maps.<sup>1</sup>
5. The expanding role of governments has meant that a provision which initially had a quite limited effect now applies much more broadly. There is no distinction in application between material which is “governmental” in nature, and other material which is not. In addition, the emergence of a variety of statutory authorities and other government-related entities means that the current provisions apply to a great number of entities other than government departments.
6. In our view, the provisions which give preferential treatment to governments (ss176(2), 177 and 178(2)) should be repealed, for reasons which include the following:
  - the range of materials covered by the provisions is vastly broader than originally envisaged;
  - the entities covered by the provisions now include a large range of statutory bodies and agencies in addition to the government departments originally envisaged;
  - determining whether a non-departmental entity is or is not covered by the provisions can be a difficult legal issue;
  - the unreasonable lack of certainty about the application of the first ownership provisions results in expense to the parties involved; and
  - a lack of awareness of the provisions can result in unintended consequences: for example, it not widely known that a licence to a government entity to first publish results in a transfer of copyright to that government.<sup>2</sup>
7. As noted in the CLRC Issues Paper, repeal of these provisions was recommended by the Intellectual Property and Competition Review Committee in its *Review of Intellectual Property Legislation under the Copyright Act* (September 2000).
8. Under our proposal, a government would be the first owner of copyright:
  - in any material in which the future copyright had been assigned (s197);
  - in the following, subject to any agreement to the contrary between the relevant parties:
    - works made by its employees (s35(6));

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<sup>1</sup> See Copinger and Skone James, *The Law of Copyright*, 8<sup>th</sup> ed, (London, Sweet & Maxell, 1948) at pp243–245.

<sup>2</sup> The effects of the provision can also be rather arbitrary. For example, an organisation which publishes its submission to the CLRC, for example on its own website, before the CLRC publishes it will retain copyright. On the other hand, an organisation which wants to publish its own submission after the CLRC has published it needs a licence from the Commonwealth to do so.

- commissioned portraits and engravings (s35(5));<sup>3</sup>
  - films and sound recordings made pursuant to agreements for valuable consideration (ss 97(3) and 98(3));
  - films and sound recordings of which the government was the “maker” (ss97(2) and 98(2)); and
  - published edition copyright where the government is the publisher (s100); and
  - a broadcast made by a government (s99).<sup>4</sup>
9. As noted above, there may need to be a special provision relating to material made by officers of governments in the course of their duties, as this material may not be covered by s35(6).
10. There may also need to be specific provisions dealing with ownership of copyright in material produced in connection with parliamentary activities (such as legislation and parliamentary reports) judgments.

### **Provisions relating to subsistence**

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11. Given the various connecting factors for copyright subsistence, and the large number of countries whose nationals are now entitled to national treatment under the Copyright (International Protection) Regulations, and in which first publication is a connecting factor for subsistence, we were unable to find examples of material which would not be protected by copyright but for ss176 to 178. We therefore think that ss176(1) and 178(1) could be repealed.
12. Given that the recognition of another country in connection with subsistence generally results in copyright protection for existing as well as future material, it may not be necessary to introduce transitional provisions in relation to ss176(1) and 178(1), as the practical situations in which copyright would not otherwise subsist may be negligible.

### **Duration of protection**

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13. In our view, the period of protection for materials in which a government owns copyright should be the same as for other material. Public access to government materials is better addressed by exceptions to infringement than by unnecessarily complicated duration periods for different types of material.
14. The recently adopted Australia/US free trade agreement would appear to require that duration of protection be one of the following:
- 70 years from the author’s death;

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<sup>3</sup> Under s35(5), the commissioning party owns copyright in a commissioned portrait or engraving. The provision relating to commissioned photographs for private and domestic purposes would appear irrelevant in this context.

<sup>4</sup> To be protected by copyright, a “broadcast” must be a communication to the public by a broadcasting service, as that term is defined in the *Broadcasting Services Act 1992* (s10(1)). The first owner of copyright is the maker (s99), who is the person who provided the broadcasting service by which the broadcast was delivered (s22(5)). As noted in the Issues Paper, the ABC has been held to not be part of the Crown, and we assume SBS is in a similar position.

- 70 years from first publication; or
  - 70 years from creation, if the work is not published within 50 years from creation.<sup>5</sup>
15. According to the Government's guidelines on the free trade agreement, these duration periods would only apply to future material, and to existing material still protected by copyright at the date of implementation of the agreement.<sup>6</sup>
16. We would favour a simplification of the rules of duration in relation to both existing and future material, with public access addressed by exceptions to infringement. It may not be necessary to preserve differential duration periods for existing Crown material.

### **Prerogative rights**

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17. The rationale for prerogative rights would appear to no longer apply. In addition, there appears to be a great deal of uncertainty about the application of the provisions.
18. We think that governments should be obliged to ensure that certain materials such as legislation and judgments are freely and easily available to the public. The Copyright Act should assist with this obligation. The Crown prerogative, however, is an outdated and uncertain mechanism for doing so. We think it could be repealed from the Copyright Act and that the common law could also be repealed. We note that it is not clear that the Commonwealth could repeal the common law in relation to State and Territory prerogative rights, and that such repeal may need to be done by the States and Territories themselves.
19. In our view, there would be sufficient assistance, from other provisions we have recommended for inclusion in the Copyright Act, for governments to ensure public access to certain material.

### **Preferential treatment for governments for existing material**

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20. In our experience, there is a great deal of uncertainty about which entities are and are not part of the Commonwealth, State or Territory governments for the purposes of first ownership of copyright. We have run training sessions on the government ownership and use provisions in the Copyright Act for the last four years, and have received many enquiries from entities uncertain about whether they are covered by the provisions, and therefore whether or not the training sessions are relevant to them. In many cases, they have had difficulty getting advice about whether or not they are covered by the provisions. The legal status of such entities can be complex, particularly where their status may have changed (for example, as a result of privatisation).
21. At the very least, it would be useful to be able to get access to a list of government-relates entities which have been advised that they are or are not part of the Commonwealth, or a State or Territory government for the purposes of the first

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<sup>5</sup> Under s180, artistic works (other than engravings or photographs) made, or first published, under the direction or control of a government are protected for 50 years from making. Under the FTA, the period of protection would need to be measured from the author's death or from first publication.

<sup>6</sup> According to government representatives, the proposed implementation date is 1 January 2005.

ownership and/or government use provisions in the Copyright Act, and the outcome of that advice. More useful would be a list, for example in the Copyright Regulations, of all entities covered by the provisions. In the UK, Crown bodies are listed on the HMSO website.<sup>7</sup> It also lists bodies which are not Crown bodies.<sup>8</sup>

22. The Issues Paper suggests that local governments may be covered by the first ownership provisions. In our view, the first ownership provisions do not generally apply to local governments.<sup>9</sup> This is just one of the areas of uncertainty in relation to application of the provisions.

### Public access to government material

23. In our view, the objectives of copyright protection do not apply to materials such as legislation and judgments. There is not a need to provide an incentive to produce these materials; governments have a duty to produce them and ensure that they are made available to the public. In addition, it is difficult to argue that legislation and judgments are an appropriate source of revenue for governments.
24. In our view, such material should be freely available. This could be achieved by providing that such materials are in the public domain. Alternatively, it could be achieved by providing that they are protected by copyright but subject to a broader exception to infringement than currently applies. The latter course may be preferable if copyright is to be used as a mechanism for ensuring the authenticity of the material.
25. Other material which could be covered by such an exception are listed in the UK guidelines relating to use of government materials. They include public notices; birth, deaths and marriage certificates; and national curriculum materials.

<sup>7</sup> [http://www.hmsso.gov.uk/copyright/policy/c\\_copyright/crown\\_bodies.htm](http://www.hmsso.gov.uk/copyright/policy/c_copyright/crown_bodies.htm)

<sup>8</sup> [http://www.hmsso.gov.uk/copyright/policy/c\\_copyright/crown\\_bodies.htm#noncrown](http://www.hmsso.gov.uk/copyright/policy/c_copyright/crown_bodies.htm#noncrown)

<sup>9</sup> As far as we are aware, all local governments exist under statute. (We are not aware of whether or not any local governments might operate under letters patent and we have not considered the extent to which our comments below might relate to any such local government; we are happy to provide further comment on this if the Committee wishes.)

Whether or not a particular entity established by statute is “the Crown” must be judged having regard to the criteria discussed by the High Court in *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282.

It is clear from that case that whether or not a particular entity is “the Crown” may vary according to the terms of the relevant statute or by factual criteria. We particularly note at 291 of that case, Gibbs CJ (with whom the other members of the Court agreed) stated that the legal authorities display “a strong tendency to regard a statutory corporation formed to carry on public functions as distinct from the Crown unless Parliament has by express provision given it the character of a servant of the Crown”.

We are not aware of any copyright case in which the issue of whether or not a local government is “the Crown” has been considered. However, there are cases relating to other areas of law which have considered the issue. For example, Lehane J in *Bodney v Westralia Airports Corporation* (WAG 6009 of 1996) found that Guildford Municipality was not “the Crown” under the Municipal Corporations Act 1906 (WA); and the Sydney City Council was found by the New South Wales Court of Appeal not to be “the Crown, or an arm of the Crown, or an emanation of the Crown, or an agent of the Crown” (per Meagher JA at 521) under the *Local Government Act 1993* (NSW) (*Sydney City Council v Reid* (1994) 34 NSWLR 506).

In the latter case, the Sydney City Council was found not to be “the Crown” even though it was in several respects subject to significant executive intervention and control.

We also note that *Stack v Brisbane City Council* (1995) 32 IPR 69, which at first blush might appear to run contrary to these cases, should be distinguished: it did not deal with whether the Brisbane City Council is the Crown, but the very different issue of whether or not the Council is “an authority of the State”.

26. In our view, there should be a positive obligation on governments to make material such as legislation and judgments freely available to the public, at least online.
27. Under our proposal, private publishers may rely on the free exception to publish legislation and judgments (as they currently rely on waivers from the Commonwealth, NSW and Northern Territory governments). They may publish these materials together with additional material in which they may own copyright, such as headnotes and annotations.

### **Response to issues in Issues Paper**

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*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?*

28. In our view, governments should generally be in the same position as anyone else in relation to first ownership of copyright, irrespective of the subject matter.
29. As noted above, there may need to be special provisions relating to material created by officers of governments in the course of their duties, and for judgments and parliamentary materials (such as legislation).

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

30. We do not think there are reasons to introduce further complications into the Copyright Act by differentiating the exclusive rights of a government owner of copyright from those of a non-government owner.
31. We do, however, think that there should be exceptions to those exclusive rights in relation to certain materials.

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

32. We do not think there is a need to further complicate the moral rights provisions by introducing particular provisions for governments. We think that the current regime applies appropriately to material in which copyright may be owned by a government. The current regime includes defences for people who act reasonably. The factors for determining whether or not a person acted reasonably include practices covered by voluntary codes of practice.<sup>10</sup>

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<sup>10</sup> We are aware that at least one government department, the Commonwealth Attorney-General's Department, has issued guidelines relating to moral rights in works produced by its employees.

*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:*

- *sections 176 and 178 (works, sound recordings and cinematograph films made by, or under the direction or control of, the government),*

33. As noted above, we think these provisions should be repealed for future material.

- *section 177 (works if published by, or under the direction or control of, the government),*

34. As noted above, we think these provisions should be repealed for future material.

- *section 35(6) (works made pursuant to the terms of employment under a contract of service or apprenticeship)?*

35. We think s35(6) should apply to governments in the same way it applies to other entities. We note that, under section 17, a person employed under the law of the Commonwealth or State is treated as if employed under a contract of service.

*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:*

- *the executive;*
- *the judiciary; and*
- *the legislative.*

36. We note that the UK and US provisions relating to Crown copyright refer to works produced by an officer of the Government, as well as by a servant or employee, in course of his or her duties.

37. It may be desirable that the Australian Copyright Act include a provision vesting in a government first ownership of copyright of works created by an officer of the government in the course of his or her duties.

38. Consideration may need to be given as to whether such a provision is appropriate for all arms of government, and/or whether there may need to be additional provisions addressing ownership of copyright in legislation and judgments.

*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.*

39. If the Crown ownership provisions are to be repealed for future material, this issue does not need to be addressed for future material.

40. For existing material, we think the application of the current provisions needs to be clarified, particularly in relation to which entities are part of the Commonwealth or a State government.

*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?*

41. As noted above, we think there should be no special provisions relating to subsistence and first ownership of copyright for governments, except for the following:
- there may need to be special provisions covering material produced by officers of a government; and
  - there may need to be special provisions for parliaments and courts.

*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?*

42. As noted above, our view is that the period of protection for materials in which a government owns copyright should be the same as for other material.

*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?*

43. In our view, exceptions to infringement should apply to material in which governments own copyright in the same way that they apply to other material. The fair dealing provisions, for example, should apply to material in which copyright is owned by the government in the same way that they apply to material in which copyright is owned by anyone else.
44. We think there should be exceptions allowing the use of certain material such as legislation and judgments, but that these exceptions apply according to the nature of the material, rather than according to who owns copyright. For example an exception which allows the use of a judgment applies irrespective of whether the copyright is owned by the judge, or the court or anyone else.

*Issue 10: The Committee seeks your views as to whether the licence in s182A 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?*

45. We would support expansion of the exception to allow multiple copies, subject to conditions intended to ensure the authenticity of the material.
46. We note that the conditions in the NSW and Northern Territory waivers, and the UK guidelines for use of government material, may provide a useful starting point for review of the conditions in s182A.

*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?*

47. As noted above, we think the prerogative right could be repealed.

*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.*

48. Acquisition on other than just terms may need to be considered if there were to be amendments to the first ownership provisions for existing material. We do not think that Constitutional issues arise from the proposals we have made in this submission.

*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?*

49. It appears from the Issues Paper and our own experience and research that the management of copyright in government material varies widely, including amongst departments and other entities of the same government. We are also aware that many governments are in the process of devising and implementing copyright management policies, and articulating the bases of these policies.

50. We think there are advantages in adopting a uniform approach, from the perspective of both the governments and the users.

51. In our view, s182A has too narrow an operation, and should be amended to operate more widely, possibly in a similar manner to the NSW Crown waiver and/or the UK guidelines for use of Crown copyright. In particular we think:

- it should allow any number of copies, not just a single copy;
- it should apply irrespective of whether or not the copy is sold;
- it should not be limited to reproduction (and, in particular, should allow communication); and
- there may need to be more detailed conditions relating to accuracy and integrity, as there are in the NSW waiver and the UK guidelines.

52. We query whether it is appropriate for governments to raise revenue from materials such as legislation and judgments, which various arms of government are obliged to produce as part of their core functions.

53. It may be desirable that s192A also cover other materials which are governmental in nature and should be easily available to the public, such as those covered by the UK guidelines:

- Public Records;
- Court Forms;
- Birth, Death and Marriage Certificates;
- National Curriculum Material, and Literacy and Numeracy Strategy Documents; and
- Government Press Notices

*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.*

54. We think the policy issues relate more to the nature of the material than to who owns copyright. There are different policy considerations for material which is governmental in nature and to which public access is important, such as legislation and judgments, than for material which is not governmental in nature but in which copyright is owned by a government (such as computer software, or a biography or the style guides formerly published by AGPS).
55. While the usual rationales for copyright do not apply to material such as legislation and judgments, copyright may be an appropriate mechanism for ensuring that the use of these materials meets certain conditions such as complete and accurate representation. A government may be able to take an action for copyright infringement if material is used without meeting these conditions.
56. We acknowledge, however, that these conditions could be imposed by other means.

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

- *does copyright continue to be relevant?*

57. As noted above, one option is to allow for public access by providing that certain materials are not protected by copyright at all. An alternative is to provide copyright protection, on the basis that it can assist to ensure the accuracy and integrity of the material, but subject to a broad exception allowing use of the material.

- *how does one safeguard against the distortion or inappropriate use of government material made available through new technologies?*

58. As for other material, this issue can be addressed by legal obligations and technological protections. The free use of government material under s182A should be subject to conditions aimed at protecting the authenticity of the material. Governments may also use technological measures to safeguard the authenticity of the material.

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

59. There is no statement in the issues paper of what the policy objectives behind government ownership of copyright might be.
60. However, we think that technological developments, particularly the Internet, assist governments to carry out their duty to make government material available to the public.

*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:*

- *executive arm of government?*
- *legislative arm of government?*
- *judicial arm of government?*

61. As noted above, one option is to provide that certain government materials are in the public domain, as is the case in the US and New Zealand. Alternatively, these materials could be subject to a free exception to copyright infringement. For the purposes of the exception, it should not matter who owns copyright.

*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.*

62. We think that the UK model provides a useful starting point, but that the existence of State and Territory governments in Australia mean that the voluntary model may be difficult to achieve in practice. In our view, it would be useful to refer to the UK guidelines from the UK when reviewing the scope of s182A.

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

63. Our views are summarised at the beginning of this submission, and detailed in subsequent parts of the submission.

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

64. As noted above, transitional issues may arise in relation to changes made to:

- subsistence of copyright under ss176(1) and 178(1);
- provisions relating to first ownership; and
- periods of protection.

65. It may not be necessary to introduce transitional provisions in relation to ss176(1) and 178(1), as the practical situations in which copyright would not otherwise subsist may be negligible.

66. We think that ss176(2), 177 and 178(1) should be repealed only in relation to future works, but that the operation of those provisions should be clarified in relation to existing works. In particular, there need to be changes so that it is much easier to determine which entities are covered by those provisions.

67. The transitional issues for duration are affected by the Australia/US free trade agreement. The period of protection for existing material would be extended to comply with the FTA. There may, however, need to be a saving provision for people who have entered into contracts or arrangements based on the old law.

68. We do not think there are any transitional issues relating to the introduction of new exceptions, or the extension of existing exceptions, if their application is only to future acts.

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

69. The determination of which entities are and are not part of a government is equally problematic under the government use provisions in the Copyright Act (s183) as it is for government ownership. The scope of the government use provision has also expanded with the creation of a large variety of government-related entities. In addition, there is uncertainty about what “services of the Commonwealth or a State” means in s183, with some entities applying a much more expansive interpretation than others. It is questionable whether the broad scope of the provision is consistent with international treaty obligations.
70. There has not been a review of the government use provisions, and we ask the Committee to recommend that there be such a review.

Libby Baulch  
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March 2004