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Reconciling Crown Copyright and Reuse of Government Information: An Analysis of the CLRC Crown Copyright Review

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Abstract

Despite the far-reaching implications of the recommendations made by the Copyright Law Review Committee in its final Crown Copyright report in April 2005, little attention, either academic or otherwise, has been given to these suggested changes. Given the increasing emphasis on the importance of reusability of government information, the ramifications of the CLRC recommendations must be evaluated to establish whether these proposals are the best approach to fulfilling both present and future demands for this information. This article maps the traditional arguments in favour of and against Crown copyright before discussing reusability of public sector information and the impact of Crown copyright on this growing practice. It continues with an analysis of the major recommendations made by the CLRC in order to evaluate the effect and impact of these proposals on both the reuse issue and the Australian copyright landscape more generally.

RECONCILING CROWN COPYRIGHT AND REUSE OF GOVERNMENT INFORMATION: AN ANALYSIS OF THE CLRC CROWN COPYRIGHT REVIEW

Catherine Bond¹

ABSTRACT

Despite the far-reaching implications of the recommendations made by the Copyright Law Review Committee in its final Crown Copyright report in April 2005, little attention, either academic or otherwise, has been given to these suggested changes. Given the increasing emphasis on the importance of reusability of government information, the ramifications of the CLRC recommendations must be evaluated to establish whether these proposals are the best approach to fulfilling both present and future demands for this information. This article maps the traditional arguments in favour of and against Crown copyright before discussing reusability of public sector information and the impact of Crown copyright on this growing practice. It continues with an analysis of the major recommendations made by the CLRC in order to evaluate the effect and impact of these proposals on both the reuse issue and the Australian copyright landscape more generally.

I. INTRODUCTION

The issue of Crown copyright in Australia is one that, on the surface, appears to have failed to permeate either the legal or public psyche to any substantial degree. Perhaps it is therefore fair to describe it as a “musty concept that is not overly pressing, in the face of other attention grabbers.”² The incidence of Crown copyright analysis in legal scholarship is also testimony to this lack of interest, with the issue appearing only sporadically in academic literature over the years.³ However, the enormous attention that the Copyright Law Review Committee (CLRC) review on Crown copyright garnered at the time indicated that such a proposition may be incorrect. The CLRC received a considerable number of written submissions from a variety of interested

¹ BMedia LLB (Hons) (*Macq*), PhD Candidate, Faculty of Law, University of New South Wales. I would like to thank the anonymous referee for their helpful comments, in addition to Professor Graham Greenleaf, Abi Paramaguru, Dominique Dalla Pozza, Alana Maurushat, David Vaile, Sophia Christou and Nigel Bond for their comments on earlier versions of this paper. Thanks also to Alison Shames and Ben Atkinson.

² EF Judge, ‘Crown Copyright and Copyright Reform in Canada’ in M Geist (ed) *In the Public Interest: The Future of Canadian Copyright Law*, Irwin Law, Canada, 2005, p 550 at 558.

³ For example, A Monotti, ‘Nature and Basis of Crown Copyright in Official Publications’ [1992] 9 *EIPR* 305; R Gellman, ‘Twin Evils: Government Copyright and Copyright-Like Controls Over Government Information’ (1994) 45 *Syr LR* 999; Special Feature on Open Access to Legal Information (1996) 2 *JILT* <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1996_2/special>; J Gilchrist ‘The Role of Government as Proprietor and Disseminator of Information’ (1996) 7 *AJCL* 1; Special Feature on Crown Copyright in Cyberspace (1996) 10 *IPJ* 131; S Saxby ‘Information Access Policy and Crown Copyright Regulation in the Electronic Age – Which Way Forward?’ (1998) 6 *IJL & IT* 1; P Leith ‘Owning Legal Information’ [2000] 8 *EIPR* 359; B Atkinson ‘The CLRC’s Report on Crown Copyright’ (2005) 23(1) *Copy Rep* 13; S Saxby ‘Crown Copyright Regulation in the UK: Is the Debate Still Alive?’ (2005) 13(3) *IJL & IT* 299; Judge, above n 2.

parties⁴ in response to its Discussion and Issues papers and held a number of well-attended forums throughout Australia while undertaking its review.⁵

The final report of the CLRC review was released in April 2005. The CLRC made sixteen recommendations in total, with the combined effect of these recommendations likely to have a significant impact on Crown copyright in Australia and how the Federal, State and Territory Governments deal with copyright issues. However, despite the interest evident during the course of the review and the far-reaching implications of the recommendations made by the CLRC, little attention, either academic or otherwise, has been given to the suggested changes.⁶

In this article it is my aim to not only fill this gap, but also to comment on the recommendations against a wider background. While the issue of “access” to government information was at the core of the CLRC review, issues of reusability of this information must also be considered. Crown copyright is arguably a greater inhibitor to reuse of public sector information than mere access to such information. Given the increasing emphasis on the importance of reusability, the ramifications of the CLRC recommendations must be evaluated to establish whether these proposals are the best approach to fulfilling modern demands for this material.

Part II of this article discusses the history of Crown copyright in Australia before considering the arguments for and against the retention of Crown copyright, both in Australia and more generally. Given that this history and traditional arguments tend to couch any discussion of Crown copyright issues, it is important to reflect on these before going to greater detail on issues of reusability and the CLRC review. Part III discusses the increasing emphasis on the importance of reusability of government information and the impact of Crown copyright on this issue. Part IV analyses a number of the recommendations made in the final report of the CLRC in detail in order to reflect on whether the Commonwealth Government should adopt these proposals in light of modern demands for this information. Given the considerable number of recommendations made in the final report, this paper will focus on those proposals most relevant to reusability issues: Crown ownership of copyright, subsistence of copyright in primary legal materials, and Crown copyright management.

II. CROWN COPYRIGHT IN AUSTRALIA

A. *A History of Crown Copyright in Australia*

One of the major criticisms of the final report of the CLRC must be its failure to sufficiently investigate the origins for Crown copyright in Australia. Given its

⁴ See <http://www.clrc.gov.au/agd/WWW/ClrHome.nsf/Page/Overview_Reports_Crown_Copyright>.

⁵ Copyright Law Review Committee, (CLRC) *Crown Copyright*, <<http://www.clrc.gov.au/agd/WWW/ClrHome.nsf/AllDocs/4F25A124B6E6F1A4CA256FDB0015D5A7?OpenDocument>>. All references to specific pages of the CLRC final report are references to pages of the PDF of the report, which is available at this site.

⁶ Exceptions include Atkinson above n 3; M Cooley ‘Crown Copyright Update’ (2005) 18(3) *AIPLB* 49; R Chua, ‘The CLRC Crown Copyright Report: Practical Implications for Agencies’ (2006) 18 *Commercial Notes* 1.

mandate on this issue, the CLRC was arguably the most qualified organisation in Australia to thoroughly investigate the history of Crown copyright and both wider and specific governmental reactions to its development over the past century. While the CLRC correctly acknowledged that United Kingdom legislation⁷ was the impetus for the inclusion of Crown copyright provisions in the *Copyright Act 1912* (Cth), further investigation into this issue would have given greater depth to the CLRC consultation.

In its discussion on the history of Crown copyright, the CLRC relied heavily on a number of secondary rather than primary sources, utilising these sources to map the history of Crown copyright in England. It was noted that, throughout the 1880s Crown copyright issues received greater attention when “private sector publishers began to realise the commercial potential of some of the titles of more general interest being used by Her Majesty’s Stationery Service” and reproduced these documents accordingly.⁸ The UK Government sought to quash this behaviour by including a notice in the London Gazette, reminding publishers that the Crown could sue for copyright infringement just as any private party could.⁹ The report then discussed Australian law and the way in which all Crown copyright sections featured in Commonwealth copyright legislation since Federation were based on UK provisions. However, rather than focusing solely on the legislation, this historical overview would have benefited from a more detailed examination of the implementation of these provisions and Government views of Crown copyright at the time. Further, in the 1959 Spicer Committee Report, Crown copyright was also briefly mentioned, with the Committee recommending that a provision similar to section 39 of the *Copyright Act 1956* (UK) be implemented.¹⁰ This introduced the somewhat controversial “direction or control” test in Australian law, which I will discuss in more detail below. This test has been repealed in England but remains in Australian law. Thus if one lesson can be drawn from Australian Crown copyright law and policy it is this: Australia follows the United Kingdom, but usually a few steps behind.

In their current form, the Crown copyright provisions are contained in Part VII of the *Copyright Act 1968* (Cth). Division 1 of Part VII addresses Crown ownership of copyright materials, while Division 2 contains eight provisions concerning Crown use of copyrighted materials.

Sections 176 – 178 of the Act provide for the subsistence of Crown copyright in works and other subject matter. Commencing with section 176, this provision of the *Copyright Act* states that where, other than by this section, copyright would not subsist in a literary, dramatic or artistic work, it does pursuant to section 176(1) if it was “made by, or under the direction or control of the Commonwealth or a State.”¹¹ Section 176(2) states that the Commonwealth or a State is the owner of a work made under its direction or control.¹² Section 177 provides that the Crown owns the copyright in any work first published in Australia if this first publication is by, or

⁷ *Copyright Act 1911* (UK).

⁸ G Robbie in CLRC, above n 5, at [3.23].

⁹ *Ibid.*, [3.24].

¹⁰ Committee to Consider What Alterations Are Desirable in the Copyright Law of the Commonwealth (Spicer Committee), *Report of the Committee appointed by the Attorney-General to consider what alterations are desirable in the copyright law of the Commonwealth*, AGPS, Canberra 1959 at paragraph 403; see also CLRC, above n 5, at [3.33] – [3.34].

¹¹ *Copyright Act 1968* (Cth) s 176(1).

¹² *Ibid.*, s 176(2).

under the direction or control of, the Commonwealth or a State.¹³ Section 178 provides for the subsistence of copyright and Crown ownership of sound recordings or cinematograph films “made by, or under the direction or control of the Commonwealth or State.”¹⁴ In addition to these provisions, the Crown will also own copyright in works produced by its employees pursuant to section 35(6) of the Act. However, section 179 states that the Crown ownership of materials may be modified by agreement.¹⁵

Sections 180 and 181 then establish the duration of copyright in Crown works, subject to any contrary agreement: 50 years from first publication for literary, dramatic and artistic works, photographs, sound recordings and cinematograph films¹⁶ or, for works addressed in section 180, if the work remains unpublished, then copyright continues to subsist.¹⁷ Section 182 details the application of Parts III and IV, which contain the general copyright provisions of the Act, to the Crown copyright sections. Section 182A then provides the only exception in the Act allowing usage of Crown copyright materials, permitting a single reprographic reproduction of specified materials, including Acts and judgments.¹⁸

It is these few provisions that were the subject of much debate when the CLRC conducted its Crown copyright review.

B. *Arguments for the Retention of Crown Copyright*

Throughout the history of Crown copyright, numerous arguments have been forwarded in favour or against the existence of government copyright ownership. Both previous literature and the CLRC have touched upon these benefits and criticisms. In order to understand the background to the CLRC review and the issue of Crown copyright more generally, the more compelling of these arguments are discussed below.

1. *Government is no different from other content producers*

Over the last thirty years, the boundaries of copyright protection have expanded further than any individual could have predicted. Today, many types of content are protected and many creators have recourse for infringement under numerous copyright law provisions. Just as, for example, private corporations, educational institutions and individuals can sue (and be sued) for copyright infringement, governments should also be able to rely on the *Copyright Act* where necessary to protect its creations.¹⁹ The same amount of effort and skill are expended on government materials as other creations: therefore copyright should also subsist in these works with the Crown being the appropriate owner.

¹³ *Ibid*, s 177.

¹⁴ *Ibid*, ss 178(1), (2).

¹⁵ *Ibid*, s 179.

¹⁶ *Ibid*, ss 180(1)(b), (2), (3), 181.

¹⁷ For a discussion of the implications that this creates for copyright in government works, see J Bannister, ‘It Ain’t What You Say, It’s The Way You Say It. Could Freedom of Political Expression Operate as a Defence to Copyright Infringement in Australia?’ (1996) 14(1) *Copy Rep* 22 at 25.

¹⁸ *Copyright Act 1968* s 182A.

¹⁹ D Vaver, ‘Copyright and the State in Canada and the United States’ (1996) 10 *IPJ* 187 at 198.

In turn, such a suggestion must be evaluated against the different roles of government and the types of content it produces. For example, there will be a difference between the types of activities undertaken and materials produced by a government in its “business” capacity and its “non-business, non-profit”, effective-running-of-the-state capacity, based on the distinction identified in section 3(1) of the Competition Principles Agreement, an inter-government agreement aimed at promoting competition²⁰ In addition, further distinctions must be made between the types of materials produced by government in its non-profit capacity, including primary legal materials, and other department-developed materials including maps, statistics, pamphlets, photographs and databases.²¹ While Crown ownership of some materials may be appropriate, it may not be in other cases.

2. *Crown copyright ensures the integrity of government materials*

The integrity and accuracy argument is the original rationale for Crown copyright.²² This is based on the premise that, given these works are emanating from a government, the material should be complete, authoritative and accurate. Non-government actors should not be able to alter government works under any circumstances, particularly where this information may be later relied on by other parties. Copyright ownership is therefore imperative in guaranteeing the integrity of government information. Given the importance of some types of government-produced information, for example, security, consumer and legal information, such an argument has merit. It is also a strong reason why Crown copyright is still in existence.²³

It has been suggested that while issues of integrity and accuracy were relevant in the past, government ownership of copyright based on such claims is no longer persuasive, particularly as “government control or licensing does not guarantee accuracy, any more than unlicensed private sector publishing guarantees inaccuracy.”²⁴ It has also been suggested that copyright itself is an ill-suited method for protecting government materials, and that other legislation, for example the *Trade Practices Act 1974* (Cth) or a statutory-based prohibition against inaccurate reproductions, would be suitable where the integrity or accuracy of government-produced material is jeopardised and recourse needs to be taken.²⁵

Again, this argument should also be considered against the two sub-categories of non-business government materials identified earlier. In relation to legal materials, it has been claimed that issues of ensuring accuracy and integrity are easily overcome, given that publishers are unlikely to print incorrect copies of legal materials lest it ruin their

²⁰ *Competition Principles Agreement 1998* s. 3(1); see also ‘NCP Agreements’ <<http://www.ncc.gov.au/activity.asp?activityID=39>>.

²¹ CLRC, above n 5, Table 1 at [2.18].

²² Saxby (2005) above n 3, at 300.

²³ Judge above n 2, at 573.

²⁴ Vaver, above n 19, at 201.

²⁵ G Greenleaf, P Chung and A Mowbray (AustLII), *Crown Copyright in Legal Materials: Strategies to Maximise Public Use of Public Legal Information*, Submission 25 to the CLRC Crown Copyright review, <[http://www.clrc.gov.au/agd/WWW/clrHome.nsf/Page/Present_Inquiries_Crown_copyright_Submissions_2004_Sub_No_25_-_Australasian_Legal_Information_Institute_\(AustLII\)](http://www.clrc.gov.au/agd/WWW/clrHome.nsf/Page/Present_Inquiries_Crown_copyright_Submissions_2004_Sub_No_25_-_Australasian_Legal_Information_Institute_(AustLII))>.

reputation (and eventually their business). It has also been stated that, with regards to judgments “it will be easy and cost-effective for others to check whether a ‘non-official’ version is consistent with the official version available at the courthouse or through a government body or an official website.”²⁶ However, the ease of confirming the accuracy of a version is questionable and the fact that an individual might need to “double-check” a piece of legislation or a judgment appears to defeat the purpose of having primary legal materials accessible through a number of means in the first place, whether Crown copyright subsists in that legislation or not.

C. Arguments Against Crown Copyright

1. Governments do not need the “copyright incentive”

One of the traditional rationales behind the granting of numerous exclusive rights to copyright owners, the “copyright incentive” argument is generally based on the premise that copyright protection for works and other content gives creators an incentive to produce these materials. In a government context, it has been claimed that this argument does not apply on the basis that government produces these works regardless of copyright, especially given some materials may be made pursuant to a statutory requirement or to fulfil a certain departmental function.²⁷ It has also been noted that

“giving the government a copyright will not increase the production or quality of other works...(and) so far as legal material is concerned: judges write as well as, or as badly as, as pithily or longwindedly, whether or not their judgments have copyright.”²⁸

It is debatable, however, whether any significant emphasis should be placed on the “copyright incentive” argument. The validity of the rationale itself is questionable in the modern information economy for a number of reasons. First, for individuals who are (increasingly) choosing to license content under a Creative Commons or similar licence, the copyright incentive argument fails to apply. Second, it is doubtful that the “copyright incentive” argument would also apply to all materials created by private sector producers. Aside from works produced for commercial purposes, many private-sector companies would generate material similar to the types produced by government where there is seen to be no incentive, although an obvious exclusion from this suggestion would be primary legal materials.²⁹ Memos and guidelines, however, would arguably still be produced by private companies without copyright protection, similar to the situation in government.

2. Government works should belong to the greater community

As government is both representative of and funded by the greater community, it has been suggested that these public sector works should belong to the people and

²⁶ Judge above n 2, at 573.

²⁷ C Tullo, ‘Crown Copyright: The Way Forward – Access to Public Sector Information’ (1998) 29(4) *Law Lib* 200.

²⁸ Vaver, above n 19, at 193.

²⁹ WT Stanbury, ‘Aspects of Public Policy Regarding Crown Copyright in the Digital Age’ (1995) 10 *IPJ* 131 at 135.

government should not be able to profit from those who fund it. This argument is probably strongest in relation to primary legal materials. However, while it is understandable that individual users who intend to use government content for informative or educational purposes should not be charged for such usage or only charged the bare cost of reproduction, it is questionable whether for-profit organisations should not be charged where they want to use this information commercially. In turn, distinctions must be drawn between materials that have no value outside government and those that do, where it may be legitimate for government to commercially exploit its intellectual property, which may in turn provide greater revenue for the community.

3. *Crown copyright prevents access to government materials, particularly primary legal materials*

In the majority of Crown copyright literature, a recurring theme is whether Crown copyright prevents access to government information, with particular attention paid to whether it prevents access to primary legal materials. Access to government materials, particularly legislation and judgments, is seen to be “essential in a democracy.”³⁰ The existence of Crown copyright in this information is often viewed as an inhibitor to access, as few can legitimately reproduce the content and make it available to all. Given that one of the final recommendations made by the CLRC was strongly influenced by this argument, it will be discussed further in Part IV.

4. *Crown copyright can be used to stifle free speech*

The final and possibly most potent argument against Crown copyright is that it can be used as a censorship tool and to stifle free speech.³¹ In Australia, whenever this issue is discussed, the High Court decision in *Commonwealth v John Fairfax & Sons Limited*³² (*Fairfax*) is inevitably raised. In that case, the Commonwealth was granted an injunction precluding Fairfax from publishing extracts from two documents produced by the Department of Defence and the Department of Foreign Affairs.³³ The materials were to be published as part of a book and in a number of newspapers.³⁴ The Commonwealth raised a number of claims seeking to prohibit these publications, including disclosure of confidential information, but was only successful on its claim of copyright infringement. In justifying the award of an injunction for copyright infringement, Mason J stated that “the plaintiff’s concern to stop publication of the information in the documents is not a reason for refusing it the protection to which it is entitled.”³⁵

The *Fairfax* decision has been criticised for allowing government to use copyright for the “ulterior purpose” of suppression of documents.³⁶ Since this decision, some

³⁰ J Bannister ‘Open Access to Legal Sources in Australasia: Current Debate on Crown copyright and the Case of the Anthropomorphic Postbox’ (1996) 3 *JILT*
<http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1996_3/bannister/>.

³¹ Vaver, above n 19, 194.

³² (1980) 147 CLR 39.

³³ *Ibid*, at 44.

³⁴ *Ibid*, 44 – 45.

³⁵ *Ibid*, 58; Bannister, above n 17, at 31.

³⁶ J Gilchrist ‘The Role of Government as Proprietor and Disseminator of Information’ (1996) 7 *AJCL* 1, 17; see also Bannister, above n 17; E Barendt, *Freedom of Speech*, 2nd ed, Oxford University Press,

commentators and the CLRC in its final *Crown Copyright* report, either noted or argued that Crown copyright could be used as a method of censorship.³⁷ However, as was noted by Mason J in *Fairfax*, copyright does not protect ideas in publications³⁸ and Fairfax eventually published summaries of the documents.³⁹ The information was eventually disseminated to the public, albeit not in its original form. Therefore, it can be argued that free speech prevailed. Further, it is not only government who may use copyright as a tool for restricting free speech, but also private copyright owners who do not support the views of the user or uses of that content.⁴⁰

Therefore, while in theory Crown copyright could be used as a tool of censorship, in reality, with the exception of the *Fairfax* decision, there have been few opportunities to test whether this is actually the case.

III. REUSABILITY OF PUBLIC SECTOR INFORMATION AND CROWN COPYRIGHT

The arguments outlined above have coloured any discussion of Crown copyright both in Australia and internationally. However, just as the Crown copyright provisions have not remained static, the types of information produced by government and opinions on the value and uses of these materials have also changed. Over the last ten years, there has been a shift from all government information being viewed as a commodity that should be exploited or privatised to an increasing emphasis on the importance of public reusability of this type of information. This change will now be addressed.

A. *The Privatisation and Commodification of Government Information*

Prior to the introduction of digital technologies, the role of government in the production and dissemination of materials was markedly different from today. Rather than being viewed as an active disseminator, government was merely the producer of such materials, with private sector companies then using this data to create products that were sold for profit. This type of arrangement was said to be reflective of the “respective roles” of government production of information and its dissemination.⁴¹ The emergence of digital technologies changed this dichotomy.⁴² Public sector organisations rapidly realised how easy it was to package and distribute material for the financial gain of the organisation. At the same time, there was also a shift in

New York, 2005, p 262; R Burrell and J Stellios, ‘Copyright and Freedom of Political Communication in Australia’ in J Griffiths and U Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses*, Oxford University Press, Oxford, 2005, p. 257, 277 – 278.

³⁷ CLRC, above n 5, p. xxv.

³⁸ *Commonwealth v John Fairfax & Sons* (1980) 147 CLR 39 at 58.

³⁹ Gilchrist above n 36, at 16; CLRC, above n 5, p. xxv; see also M de Zwart, ‘The Future of Fair Dealing in Australia: Protecting Freedom of Communication’ (2007) 4(1) *SCRIPT-ed* 95 <<http://www.law.ed.ac.uk/ahrc/script-ed/vol4-1/dezward.asp>> at 111.

⁴⁰ For an example of this, see the “Free Republic” case in Y Benkler, ‘A Political Economy of the Public Domain’ in R Cooper Dreyfuss, DL Zimmerman and H First (eds) *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, Oxford University Press, New York, 2001, p 267 – 268.

⁴¹ J Pas and L Rechten, ‘The Commercialisation of Government Information and the Proposal for a Directive COM(2002) 207 by the European Commission’ (2002) 9(4) *E LAW* <<http://www.murdoch.edu.au/elaw/issues/v9n4/pas94nf.html>>.

⁴² *Id.*

thinking that all public sector information should be commodified for the benefit of the government. Private sector companies were understandably upset by this change and the unfair competition it could create,⁴³ although during this time many companies benefited from the privatisation of government information to the detriment of the general public.

One prime example of this practice occurred in the Netherlands, where a private monopoly was created over an electronic collection of all Dutch government legislation.⁴⁴ Rather than sustain intra-government based efforts to create an electronic database of legislation, the Dutch government granted legal publisher Kluwer a 10-year exclusive contract for the creation and maintenance of a legislation database. The government agreed that it would not supply to any other party the “raw materials” in question electronically.⁴⁵ As van Eechoud has noted, the fact that a “government chose to commercialise the electronic publication of laws caused public outcry.”⁴⁶ The outcry was soon acknowledged and the Dutch government eventually reformed its agreement.

This example, however, highlights the extent of the privatisation and commodification of government information. In the Dutch example, laws were treated as a commodity and the development of an electronic database privatised. During the 1980s and 1990s the treatment of government information fell into either of these categories: production of the information was privatised or it was treated as a commodity by the government and sold. In both cases, the private sector – and the broader public – suffered. Given this detrimental impact, it is perhaps unsurprising that questions regarding the reusability of government information began to emerge, both from the private sector and the wider community.

B. *The Shift Towards Reusability*

Before proceeding, it is important to note the two types of reuse of information that are relevant when discussing this issue.

First, there is reuse of public sector information for commercial purposes, similar to the situation identified earlier that had previously existed between government and the private sector. This reuse involves private companies taking public information and releasing a “value-added” product using this core material. Legal publishing is one example of a value-added service, where headnotes, case summaries and other privately-produced content are added to case law and legislation that is licensed in its basic form by the relevant government. This use of government-produced materials by private companies is generally viewed positively and has increasingly been seen as encouraging economic growth in the information industry.⁴⁷ Private sector bodies

⁴³ M van Eechoud ‘The Commercialisation of Public Sector Information: Delineating the Issues’ in L Guibault and P.B Hugenholtz (eds) *The Future of the Public Domain*, Kluwer Law International, The Netherlands, 2006, p 279.

⁴⁴ *Ibid*, at 285.

⁴⁵ *Ibid*, at 285 – 286.

⁴⁶ *Ibid*, at 286.

⁴⁷ K Janssen and J Dumortier ‘Towards a European Framework for the Re-use of Public Sector Information: a Long and Winding Road’ (2003) 11(2) *IJL & IT* 184 at 185.

also want to ensure that they can continue their “agent role” and “remain indispensable for making government data useable.”⁴⁸

Second, there is personal, educative and non-profit reuse of government-produced content. This type of reuse may occur in a number of ways: an individual may want to reproduce a fact sheet on lung cancer for several friends who are considering quitting smoking or a teacher may want to reproduce a publication on forestry for students as part of an environmental study. Given the minimal impact of this use, both in terms of the remuneration it could produce for the copyright owner or the extent of infringement that may occur, it is likely that few government agencies would object to this type of reuse.⁴⁹ To the contrary, given the role of government and the types of material produced, this type of reuse should arguably be encouraged.

One type of reusability that has always been under contention is the reuse of primary legal materials, specifically judgments and case law. Indeed, it is perhaps a shame that such emphasis is placed on these types of materials, rather than on other educative, commercial or cultural content that is produced by governments. I will discuss this broader issue of reuse of primary legal materials below, but it must be noted that, even prior to the more recent shift towards reusability, some Australian State governments developed permissive licences to allow reproductions of primary legal materials in the late twentieth century. In 1996 both the New South Wales and the Northern Territory governments released permissive copyright licences that allowed reproduction of judgments and legislation, as long as a number of criteria were met.⁵⁰ These included, for example, not directly or indirectly indicating that the reproduction was an official version of the judgment or legislation. Thus, in this respect NSW and the NT were of the times. Further, these permissive licences, which have now been in place for ten years, also provide a worthy alternative to simply placing this material in the public domain with no restrictions attached. I will discuss these waivers in greater detail below.

While it appears that the more recent shift towards reusability of information has not been caused by only one major impetus, the implementation of the 2003 European Union *Directive on the Re-use of Public Sector Information* can be seen as one of the first important declarations on the importance of this practice.⁵¹ The Directive was the result of a prolonged process of investigation and consultation with EU Member States concerning this practice, its importance and how it might best be achieved.⁵²

⁴⁸ J Pas and B de Vuyst ‘Re-establishing the Balance between the Public and Private Sector: Regulating Public Sector Information Commercialisation in Europe’ (2004) 2 *JILT* <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_2/pasanddevuyst/>.

⁴⁹ In fact it is quite the opposite and there are moves for government websites to feature copyright notices explicitly allowing this type of reuse. See, for example, the copyright policy of the NSW Attorney General’s Department website <http://www.lawlink.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_disclaimer>.

⁵⁰ The NSW waivers were attached as an Appendix to the CLRC *Crown Copyright* report: see above n 5 at Appendix 3, p. 203. The Northern Territory waivers can be found attached to Submission no. 72, Solicitor for the Northern Territory, to the CLRC *Crown Copyright* review at <http://www.clrc.gov.au/agd/WWW/clrHome.nsf/Page/Present_Inquiries_Crown_copyright_Submissions_2004_Sub_No_72_-_Solicitor_for_the_Northern_Territory>.

⁵¹ *Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on Re-use of Public Sector Information* [2003] OJ L 345/90.

⁵² Janssen and Dumortier, above n 47, at 186.

While the Directive is concerned with both personal and commercial reuse, one motivation behind the Directive was to ensure that any differences between Member State reuse policies were minimised as a means of reducing barriers to the commercial exploitation of the information.⁵³ In total, the Directive contains 5 Chapters and 15 Articles, with Chapters II – IV setting out the major provisions. These included sections dictating that Member States were required to process reuse requests in a fair, transparent and timely manner. A Member State could also charge for reuse where appropriate, although there are limitations on the amount that can be charged.⁵⁴ Further, public sector bodies may also allow reuse under a licence.⁵⁵

The United Kingdom in particular has been quick to implement major changes to its Crown copyright practices based on this Directive and broader reusability issues. The obligations on the U.K. under the EU Directive appear to be only one factor behind the implementation of new practices regarding government information: U.K. government consultation into this practice was occurring concurrently to the progress in the EU.⁵⁶ Her Majesty's Stationery Office is now solely in charge of legislation and the new Office of Public Sector Information (OPSI) was introduced, with the focus of this agency on ensuring the reusability of government-produced content through streamlined licensing practices.⁵⁷ The *Re-use of Public Sector Information Regulations 2005* (UK)⁵⁸ statutorily directs agencies on reusability practices, while the OPSI has created a wealth of information aimed at educating both the public and government officials on the importance of reuse and how this can be best achieved.⁵⁹

In addition, there have also been a number of other factors behind the shift towards reusability of government information. The open content licensing movement in particular must be credited for its role in this issue. Indeed, it is arguable that without the explosion of interest in open content licensing and “free culture”, the move towards encouraging reuse of government materials would not have been so successful.⁶⁰ While still in its early years, the open content licensing movement is aimed at allowing copyright owners to manage their copyright better through “releasing” content from increasingly restrictive exclusive copyrights. The face of the open content licensing movement has been Creative Commons,⁶¹ which developed a set of permissive licences, originally under United States copyright law allowing a copyright owner to attach a licence according to their preferences. Creative Commons has now spread throughout the world and six Australian licences were introduced in early 2005.⁶²

⁵³ *Directive 2003/98/EC*, above n 51, at (6).

⁵⁴ *Ibid*, Article 6

⁵⁵ *Ibid*, Article 7.

⁵⁶ For a general discussion of the UK experience see S Saxby, ‘Crown Copyright Regulation in the UK – Is the Debate Still Alive?’ (2005) 13(3) *IJL & IT* 299.

⁵⁷ See Office of Public Sector Information, <<http://www.opsi.gov.uk/>>.

⁵⁸ *The Re-use of Public Sector Information Regulations 2005* (UK).

⁵⁹ Office of Public Sector Information, <<http://www.opsi.gov.uk/>>.

⁶⁰ See also Intrallect Ltd and AHRC Research Centre for Intellectual Property and Technology Law, *Final Report to the Common Information Environment Members of a Study on the Applicability of Creative Commons Licences*, 10 October 2005 <<http://www.intrallect.com/cie-study/>>.

⁶¹ Creative Commons <<http://creativecommons.org>>; L Lessig, *Free Culture*, Penguin, USA, 2004.

⁶² Creative Commons Australia <<http://creativecommons.org.au/>>; B Fitzgerald and I Oi, ‘Free Culture: Cultivating the Creative Commons’ (2004) 9(2) *MALR* 137.

In Australia, one of the major steps taken by a government towards reusability of information has been based on the viability of Creative Commons licences in a government context. At the time of writing, the Queensland Spatial Information Council is currently in the second stage of a three-stage investigation into the possibility of introducing a “standardised information licensing arrangement for Queensland government information.”⁶³ Stage 2 of this project is aimed at developing licensing conditions based on the Creative Commons model.⁶⁴ Other open content licensing organisations, particularly AEShareNet must also be recognised for their role in encouraging reuse of government data.⁶⁵ The AEShareNet Preserve Integrity licence has also been suggested as a possible licence for allowing reuse of policy documents where it is important that the licensee be required to reuse a document in its entirety.⁶⁶

While there has been no specific announcement by the Federal Government, or any State or Territory Government, that reusability issues need to be considered, it is obvious that reuse is becoming increasingly in vogue in Australian government. This is perhaps best illustrated by the example of the Australian Bureau of Statistics (ABS). Previously, statistics produced by the ABS were generally only available for purchase and were not available through any electronic or print medium for free. However, in December 2005 the Hon. Peter Costello, the Federal Treasurer, announced that all ABS publications, spreadsheets and Census data would be freely available on the ABS website.⁶⁷ A permissive website copyright policy means that individuals will now be able to reuse a large amount of these statistics.⁶⁸ The implementation of this policy indicates how far the ABS has come; it was not long ago that Australian individuals were being charged exorbitant fees to access ABS publications and other statistics.⁶⁹ In addition, in the Department of Communications, Information Technology and the Arts final report on digital industry content, titled *Unlocking the Potential*, it was recommended that there be greater engagement with “alternative approaches to intellectual property management”, including Creative Commons.⁷⁰ Both of these examples indicate the prominent shift in attitudes towards reuse.

⁶³ See Queensland Spatial Information Council, ‘Licensing’ <<http://www.qsic.qld.gov.au/qsic/QSIC.nsf/CPByUNID/6C31063F945CD93B4A257096000CBA1A>>; Anne Fitzgerald, Neale Hooper and Tim Barker, ‘Queensland Government Whole of Government Information Licensing Project’ [2007] AIPLRes 30 at <<http://www.austlii.edu.au/au/other/AIPLRes/2006/30.html>>.

⁶⁴ Id.

⁶⁵ AEShareNet <<http://www.aesharenet.com.au/>>.

⁶⁶ AEShareNet ‘P’ <<http://www.aesharenet.com.au/P4/>>.

⁶⁷ Australian Bureau of Statistics, ‘Pricing – Free Statistics on the ABS website’ <<http://www.abs.gov.au/websitedbs/d3310114.nsf/4a256353001af3ed4b2562bb00121564/83b66e9ffaf6d6abca257140007575b5!OpenDocument>>.

⁶⁸ ABS Copyright

<<http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/%C2%A9+Copyright?OpenDocument>>

⁶⁹ For more information on this issue, see generally B Fitzgerald et al, *OAK Law Project Report No. 1* (August 2006), accessible at <http://eprints.qut.edu.au/archive/00006099/01/Printed_Oak_Law_Project_Report.pdf>; specifically at 5.

⁷⁰ Department of Communications, Information Technology and the Arts, *Unlocking the Potential: Digital Industry Content Action Agenda* (November 2005) <http://www.dcita.gov.au/arts_culture/publications_and_reports/film_and_digital_content/unlocking_the_potential_digital_content_industry_action_agenda_report> at [3.5].

C. *The Relationship Between Crown Copyright and Reusability*

Among the various Terms of Reference underpinning its review, the CLRC was directed to consider how Crown copyright impacted upon access to government information, particular primary legal materials.⁷¹ The “access” issue was repeatedly discussed throughout the final CLRC report and it is clear that a strong motivating factor behind one of the major recommendations made by the CLRC – that copyright be abolished in legislation and judgments, plus a number of other materials – was increasing access to these materials. While this was one of the Terms of Reference of the Committee and it was therefore bound to consider it, it is arguable that Crown copyright is more an issue for reusability rather than access to government information, whether this is legal or other types of government-produced information.

In a European context it has been noted that

“whether public sector information is protected by copyright or not, has no actual impact on the citizen’s access to the information, but it can have an adverse effect on exploitation, since the information concerned cannot be reused without permission of the copyright holder.”⁷²

The same can be said of the Australian situation. Even a brief survey of Federal, State or Territory government websites will reveal that there is a wealth of public sector-produced information available for general public access on these sites.⁷³ For example, as noted earlier, the Australian Bureau of Statistics now makes an enormous amount of statistical information freely available on its website, and this is updated daily. Other government websites also allow free access to the wide range of materials that the CLRC identified in its report.⁷⁴ This type of available material ranges from primary legal materials, for example, legislation, Bills and exposure drafts, to more consumer and cultural-based content including brochures, fact sheets and information guides. Therefore, it appears that the problem is not that government information is unavailable, but how the general public and commercial publishers may be able to legally reuse these materials. While the legal permissibility of commercial reuse may require greater consideration than other types, even at the most basic level of reuse – namely reuse of government information for personal, educative or non-commercial purposes – it is often unclear whether this is permitted and it is arguable that Crown copyright is the main inhibitor to this reuse. The conclusion that can be drawn from this action is that currently many agencies, at both the Federal and State and Territory levels, do not understand how best to manage Crown copyright so as to allow the types of public use that agencies may find desirable.

The issue that must now be addressed is what impact the recommendations made by the CLRC may have on reusability. It will have become apparent that the shift towards reusability of government information is gaining momentum and given this

⁷¹ CLRC – Terms of Reference – Crown Copyright
<<http://www.clrc.gov.au/agd/WWW/clrHome.nsf/Page/RWP3C2E5B1D1B98D6FACA256DE3000E9471>>.

⁷² Janssen and Dumortier, above n 47, at 192.

⁷³ C Bond, ‘The State of Licensing: Towards Reuse of NSW Government Information’ [2006] AIPLRes 43 <<http://www.austlii.edu.au/au/other/AIPLRes/2006/43.html>>.

⁷⁴ CLRC, above n 5, Table 1 at [2.18].

increased attention it is clear that any Crown copyright reforms considered by the Federal Government should include consideration of the issue of reuse. Unfortunately, however, the majority of the recommendations made by the CLRC do not adequately reflect reuse as being currently a primary demand on government materials, nor do the recommendations realistically address Australian Crown copyright in the information age.

IV: AN ANALYSIS OF THE CLRC RECOMMENDATIONS

In what transpired to be its final review before it was dissolved in mid-2005, the CLRC was instructed by the Attorney General at the end of 2003 to inquire into Crown ownership of copyright in Australia.⁷⁵ A number of factors influenced the timing of this inquiry, including findings of the Review of Intellectual Property Legislation under the Competition Principles Agreement (the Ergas Committee).⁷⁶ Sixteen recommendations were made and at the time of writing, the Government has been considering these recommendations.⁷⁷ To date there is no indication as to whether any or all will be adopted.

Given the public consultation undertaken by the CLRC in its Crown copyright inquiry, it would not be unreasonable to expect the submissions made to have had a substantial effect on the final report. A number of these included a discussion on the importance of reusability and open content licensing and the effect this issue should have on any recommendations made by the CLRC.⁷⁸ However, as Atkinson has noted, the final recommendations made by the CLRC are odd in a number of ways. First, the final report itself “goes against the grain of opinion.”⁷⁹ According to Atkinson’s count, 60% of the 77 submissions received “favoured the Crown copyright status quo.”⁸⁰ This status quo is not maintained in the final CLRC report. Second, the report has also been criticised for failing to give sufficient reasons for its recommendations and lacking understanding as to how governments work.⁸¹

Both are interesting comments. The first criticism is arguably justified on the basis that the CLRC continually reiterates several reasons why government ownership copyright is “bad” per se – for example, it places the government in a more favourable position and Crown copyright in primary legal materials can preclude access and could be used as a tool of censorship – without evidence that strongly supports either repeated claim. This second comment is similarly valid. In a majority of cases, the recommendations made by the CLRC are counter to what was suggested by a State or

⁷⁵ CLRC, above n 5, at [1.01].

⁷⁶ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation Under the Competition Principles Agreement*, September 2000, p. 114, in CLRC, above n 5, at [1.04].

⁷⁷ Australian Government Attorney Generals Department *The AGD eNews on Copyright*, June 2005 Issue 36 <http://www.ag.gov.au/agd/WWW/enewsCopyrightHome.nsf/Page/eNews_Issue_36_-_June_2005>.

⁷⁸ See Submission No. 17 Professor Brian Fitzgerald and Submission No. 28 AShareNet Limited, accessible at the CLRC Crown Copyright Review website, <http://www.clrc.gov.au/agd/WWW/clrHome.nsf/Page/Overview_Reports_Crown_Copyright>.

⁷⁹ Atkinson, above n 3, at 13.

⁸⁰ *Id.*

⁸¹ *Ibid.*, at 13 – 14.

Territory government or department, although it should be noted that these groups are the copyright owners.

Undertaking a review of such an immense and contentious legal doctrine was never going to be a simple task, but a number of the recommendations made by the CLRC in its final report can be criticised for several reasons. In turn, however, the CLRC also made a number of positive suggestions that perhaps should be adopted. While the primary focus of the following analysis is on how the recommendations impact on reusability, a more general analysis and critique will also be undertaken.

A. *The Crown Copyright Ownership Provisions*

The first CLRC recommendation concerned the repeal of the Crown subsistence and ownership provisions in sections 176 – 179 of the Act. As I discussed earlier, section 176 provides for Crown copyright ownership of a work “made by, or under the direction or control of the Commonwealth or a State.” Section 177 states that the Crown owns copyright in any work first published in Australia if this first publication is by, or under the direction or control of the Commonwealth or State. The provision has been dubbed the “first publication” rule. Section 178 provides for Crown copyright ownership of sound recordings or films again “made by, or under the direction or control of the Commonwealth or a State.” Finally, section 179 permits these provisions to be modified by agreement.

It appears that, *prima facie*, the repeal of these provisions would have little effect on the reusability of government information, given that section 35(6), the broader employment provision of the *Copyright Act*, would still operate to ensure government ownership of employee-produced materials. To the contrary, with some clarification, these provisions may allow government control over a wider range of materials that can subsequently be positively managed to ensure commercial and public reuse.

One of the major impetuses behind the CLRC Crown copyright review was a recommendation concerning section 176 of the *Copyright Act* by the Ergas Committee in 2000. The Committee recommended “that s. 176 of the *Copyright Act* be amended to leave the Crown in the same position as any contracting party.”⁸² In making this finding, the Ergas Committee suggested that the nature of section 176 placed the Crown “in a more favourable position than other contractors or employers, who only become copyright owners under an assignment in writing, or subject to the terms of a contract of employment.”⁸³ Further, the Committee also considered section 3(1) of the Competition Principles Agreement, which says in part:

“Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles apply only to the business activities of publicly owned entities, not the non-business, non-profit activities of those entities.”⁸⁴

⁸² Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation Under the Competition Principles Agreement*, September 2000, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ErgasCommitteereport-September2000>, at 114.

⁸³ *Ibid*, at 113.

⁸⁴ *Competition Principles Agreement 1998* s. 3(1).

This recognises the distinction between the different functions of government discussed earlier. However, rather than amend section 176, the Federal Government chose to develop best practice policy guidelines aimed at reducing the issue.⁸⁵

This recommendation of the Ergas Committee was included in the CLRC *Crown Copyright* review Terms of Reference.⁸⁶ The CLRC placed great emphasis on this recommendation of the Ergas Committee and it is discussed extensively in at least four sections of its final report.⁸⁷ It concluded that this recommendation, along with a number of other public policy reasons, the majority of which were identified earlier in this article as arguments against Crown copyright, “provide reasons for abolishing or amending the Part VII provisions.”⁸⁸

This recommendation can be criticised both generally and specifically against the reusability issue. First, at a more general level, the continued reliance by the CLRC on this recommendation of the Ergas Committee is fundamentally flawed. The CLRC failed to make a distinction between the Crown copyright provisions as they apply to government businesses and non-profit-activities of government.⁸⁹ It noted this when discussing the Competition Principles Agreement in the context of the Ergas Committee findings, but failed to actively make this distinction before making its own Recommendation 1.

Second, the CLRC stated that since the introduction and expansion of the Crown copyright provisions throughout the last 90 years “the range of government activity has increased significantly from activities to include those which are much more commercial in nature.”⁹⁰ However, it failed to differentiate between how copyright should apply to those “commercially-produced” materials and those being produced through the more traditional functions of government. Further, while the CLRC also noted criticisms that the range of materials protected is “vastly broader than originally envisaged”⁹¹ it also failed to acknowledge the reality that the range of *all* materials protected by copyright is broader than was ever previously imagined.

Third, the CLRC also placed great emphasis on the “uncertain ambit” of the ‘made by, or under the direction or control’ terminology in sections 176, 177 and 178 in recommending the repeal of these provisions. The issues identified by the CLRC regarding the “direction or control” terminology are not new and any criticism of this test is quite valid. However, rather than abolish these particular Crown copyright provisions in their entirety, the CLRC could have chosen other avenues, including greater consideration of case law surrounding the interpretation of this test.⁹² Admittedly, such analysis is limited, though a deeper discussion would have at least

⁸⁵ Government Response to the Intellectual Property and Competition Review Recommendations, p. 3 <http://www.ipaustralia.gov.au/resources/news_new_archived_2001.shtml#reviewrelease>.

⁸⁶ CLRC, above n 5, at [1.04].

⁸⁷ *Ibid*, at p. xix; [1.04]; [4.02] – [4.12], [9.03].

⁸⁸ *Ibid*, at [4.12].

⁸⁹ Atkinson, above n 3, at 14.

⁹⁰ CLRC, above n 5, at [9.04].

⁹¹ Australian Copyright Council, Submission 27 in CLRC, above n 5, at [5.59].

⁹² See, for example, *Linter Group Ltd (in liq) v Price Waterhouse* [2000] VSC 90 (unreported, Harper J, 17 March 2000, BC200001098); A Fitzgerald and B Fitzgerald, *Intellectual Property in Principle*, LawBook Co., NSW, 2004, at [4.250].

meant the CLRC could not be criticised for failing to take judicial interpretation into consideration. The CLRC should also have considered to a greater extent the positions in other jurisdictions, both in terms of their approach to these provisions and introducing possible exceptions to where these provisions may apply.

In addition, more reusability-focussed criticisms can also be raised against these proposed changes. One of the issues that has been repeatedly identified in this paper is the difficulties that the various Australian Governments appear to be experiencing in relation to the management of Crown copyright. This is occurring even with the current government-specific provisions included in the *Copyright Act*. It is unlikely that these problems will disappear if these provisions are repealed and greater emphasis placed on section 35(6), the employment provision of the Act, as the CLRC further recommended.

Rather than repeal these sections, the Federal Government should focus on the positive impact that their scope may have on the reusability issue. Works falling under these provisions could be actively managed to ensure that the general public, non-profit organisations, educators, and commercial publishers can reuse and exploit these works. This may not need to occur on an individual basis for each publication, but through a larger government copyright policy on reusability or standard, Creative Commons or AEShareNet-style licensing. Further, for works falling under a number of these provisions, copyright protection ceases fifty years after publication, with the added benefit of these works falling into the public domain relatively early and when Government is less concerned with ensuring the integrity or accuracy of these materials.

Despite these benefits, it could still be argued that the nature of these provisions is inherently unfair. This is particularly true of section 177, the “first publication” rule. Given its potentially broad scope, the CLRC was adamant that this provision be repealed. In the United Kingdom, however, a public administration exception exists that in Australia would serve to limit the potential scope of section 177.⁹³ Section 48 of the UK *Copyright, Design and Patents Act 1988* provides that the Crown can make copies of previously unpublished works and issue these copies to the public.⁹⁴ The exception applies in limited circumstances; namely, when a document has been communicated to the Crown in the course of public business for any purpose, with the licence of the copyright owner and a document embodying the work is owned by or in the custody or control of the Crown.⁹⁵ “Public business” is defined broadly in the statute to include “any activity carried on by the Crown.”⁹⁶ The Crown may copy the work for the purpose it was communicated, or “any related purpose which could reasonably have been anticipated by the copyright owner.”⁹⁷ However, the Crown may not copy a work or issue copies under this section if the work has been previously published.⁹⁸

⁹³ *Copyright, Design and Patents Act 1988* (UK) s 48.

⁹⁴ Id; K Garnett, J Rayner James and G Davies, *Copinger and Skone James on Copyright*, 14th ed, Sweet & Maxwell, London, 1999 at 9-55.

⁹⁵ Ibid, s 48(2).

⁹⁶ Ibid, s 48(4).

⁹⁷ Ibid, s 48(2).

⁹⁸ Ibid, s 48(3).

In a reuse context, a similar style of provision may have a limited impact. Indeed, it may only serve to complicate matters, where government allows broad permissions to reuse any materials it makes available. However, the exception could be tailored to ensure that the true copyright owner would be properly protected. Overall, the many public administration exceptions in the UK *Copyright, Design and Patents Act* provide a strong example of statutory reusability exceptions in practice. Although the current Federal Government may be reluctant to grant any new exceptions given that a number of new user-based provisions were introduced in the *Copyright Amendment Act 2006* (Cth) and these are yet to be tested in an Australian court, the retention of the special Crown copyright provisions balanced with a number of new public administration-type exceptions would better serve the broader public interest in reuse of government information.

B. *Crown Copyright in Primary Legal Materials*

In government copyright literature, a recurring issue is whether copyright should subsist in legislation and case law.⁹⁹ Legal materials appear to be a particularly privileged category of copyright-protected government information, given their significance to society and democracy. However, submissions to the CLRC review were divided on whether copyright should be retained or removed for these types of works. Some argued that Crown copyright greatly inhibited access to these materials and should therefore be removed, while other submissions suggested that it was not Crown copyright that was precluding access to these legal materials. In the final CLRC report, five recommendations were made on this issue.

First, in Recommendation 4, the CLRC proposed that copyright be abolished in bills, statutes, judgments and other types of parliamentary documents, including reports of commissions and records of parliamentary debates. It argued that “the public interest would be best served if copyright did not continue to subsist” in these materials.¹⁰⁰ The CLRC further commented that none of the traditional rationales for Crown copyright, for example, ensuring accuracy and integrity, justified its continuation.

Second, in Recommendation 5, the CLRC proposed that a statutory duty be created that would require the various Australian governments to disseminate legislation and judgments. Regardless of whether Crown copyright was retained or abolished, this is a fairly uncontroversial recommendation, aimed at creating greater access to these types of legal materials.

Third, in Recommendation 6, the CLRC recommended that the “prerogative rights” of the Crown should be abolished. The Crown prerogative is an aged English doctrine, but one that “no one this moment can say exactly what (it) does or does not include.”¹⁰¹ Its existence in Australia was confirmed in *Attorney General of New South Wales v Butterworth & Co (Australia) Ltd* (1938) 38 NSWSC 195, where Long Innes CJ found that the prerogative right gave the Crown the exclusive right to print and publish the statutes that it produced.¹⁰² Currently the prerogative is recognised in section 8A(1) of the *Copyright Act* and a perpetual length of protection applies for

⁹⁹ See, for example, Bannister, above n 30; Leith, above n 3.

¹⁰⁰ CLRC, above n 5, at [9.48].

¹⁰¹ J Bryce in *Monotti*, above n 3.

¹⁰² *Ibid*, at footnote 5.

works falling under this category. Most of the submissions made to the CLRC on this issue argued for its abolition¹⁰³ and this recommendation that it be removed supports Recommendation 4.

Fourth, Recommendation 7 was an alternative suggestion if the Federal Government chose to retain Crown copyright. In this case, it was recommended that copyright in materials covered by the prerogative be placed under certain statutory provisions and a statutory waiver be enacted permitting the reproduction of these materials.

Fifth, and finally, it was recommended that the existing section 182A be abolished. This provision currently permits the single reproduction of a statute or judgment and its recommended abolition is in line with the major proposal by the CLRC that copyright protection be removed from primary legal and similar materials.

I will focus primarily on Recommendation 4 and the alternative proposal of the CLRC in Recommendation 7. While it goes against both the CLRC recommendation and the grain of opinion on this issue, it is my belief that Crown copyright in these materials should not be abolished. While it is clear that placing these materials in the public domain would obviously ensure that this content could be reused, when considered against a broader background it is preferable that government retain some control over this type of information for a number of reasons. Further, there are other methods for encouraging the reusability of this information without simply releasing it into the public domain.

First, it is debatable whether Crown copyright is as great an inhibitor to access to primary legal materials as the CLRC suggested. McGill J, for example, noted that “there is no practical advantage in abolishing copyright in judicial materials, since judgments were currently widely disseminated.”¹⁰⁴ The CLRC rightly noted the difficulties faced by AustLII and other legal publishers seeking to reproduce case law and legislation and the plethora of approaches taken by different governments towards the format, dissemination and licensing of such materials. However, rather than Crown copyright being seen as an inhibitor, greater emphasis should be placed on each individual government taking the first step and making their legal materials accessible via websites. The reuse issue could then be solved through other methods, including a statutory waiver, which is my preferred approach. I will discuss this in more detail below.

Second, the CLRC noted the “worldwide trend in making such information freely available, as evidenced by the growth of international websites that provide free access.”¹⁰⁵ These countries include the United States, France and Spain, where copyright does not subsist in legislation or judgments.¹⁰⁶ However, there does not appear to be any evidence illustrating that United States legislation is more accessible solely because copyright does not subsist in U.S. government works. In fact, after undertaking a comparative study regarding the copyright in primary legal materials in a number of jurisdictions, Cox concluded that “upholding Crown copyright in...Australia may perhaps have allowed better public access to the law” particularly

¹⁰³ CLRC, above n 5, at [6.20].

¹⁰⁴ Submission 70, D J McGill SC DCJ, in CLRC, above n 5, at [4.50].

¹⁰⁵ CLRC, above n 5, at [9.29].

¹⁰⁶ Id.

when compared to other countries.¹⁰⁷ This suggests that a ‘lack’ of copyright does not automatically ensure ease of access – or even any public access – to such materials.

Again, and following from the earlier discussion on this issue, Crown copyright must be seen as an inhibitor to *reuse* rather than access and this could be addressed through other mechanisms – although the key must be that such action does in fact occur. Anne Fitzgerald has stated that:

“The answer to the question is not so simple as to say abolish Crown copyright. Unfortunately, licensing as a concept and practice was not particularly addressed in the Crown copyright Issues Paper and Discussion Paper (July 2004)...what we have seen, in looking at freedom and access and the remix of material, which is essentially culture, the fabric of society, the running of our communities, knowledge about law, judgments, government information and so forth, is that it is not necessarily the case that that information is going to be made more freely available and accessible by removing copyright. It may be more accessible by retaining copyright. It is very strange in this era to think about removing copyright.”¹⁰⁸

Therefore, as Anne Fitzgerald noted, the fact that material is in the public domain does not automatically lead to greater access and reuse of that content: it only means that, if this content can be found, it can be reused. This is unfortunately true of both government and other cultural creations. Rather than simply removing copyright protection from these materials, other methods for managing copyright should be investigated, aimed at both encouraging reuse and permitting government to retain some control over this information.

One method that may achieve this aim is the introduction of a statutory waiver, as proposed by the CLRC as an alternative in Recommendation 7. This type of waiver is already in existence in New South Wales and the Northern Territory. As noted earlier, it is evident from the findings of the CLRC that the way the Federal, State and Territory Governments manage their copyright needs to be thoroughly revamped. Before abolishing Crown copyright in certain materials or even changing the current statutory provisions, the various Governments need to undertake the task of organising the management of Crown copyright in a realistic manner. The introduction of a statutory waiver could be a major step in achieving this goal.

The waiver itself could be broad enough to permit both commercial and personal reuse of primary and other legal materials for a variety of purposes and this would still allow the various governments to retain an element of control in these materials in case of misuse. For example, the waiver could require, as is currently the case in the NSW waivers, that any publication cannot purport to be an official version of the

¹⁰⁷ N Cox, ‘Copyright in Statutes, Regulations and Judicial Decisions in Common Law Jurisdictions: Public Ownership or Commercial Enterprise?’ (2006) 27(3) *Sta LR* 185 at 208.

¹⁰⁸ A Fitzgerald, ‘Why Governments and Public Institutions Need to Understand Open Content Licensing’ (with S Cunningham, T Cutler, N Hooper and T Cochrane) in B Fitzgerald (ed) *Open Content Licensing: Cultivating the Creative Commons*, Sydney University Press, Sydney, 2007, p. 81; see also B Fitzgerald and I Oi, ‘The Australian Creative Commons Project’ (2005) 22(4) *Copy Rep* 138 at 143.

case or legislation¹⁰⁹ and that the arms of the State should not be used on the document.¹¹⁰

Commentators against this proposition may argue that a waiver does not go far enough to solve this issue, particularly where it could be withdrawn. The CLRC noted this in the context of censorship and stated that it was “desirable that governments should not be able to withdraw their consent to publish legal material, an option which is always available if copyright subsists.”¹¹¹

This statement, however, confuses a number of issues. One issue is whether the government itself is making this information available. This could be guaranteed by implementing a statutory duty to disseminate. Second, there is the issue of if a government revoked statutory waiver in primary legal materials. However, both the NSW government case law and legislation waivers contain revocation clauses, and there is no evidence that either of these waivers have ever been revoked, varied, or withdrawn throughout their history, indicating that this may be an empty claim.

Therefore, on the basis of this discussion it appears that there are valid arguments for the retention of Crown copyright in these types of materials.

C. Crown Copyright Management

Compared to the other recommendations made by the CLRC, recommendations 11-16, concerning Crown copyright management, were less controversial although still significant. Instead, these recommendations proposed changes that could be made at both the Federal and State or Territory levels, aimed at simplifying issues of government copyright and its management. Recommendation 12, the proposal most applicable to issues of reusability of government information, will be the focus of this discussion.

Recommendation 12 states that the issue of uniformity of Crown copyright management in the State and Territory governments be referred to the Standing Committee of Attorneys-General (SCAG). The CLRC devoted a large section of its final report to reviewing the issue of uniformity and produced a case study, focusing on primary legal materials, that it believed highlighted the difficulties inherent in the plethora of approaches taken to managing copyright in these materials by the various State and Territory governments.¹¹² The CLRC also discussed the views of the State governments, concluding that “most States support the principle of uniformity in approach, while wishing to retain some flexibility.”¹¹³ However, the States also raised a number of valid criticisms against uniformity: for example, the Queensland Government argued that “there was no suitable single model either within or among the States, Territories and the Commonwealth.”¹¹⁴

¹⁰⁹ Section 2(c) Notice: Copyright in legislation and other material (NSW), above n 50.

¹¹⁰ Section 2(d) Notice: Copyright in legislation and other material (NSW), above n 50.

¹¹¹ CLRC, above n 5, at [9.30] (citations omitted).

¹¹² *Ibid.*, at [11.45] – [11.76].

¹¹³ *Ibid.*, at [11.100].

¹¹⁴ Submission 71, Queensland Government, in CLRC, above n 5, at [11.99].

If, however, the Federal, State and Territory governments did choose to adopt a uniform approach to copyright management, this would provide a prime opportunity for the various governments to decide how the reusability issue should be addressed in Australia and how this practice could be best implemented. However, the criticisms raised by the various State governments are both valid and therefore it was arguably better that this issue be recommended for consideration by SCAG than the CLRC simply recommending that uniformity in approach be adopted. However, given the difficulties that implementing a uniform approach may create, it may be preferable for a set of 'best practice' guidelines be developed by the government to aid State and Territory governments in their management of Crown intellectual property. If the Government chose to do this, the EU reuse directive, discussed above,¹¹⁵ would provide useful assistance in achieving this aim.

V. CONCLUSION

"Uneasy lies the head that wears a crown"¹¹⁶ may be true for the monarch, but the issue of Crown copyright should not be viewed as a burden. Instead, the focus should be on how, in the new millennium, Crown copyright should be actively managed to free information to the greater benefit of the community, business, the educational sector and indeed government itself. While copyright law in general has been the subject of substantial analysis since its inception, Crown copyright, in contrast, has received relatively little attention. Crown copyright is not a particularly ancient legal doctrine, nor does it constitute one of the more well-understood categories of copyright law. It is unfortunate that this issue has not been the subject of greater analysis, particularly given the response that the Copyright Law Review Committee received to its *Crown Copyright* review. It is also unfortunate that the Copyright Law Review Committee did not place greater emphasis on the issue of reusability throughout its review and in its final report. However, now is the time for the Australian Government, at both Federal and State and Territory level, to give serious consideration to the issues that Crown copyright creates and the broader impact that the growing shift towards reusability of this type of information may have.

¹¹⁵ See above n 51.

¹¹⁶ W Shakespeare, *King Henry IV Part II*, Act III, Scene 1.