RIGHTS VESTING UNDER PART VII OF THE COPYRIGHT ACT 1968 AND THEIR INTERRELATIONSHIP WITH THE PREROGATIVE RIGHT OF THE CROWN IN THE NATURE OF COPYRIGHT

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ABSTRACT

This article is a sequel to the two articles published in the last issue of the Canberra Law Review (2012) 11(2) on the prerogative right of the Crown in the nature of copyright.

Although the Copyright Act 1968 (Cth) has affected the nature of the Crown's prerogative right to print and publish certain works in Australia, the Copyright Act 1968 itself provides statutory rights in works made or first published by the Commonwealth or a State which are akin to the prerogative right and which arise under sections 176-179 of Part VII of the Act. These provisions deal with the vesting in the Commonwealth or a State of rights in original literary, dramatic, musical and artistic works as well as sound recordings and cinematograph films. This article considers the scope of Part VII and its relationship to other Parts of the Copyright Act and focuses the remainder of the discussion on the interrelationship between the prerogative and statutory rights, which has hitherto not been the subject of detailed analysis.

I GENERAL SCOPE OF PART VII OF THE COPYRIGHT ACT 1968

Part VII of the *Copyright Act 1968* (Cth) provides for the vesting in the Commonwealth or a State of copyright in all the subject matter protected by the Act with the exception of published editions of works and television and sound broadcasts. The nature of the rights in literary, dramatic, musical and artistic works is set out in section 31 of the Act. This section and most other sections of Part III of the Act apply to copyright subsisting by virtue of Part VII in works, by virtue of sub-section 182(1) of the Act. The rights in copyright in works include the right to reproduce the work in a material form, to publish the work, to perform the work, other than an artistic work, in public, and to communicate the work to the public. In the case of literary, dramatic and musical works the Act also gives to the copyright owner the

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right to make an adaptation of the work. This includes, inter alia, the right to make a translation of the work.

The nature of copyright in sound recordings and cinematograph films is set out in sections 85 and 86 of the Act. These sections as well as most other provisions of Part IV of the Act apply to copyright subsisting by virtue of Part VII in these subject matter, by virtue of sub-section 182(2) of the Act. The sections give to the owner of copyright in sound recordings and cinematograph films the right to copy the subject matter and in addition, in the case of a sound recording, to play it in public and to communicate the recording to the public, and in the case of a film, to show it in public, and to communicate the film to the public.[1]

As a matter of statutory interpretation it would appear arguable that adopting the maxim *expressio unius est exclusio alterius* copyright subsisting in both published editions of works and television and sound broadcasts could not vest in the Commonwealth or a State, unless the copyright was assigned by the original copyright owner. The basis of this view is that Part VII would appear to represent a complete code in respect of the protection of Crown works and the omission of the two subject-matter in Part VII indicates that it was the legislature's intention that the Crown should not be the original owner of such rights. Furthermore, the owners of copyright in broadcasts and published editions of works are clearly specified by ss 99 and 100 of the Act and do not expressly include the Commonwealth or a State.

The consequences of such an interpretation are at least in one respect significant. Both the Commonwealth and the States, through Government Printing Offices and through online websites, are engaged in the publishing and public communicating of government produced or commissioned works and the adoption of a restrictive view would place the Commonwealth and the States in an anomalous position in respect of other publishers and communicators which are entitled to the protection against the facsimile reproduction of editions of published works that section 88 affords. The Commonwealth or State as publisher would have no means of preventing another publisher photographically reproducing a Commonwealth or State published work where copyright in the work as such has expired or does not exist. One example would be the reproduction of an early government document such as a report. The implications in respect of broadcasting are not, as far as policy implications are concerned, as significant, because except in rare cases such as the provision of sound broadcasts to Norfolk Island, neither the Commonwealth nor the States have been directly engaged in broadcasting. The Commonwealth has, though, established two bodies corporate to carry out sound and television broadcasting services but both are specified as owners of copyright in their broadcasts by virtue of ss 91 and 99 of the Act.[2]

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1 'Communicate' means make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject matter, including a performance or live performance within the meaning of this Act: refer s.10 of the Act.

2 The Australian Broadcasting Corporation is established under the *Australian Broadcasting Corporation Act 1983*. This body superceded the Australian Broadcasting Commission, which had been established under Part III of the *Broadcasting Act 1942*, on 1 July 1983. The provisions establishing the Special Broadcasting Service as a body corporate were originally contained in Part IIIA of the *Broadcasting Act 1942* but the corporation was subsequently restructured under the *Special Broadcasting Service Act 1991*.

While the restrictive view of Crown rights has been strengthened with the insertion in the 1980 Amendments to the *Copyright Act* of a further provision relating to Crown works (s 182A), it is clear from a reading of the Act as a whole that Part VII is not a complete code. For example, s 182 of the Act applies many of the provisions of Part III and IV of the Act to copyright subsisting by virtue of Part VII in the subject matter described in that Part. The section reads:

> 182 (1) Part III (other than the provisions of that Part relating to the subsistence, duration or ownership of copyright) applies in relation to copyright subsisting by virtue of this Part in a literary, dramatic, musical or artistic work in like manner as it applies in relation to copyright subsisting in such a work by virtue of that Part.
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> (2) Part IV (other than the provisions of that Part relating to the subsistence, duration or ownership of copyright) applies in relation to copyright subsisting by virtue of this Part in a sound recording or cinematograph film in like manner as it applies in relation to copyright subsisting in such a recording or film by virtue of that Part.

It should be emphasized that the phrase in sub-section 182(2) 'other than the provisions of that Part relating to ...ownership of copyright' applies only in relation to copyright subsisting by virtue of Part VII in sound recordings and cinematograph films and does not in itself imply that the ownership provisions in Part IV cannot otherwise apply to the Commonwealth or the States. Section 7 in Part 1 of the Act provides 'subject to Part VII, this Act binds the Crown...' which indicates that all the provisions of the Act apply to the Crown subject to the specific provisions of Part VII and suggests, at least, that the Crown in right of the Commonwealth and Crown in right of a State[3] as publishers may own rights under section 100 of the Act in published editions of works. Although the provisions in Parts III and IV relating to ownership of copyright in original works and subject matter other than works are subject to Part VII and X, there is no provision in Parts VII and X which provides or implies that the Commonwealth or a State cannot have such rights. Sections 176(1) and 178(1) of Part VII also contemplate reference to Parts III and IV of the Act to determine whether copyright subsists in a work or sound recording or cinematograph film and reference to the provisions of these Parts is essential in determining the nature of the rights in copyright subsisting under Part VII.

The provisions of Part VII relating to the subsistence, duration and ownership of rights followed a recommendation of the Copyright Law Review Committee (the Spicer Committee) which proposed the enactment of a provision similar to section 39 of the United Kingdom *Copyright Act 1956* which also did not mention specifically Crown rights in broadcasts and published editions of works.[4] It is arguable that the special provisions dealing

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3 Refer to the definition of the word 'Crown' in sub-section 10(1) of the *Copyright Act* 1968.

4 No reason is expressed in the Second Reading speech on the Copyright Bill 1956, its Explanatory Memorandum, the debates on the Bill or in the Standing Committee consideration of it, for the lack of express mention of the subject matter. United Kingdom. *Parliamentary Debates (Hansard)* 5th Series, House of Commons, Vol. 553 (London, 1956) 715-723 2R, 723ff (553 H.C. Deb.715-723 2R, 723ff); *Commons Papers 1955-1956*, Vol. 6 (London, 1956) 1-28, 343ff; *Sessional Papers, House of Lords*, 1955-1956, Vol. I, (London, 1956) 511 (Expl. Mem.).

with copyright in works produced by the Commonwealth or a State are necessary merely because they contain, for practical and policy reasons,[5] periods of protection which differ from those normally provided in the Act and establish criteria for the vesting of rights in the Commonwealth or State in circumstances which are wider in scope than otherwise would be the case under Parts III and IV. The period of protection for sound recordings and films is 50 years from the year of first publication under Part VII, rather than 70 years under Part IV, and the period of protection for works under Part III is 70 years from the year of first publication in contrast to the period of protection for Crown works under Part VII, which is 50 years from the year of first publication.

The proper interpretation of the Act is not clear, and the question has not been judicially considered. It is nevertheless suggested, bearing in mind the caution with which courts apply the maxim *expressio unius est exclusio alterius*,[6] that the failure to specifically provide for the protection of published editions of works and for broadcasts in Part VII does not in itself preclude the Commonwealth or a State owning rights in published editions or broadcasts. In the writer's view the Commonwealth or a State is entitled to rights in published editions of works under s 100 of the Act. The subsistence of copyright in published editions under s 92 of the Act is not subject to any overriding provisions dealing with the Crown and nothing in Part VII is expressly inconsistent with giving effect to the broad terms of s 100. That section provides, 'subject to Parts VII and X, the publisher of an edition of a work or works is the owner of any copyright subsisting in the edition by virtue of this Part.'[7] The word 'publisher' in s 100 is not qualified in any way and should be read as including the Commonwealth or State as a publisher of works. It should be pointed out, however, that as neither the Commonwealth nor the State is a 'qualified person' within the meaning of s 92(1)(b) of the

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5 Paragraph 598 of the Whitford Committee Report states, 'the justification for special Crown copyright was sa*id* to be that, because of the large number of servants employed by the Crown, it would be impracticable to keep track of individual authors. This difficulty, it was said was enhanced by the fact that, in the production of copyright works, notably reports and so on, much material is worked on by a number of Crown servants. It is for this reason too that the term of Crown copyright is fixed in the case of published literary, dramatic and musical works at 50 years only from the date of first publication, or in the case of artistic works generally 50 years only from the date of first making, irrespective of the life of the author.' United Kingdom. *Report of the Committee to consider the Law on Copyright and Designs* Cmnd. 6732 (London, 1977) 151. The shorter period of protection for published works also reflects the recognition that the Government does not require the same period of protection as an individual to secure an adequate return for its investment in works, and that that investment is ultimately borne by the taxpayer. It is also arguable that a shorter period of protection is justified on the basis of those public interest considerations in the dissemination of such Government produced material. The period of protection is derived from that period originally provided in section 18 of the *Copyright Act* 1911 for Crown works. No reasons were provided in the Report of the Committee of the House of Commons, which caused section 18 to be inserted in the Act, or in its published proceedings, for arriving at this period. (*Report from Standing Committee A on the Copyright Bill with the Proceedings of the Committee* (London, 1911) 36 in *Sessional Papers, House of Commons*, 1911, Vol. VI, (London, 1911) 725,736. The provision was not the subject of any Parliamentary debate.

6 *State of Tasmania v Commonwealth of Australia and State of Victoria* (1904) 1 CLR. 329, 343, *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88, 94. DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (7th ed.) (LexisNexis Butterworths, Sydney, 2011) 141-144 at 142.

7 As mentioned earlier in this Article, although the provision is expressed to be subject to Part VII and X, there is no provision in either Part which suggests or implies that the Commonwealth or a State cannot have such rights.

Act, the Crown could only acquire copyright under s 92 in editions first published in Australia, or other countries to which that provision of the Act extends.[8] It is noteworthy that in respect of this general question, there is clear evidence that in practice the Commonwealth has sought and obtained remuneration from other publishers for permission to use a typographical arrangement.[9]

Nevertheless s 91 of the Act clearly specifies the persons and bodies which may own copyright in broadcasts under the Act - namely the Australian Broadcasting Corporation, the Special Broadcasting Service, or the holder of a licence or a class licence under the *Broadcasting Services Act 1992* and does not specifically include the Commonwealth or a State. Section 99 simply provides that the ownership vests in the maker of a broadcast, and broadcast is defined in s 10 to mean 'a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992*'. While there are seven categories of broadcasting services, including national broadcasting services and community broadcasting services, under the *Broadcasting Services Act*, that Act does not, when read in conjunction with ss 99 and 91 of the *Copyright Act*, expressly extend to enable the Commonwealth or a State to own such rights in so far as either body may directly engage in broadcasting.[10] Proceedings of the Commonwealth Parliament are required to be broadcast under the *Parliamentary Proceedings Broadcasting Act 1946* by the Australian Broadcasting Corporation and not the Commonwealth.[11]

Part VII extends the ambit of the provisions of the Act dealing with subsistence of copyright. Sections 176(1) and 178(1) have this effect. These sections provide:

> 176 (1) Where, apart from this section, copyright would not subsist in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the work by virtue of this sub-section.

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8 Section 84 defines 'qualified person' in Part IV as (a) an Australian citizen or a person (other than a body corporate) resident in Australia; or (b) a body corporate incorporated under a law of the Commonwealth or of a State. Although s 2C of the Commonwealth *Acts Interpretation Act 1901* provides that in any Act, 'person' includes a body politic or corporate as well as an individual, the wording of s 84 and paragraph(a) in particular as well as the context of Part IV and the Act as a whole suggests an intention to restrict the meaning of the word 'person' in the definition to natural persons and thus to exclude bodies politic from the definition of 'qualified person'. Refer generally K Lindgren,WA Rothnie and JC Lahore, *Copyright and Designs* (Sydney, Butterworths, 2004) vol 1 looseleaf [12,140].

9 For example, the publicly available document 'Licensing Private Publication of Commonwealth Legislation Etc.' approved by the Commonwealth Government on 15 December 1982, included a requirement for agreement with the Australian Government Publishing Service where private publishers intended to publish facsimile reproductions of the official version of Commonwealth legislation. The Australian Government Publishing Service imposed a charge which had been approved by its responsible Minister, assessed at 20% of the retail price of the publication, multiplied by the number of copies and adjusted to the number of pages, with an upper limit of 3000 copies beyond which no extra payment was required.

10 The *Broadcasting Services Act 1992* does not specify the 'Commonwealth' or a 'State' holding the licences referred to under that Act and the Act is expressed to bind the Crown in all capacities (s 9).

11 *Parliamentary Proceedings Broadcasting Act 1946* (Cth), s 4.

> 178 (1) Where, apart from this section, copyright would not subsist in a sound recording or cinematograph film made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the recording or film by virtue of this sub-section.

The question whether copyright subsists in an original work is determined by the requirements of s 32 of the Act. Under that section, copyright subsists in an original unpublished work the author of which was a qualified person at the time when the work was made, or if the making of the work extended over a period, was a qualified person for a substantial part of that period, and in an original published work if the first publication of the work took place in Australia, or if the author of the work was a qualified person when the work was first published, or if the author died before that time, was a qualified person immediately before his or her death. A 'qualified person' is defined in that section to mean an Australian citizen or a person resident in Australia.[12] The Copyright (International Protection) Regulations extend the operation of the Act and the provisions dealing with subsistence of copyright in particular to works published in certain specified countries or works made by citizens or residents of those countries.[13] Those countries are parties to the major multilateral copyright treaties listed in reg 4 and principally - the Berne Convention for the Protection of Literary and Artistic Works, the WIPO Copyright Treaty, the Rome Convention and the Universal Copyright Convention.

The effect of s 176(1) is that copyright would still subsist in an original work made by, or under the direction or control of, the Commonwealth or a State although the author of the work did not satisfy the mentioned requirements for protection under the Act. Thus, for example, where a work is made by a resident of a country that is not a party to a treaty specified in the Copyright (International Protection) Regulations, and would not otherwise qualify for protection, and the work was made under the direction or control of the Commonwealth, copyright would still subsist in Australia under the Act by virtue of sub-section 176(1).

Section 178(1) is similar in effect. The principles applying to the subsistence of copyright in sound recordings and cinematograph films, as well as other subject matter dealt with in Part IV are set out in ss 89 to 92 of Division 3 of that Part. The operation of these provisions of the Act also extends by virtue of the Copyright (International Protection) Regulations to such subject matter made or first published in countries that are party to the relevant major copyright treaties specified in reg 4 or made by citizens or residents of those countries.[14] It is sufficient to say that s 178(1) similarly extends the subsistence of copyright to films or sound recordings which would not otherwise be protected under the Act.

The major provisions dealing with the vesting of copyright in the Commonwealth or State are ss 176(2) and 178(2), and s 177 of the Act. Those provisions in numerical order read as follows:

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12 Section 32(4) of the *Copyright Act 1968*.
13 Regulation 4 of the Copyright (International Protection) Regulations.
14 *Ibid.* Qualified by regs 5-7.

> 176 (2) The Commonwealth or a State is, subject to this Part and to Part X, the owner of the copyright in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or the State, as the case may be.
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> 177 Subject to this Part and to Part X, the Commonwealth or a State is the owner of the copyright in an original literary, dramatic, musical or artistic work first published in Australia if first published by, or under the direction or control of, the Commonwealth or the State, as the case may be.
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> 178 (2) The Commonwealth or a State is, subject to this Part and to Part X, the owner of the copyright in a sound recording or cinematograph film made by, or under the direction or control of, the Commonwealth or the State, as the case may be.

The phrase 'by, or under the direction or control of, the Commonwealth or the State', which appears in the above provisions and the other sub-sections of ss 176 and 178 is not defined in the *Copyright Act 1968.*

A *Meaning of 'By, Or Under the Direction or Control'*

In *Linter Group Ltd (in liq) v Price Waterhouse*[15] Justice Harper of the Supreme Court of Victoria held that a transcript of judicial proceedings produced pursuant to the judge's direction under the *Evidence Act 1958* (Vic) had been produced under the direction of the State for the purposes of s 176 of the *Copyright Act*:

> As I understand it, it is common ground that the State of Victoria is the owner of the copyright in such transcript as is produced following a direction made pursuant to s.130 of the Evidence Act 1958. That section empowers a person acting judicially to direct, in circumstances that apply to this litigation, that any evidence to be given in the proceeding be transcribed in any manner that the judicial officer directs. Every person who thereafter transcribes the evidence shall, in doing so, be under the direction of the Court: s.134. That position obtains here. By s.176 of the Copyright Act 1968, the ownership of the copyright in an original literary work produced under the direction of a State shall inure to that State. As one of the three arms of government of the State of Victoria, the Supreme Court is, for the purposes of this provision, the State.[16]

Another relevant case—involving the equivalent phrase in the British *Copyright Act 1911*—was *British Broadcasting Co v Wireless League Gazette Publishing Co*.[17] In that case, the plaintiff company produced a publication called the Radio Times which contained advance daily programmes for the ensuing week. The defendant selected and copied numerous items from one of the plaintiff's publications in the Wireless League Gazette. Astbury J held that the plaintiff's publication was a compilation in which copyright subsisted but that it was not a work 'prepared or published by or under the direction or control of His Majesty or the

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15 [2000] VSC 90 (20 March 2000) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/vic/VSC/2000/90.html?query=Linter%20Group>.

16 *Ibid*, para 7.

17 [1926] Ch 433.

Postmaster-General' within the meaning of s 18 of the *Copyright Act 1911*. Copyright in the compilation of the programmes therefore belonged to the plaintiff and not the Crown.

The plaintiff was required under its broadcasting licence and a supplementary agreement to 'transmit efficiently' every day a programme of broadcast matter to the reasonable satisfaction of the Postmaster-General who had the power to revoke the licence if the programme included improper matter. Astbury J stated that the plaintiff was a licensed corporation entitled, so long as it complied with the licence, to carry on its broadcasting service for profit and to acquire and hold assets to effect that service. He concluded 'so long as they are allowed to carry on their broadcasting business for their own profit… the property in the Radio Times, including the programmes, brought into existence for the purposes of that business, is their own'.[18] Astbury J did not explore the proper construction of the phrase 'direction or control' although it is clear from the case that the production of a publication by the plaintiff was not the object of the licensing power exercised by the Postmaster-General which was directed towards the censorship of improper matter from broadcast programmes. Merely to specify the form of the programme did not constitute a direction to prepare it or to control the manner in which it was prepared.

In *Land Transport Safety Authority of New Zealand v Glogau*[19] a local statute required taxi drivers to keep log books of driving hours in a form approved by the Secretary for Transport. The Crown claimed copyright in the log books under s 52(1) of the *Copyright Act 1962* (NZ), the equivalent provision to s 176 of the Australian Act. The New Zealand Court of Appeal held that there was no Crown copyright in the log books even though there was de facto direction as to their contents and control over their form and content, because the Crown could not under statute or contract require a driver to produce the log books.

These cases therefore are of limited assistance in interpreting the words 'direction' and 'control'.

Copinger and Skone James have suggested that the phrase 'direction or control' in an equivalent United Kingdom provision is a much wider expression than 'contract of service' and that copyright in works which have been commissioned by the Crown may still vest in the Crown under that section.[20] Lindgren, Rothnie and Lahore have expressed the view that the author may be an independent contractor and a work may still be made 'by, or under the direction or control of' the Commonwealth or a State.[21] Ricketson and Creswell consider that the phrase 'is not confined to works made by authors who are employed by the Commonwealth or a State pursuant to a contract of service… but appears wide enough to cover works made for the Commonwealth or a State by independent contractors. However it is likely that, in such circumstances, the production of such works will need to be the

18 *Ibid*, 444.

19 [1999] 1 NZLR 261.

20 EP Skone-James, JF Mummery and JE Rayner-James, *Copinger and Skone James on Copyright* 12th ed, (Sweet and Maxwell, London, 1980) 846-848 and Kevin Garnett, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright*, 15th ed, (London, Sweet and Maxwell, 2005) Vol 1, 588.

21 K Lindgren,WA Rothnie and JC Lahore, *Copyright and Designs* (Sydney, Butterworths, 2004) vol 1 looseleaf [20,190].

principal object of the exercise of government direction or control, and not merely an incidental or peripheral consequence of some generalized government licensing or monitoring power'.[22] The Australian Copyright Law Review Committee in its report on *Crown Copyright* stated 'while the term clearly includes works created by government employees in the course of their duties, its exact scope is uncertain. It may include commissioned works and the works of volunteers supervised by government'.[23]

While the purposive approach to statutory interpretation guides the construction of all Commonwealth enactments, there is no clear guidance from the context of the Act itself, or its extrinsic materials and case law to assist in ascertaining the meaning of the provision. The provision should be construed according to the ordinary and natural meaning of the words.[24]

A more helpful case is the Federal Court of Australia decision in *Copyright Agency Limited v New South Wales*.[25] That case concerned certain dealings by the State of New South Wales with survey plans prepared by surveyors who were members of the Copyright Agency Limited, a collecting society for the purposes of the *Copyright Act 1968*. The State argued that the copyright in survey plans deposited for registration in pursuance of statutory land holding regimes within the State was vested in the State pursuant to s 176 or s 177 of the Act. Alternatively, it argued that it was authorized to do certain acts in relation to the survey plans otherwise than in pursuance of the Crown use provision which would attract a claim for remuneration from copyright owners in respect of those acts. The State copied and scanned the plans and incorporated them into a database for statutory as well as administrative reasons. It charged the public access and copying fees for the plans, whether electronically or over the counter.

In the majority judgment, Emmett J, with whom Lindgren J agreed, examined the meaning of the phrase 'by, or under the direction or control of the' Crown. He stated:

> 122. … "*By*" is concerned with those circumstances where a servant or agent of the Crown brings the work into existence for and on behalf of the Crown. "*Direction*" and "*control*" are not concerned with the situation where the work is made **by** the Crown but with situations where the person making the work is subject to either the direction or control of the Crown as to how the work is to be made. In the copyright context, that may mean how the work is to be expressed in a material form.
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> 123 **Direction** might mean order or command, or management or control (Macquarie Dictionary Online). Direction might also mean instructing how to proceed or act, authoritative guidance or instruction, or keeping in right order management or administration (Oxford English Dictionary Online).

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22 S Ricketson and C Creswell, *The Law of Intellectual Property*, (LBC Thomson Reuters Sydney, 2002-) Vol 2, looseleaf [14.180].

23 Australia. Copyright Law Review Committee, *Crown Copyright* (2005) 67, para 5.15.

24 Refer ss 15AA, 15AB *Acts Interpretation Act 1901* (Cth); DC Pearce & RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) 36-40.

25 [2007] FCAFC 80 (5 June 2007) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/FCAFC/2007/80.html>.

> 124 **Control** might mean the act or power of controlling, regulation, domination or command (Macquarie Dictionary Online). Control might also mean the fact of controlling or of checking and directing action, the function or power of directing and regulating, domination, command, sway: *Shorter Oxford English Dictionary* (5th ed, Oxford University 2002).
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> 125 Thus, when the provisions refer to a work being made **under the direction or control of** the Crown, in contrast to being made **by** the Crown, the provisions must involve the concept of the Crown bringing about the making of the work. It does not extend to the Crown laying down how a work is to be made, if a citizen chooses to make a work, without having any obligation to do so.
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> 126 The question is whether the Crown is in a position to determine whether or not a work will be made, rather than simply determining that, if it is to be made at all, it will be made in a particular way or in accordance with particular specifications. The phrase "*under the direction or control*" does not include a factual situation where the Crown is able, *de facto*, to exercise direction or control because an approval or licence that is sought would not be forthcoming unless the Crown's requirements for such approval or licence are satisfied. The phrase may not extend much, if at all, beyond commission, employment and analogous situations. It may merely concentrate ownership in the Crown to avoid the need to identify particular authors, employees or contracting parties.
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> 127 The Parliament did not intend that the Crown would gain copyright, or share in copyright, simply as a side effect of a person obtaining a statutory or other regulatory approval or licence from the Crown.[26]

In this view of the phrase 'by, or under the direction or control' of the 'Crown, works of Crown servants and agents are made 'by' the Crown. It would also be consistent with this view that works made by the holder of a public or statutory office who normally exercise independent powers and functions would also be works made 'by' the Crown since, in Emmett J's view, the words 'direction or control' are not concerned with the situation where the work is made by the Crown but are concerned with the situation where the person making of the work is subject to either the direction or control of the Crown.

Emmett J made it clear that where a work is made 'under the direction or control of the Crown' the Crown must bring about the making of the work. The meaning of the phrase would not extend to the factual situation where the Crown is able *de facto* to exercise direction or control because an approval or licence would not be forthcoming unless Crown requirements are satisfied. In the majority judgment of the Full Federal Court delivered by Emmett J the phrase 'may not extend much, if at all, beyond commission, employment and analogous situations'.[27] While the Full Court of the Federal Court held on the facts that there 'a surveyor must be taken to have licensed and authorized the doing of the very acts that the surveyor was intending should be done as a consequence of the lodgement of the Relevant

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26 [2007] FCAFC 80 (5 June 2007) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/FCAFC/2007/80.html>.

27 [2007] FCAFC 80 (5 June 2007) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/FCAFC/2007/80.html> para 126.

Plan for registration'[28] that is, there was an implied licence for the State to do everything that, under the statutory and regulatory framework that governed registered plans,[29] the State is obliged to do with, or in relation to, registered plans, the Court did not consider that any of the registered plans were made under the direction or control of the State within the meaning of s 176(2) of the *Copyright Act 1968* (Cth).

Accordingly, the phrase 'by, or under the direction or control of the Crown' in the majority view would encompass works of Crown servants, agents, public office holders, and commissioned works and would extend to other works of independent contractors where the Crown's contract has brought about the making of the work. It would seem consistent with this view that works of independent contractors must either be the central object of the Crown's direction (a commissioned work) or be contemplated by the parties as necessarily arising from that direction. This is consistent with a wider meaning of 'direction' beyond 'control'. Of course, a relationship of independent contractor is often governed by a written contract and ownership of copyright in works or other subject matter produced under a commission, or other form of independent contract, can be the subject of an express agreement between the parties, by virtue of s 179 of the *Copyright Act 1968*.

B *Vesting Of Copyright by First Publication*

One of the major provisions dealing with the vesting of copyright in the Commonwealth or State, s 177, raises other questions of interpretation and policy. It vests in the Commonwealth or a State the copyright in works first published in Australia or in a country to which the Act extends if first published by, or under the direction or control of, the Commonwealth or the State to the extinguishment of the rights of any person who claims the copyright in the unpublished work. This appears to be the position even though s 29(6) of the Act provides that in determining whether a work has been published for the purposes of any provision of the Act, any unauthorized publication (that is, without the licence of the copyright owner) shall be disregarded.[30] That is, that section implies that s 177 should vest copyright in the

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28 [2007] FCAFC 80 (5 June 2007) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/FCAFC/2007/80.html> paras 156, 155.

29 On appeal from the Full Federal Court, the High Court of Australia rejected the implication of a licence: 'a licence will only be implied when there is a necessity to do so. As stated by McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*, 'This notion of 'necessity' has been crucial in the modern cases in which the courts have implied for the first time a new term as a matter of law.' Such necessity does not arise in the circumstances that the statutory licence scheme excepts the State from infringement, but does so on condition that terms for use are agreed or determined by the Tribunal (s 183(1) and s 183(5)). The Tribunal is experienced in determining what is fair as between a copyright owner and a user. It is possible, as ventured in the submissions by CAL, that some uses, such as the making of a "back-up" copy of the survey plans after registration, will not attract any remuneration: *Copyright Agency Ltd v New South Wales* [2008] HCA 35 <http://www.austlii.edu.au/au/cases/cth/HCA/2008/35.html> paras 92, 93.

30 Sub-sections 29(6) and 29(7) provide:
(6) In determining, for the purposes of any provision of this Act-
(a) whether a work or other subject-matter has been published;
(b) whether a publication of a work or other subject-matter was the first publication of the work or other subject-matter; or

Commonwealth or State only where the publication is with the consent of the author. Nevertheless, s 7 of the Act provides that the provisions of the Act bind the Crown subject to the provisions of Part VII and it would therefore appear that s 177 is paramount in its operation over and above the requirements of s 29(6).

According to the United Kingdom Committee to consider the Law on Copyright and Designs (the Whitford Committee), the then equivalent United Kingdom provision dealing with the automatic vesting of rights in the Crown on first publication 'is said to be necessary in order to safeguard the right of the Crown to publish, for example, evidence given to committees and commissions and the findings of such bodies'.[31] Section 177 has substantial consequences and indeed on its face appears to be a law with respect to the acquisition of property without provision for just terms as required by s 51(xxxi) of the Commonwealth Constitution. But the general provision in the Act dealing with ownership of copyright in works (s 35) is subject to the provisions of Parts VII and X and it is difficult to characterize s 177 as a law dealing with the acquisition of property because the Act itself creates that property and itself determines in whom that property vests. It should be pointed out that under the Act there is no automatic continuation of a copyright subsisting in an unpublished work on the publication of that work. Those requirements of s 32 of the Act described earlier in this Article must be met for copyright to subsist in a published work from the time of its first publication. The effect of s 177 is however, tantamount to a law with respect to the acquisition of property within the meaning of s 51(xxxi). As the Whitford Committee commented on the question of safeguarding the right of the Crown to publish material such as evidence given to committees,

> It is understandable that it may indeed be desirable to safeguard this right; but we do not see that a right arising because of publication safeguards a right to publish. Further it seems indefensible to provide such a safeguard by a provision enabling the Crown to override an independent copyright in works independently produced.[32]

In Australia, the Copyright Law Review Committee in its *Crown Copyright* report recommended the repeal of s 177 for similar reasons.[33]

(c) whether a work or other subject-matter was published or otherwise dealt with in the life-time of a person,
any unauthorized publication or the doing of any other unauthorized act shall be disregarded.
(7) Subject to section 52, a publication or other act shall, for the purposes of the last preceding sub-section, be taken to have been unauthorized if, but only if-
(a)copyright subsisted in the work or other subject-matter and the act concerned was done otherwise than by, or with the licence of, the owner of the copyright; or
(b) copyright did not subsist in the work or other subject-matter and the act concerned was done otherwise than by, or with the licence of-
(i) the author or, in the case of a sound recording, cinematograph film or edition of a work, the maker or publisher, as the case may be; or
(ii) persons lawfully claiming under the author, maker or publisher.

31 United Kingdom. *Report of the Committee to consider the Law on Copyright and Designs* Cmnd. 6732, (London, 1977) 151 (para. 599).

32 *Ibid.*

33 Australia. Copyright Law Review Committee, *Crown Copyright*, Canberra 2005, xxi, 76-78 128.

The fundamental question surrounding the operation of s177 is whether s 29(6) of the *Copyright Act* has the effect of restricting the operation of s 177 to circumstances only where the publication is with the consent of the author? This narrow interpretation would deny s 177 of much of its force.

There are conflicting views on this issue. Monotti argues[34] that s 177 should be read in this way because the s 29(6) does not appear to be subject to Part VII and yet s 29(8) specifically mentions that nothing in either of the two preceding subsections (including s 29(6)) affects any provisions of Part IX (dealing with moral rights). Further, she argues that s 177 should be read down to avoid the constitutional limitation on acquisition of property other than on just terms,[35] the two provisions are not inconsistent if first publication arises only after the author's consent has been obtained, and that other provisions of the Act specifically provide that they are subject to Part VII.

Nonetheless, s 7 of the Act provides that the provisions of the Act bind the Crown subject to the provisions of Part VII and accordingly suggests that s 177 is paramount in its operation over and above the requirements of s 29(6). Section 177 deals with the ownership of works on first publication by the Commonwealth or a State. The general provision in the Act dealing with ownership of copyright in works (s 35) is expressed to be subject to Parts VII and Part X.

Be that as it may, s 29(6) could be read harmoniously with s 177 if the word authorized in s 29(6) was read as 'authorized by the Act'.

The narrow view was accepted in *Copyright Agency Limited v New South Wales*[36] although the Federal Court of Australia held in that case that the Crown did not 'first publish' (within the meaning of s 177 of the *Copyright Act 1968*) the survey plans registered with it by making the plans available to the public and to local government and authorities.

Emmett J stated in that case:

> 131 Under s 183(8), an act done under s 183(1) does not constitute publication of a work. Thus, if the making available of a work to the public by the State is done under s 183, it does not constitute publication. *A fortiori*, it is not first publication. On the other hand, if such making available by the State is not done under s 183(1), and there is no

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34 A Monotti, 'Nature and basis of Crown copyright in official publications' (1992) 14 *European Intellectual Property Review* 305, 314.

35 Although s177 may appear on its face to be a law with respect to the acquisition of property without provision for just terms as required by s 51(xxxi) of the *Australian Constitution*, it is difficult to characterize s 177 as a law dealing with the acquisition of property because the *Copyright Act 1968* itself creates that property and itself determines in whom that property vests. The High Court of Australia has taken the view that to the extent that a law passed under the copyright power, s 51(xviii) of the *Constitution*, conferring rights on authors and other originators of copyright material is concerned with the adjustment of competing rights or obligations of other persons, that impact is unlikely to be characterised as a law with respect to the acquisition of property for the purposes of s 51: refer *Nintendo Company Limited v Centronics Systems Pty Limited* (1994) 181 CLR 134, 160-161; [1994] HCA 27 per Mason CJ, Brennan, Deane, Toohey, Gaudron, and Mc Hugh JJ at [38 - 39].

36 [2007] FCAFC 80 (5 June 2007) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/FCAFC/2007/80.html?query=C>.

> other licence taken to have been granted to the State to make a work available, it would follow that those acts of the State would be an unauthorised publication and, accordingly, under s 29(6) must be disregarded in determining whether the work has been published and whether the publication was the first publication of the work.[37]

Emmett J held on the facts that the survey plans had previously been published and that by the lodgement of the plans, a surveyor must have been taken to have licensed and authorized the Crown to make available to the public, copy and do any other acts required by the Crown's statutory and regulatory planning regime. Copyright in the plans remained with the surveyor. While the case recognised this notion of implied licence in dealings with government it did not explore arguments for the wider interpretation of s 177 above. The Court did not have to decide whether s 177 effected an acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the *Commonwealth Constitution*.

Section 177 applies only in relation to hitherto unpublished works and the Commonwealth or a State must, in order to avoid infringement of copyright by publishing previously published works, either seek the permission of the copyright owner or rely upon s 183 of the Act if the publication is for 'the services of the Commonwealth or the State'. That section provides a statutory defence to infringement but obliges the Commonwealth or a State to notify the copyright owner of the publication and to come to agreement on terms with the copyright owner, or in default of agreement, as fixed by the Copyright Tribunal.[38]

II WHAT CONSTITUTES THE CROWN UNDER PART VII OF THE COPYRIGHT ACT 1968

In relation to the way in which ss 176-178 in Division 1 of Part VII of the *Copyright Act 1968* operate, the Copyright Law Review Committee in its *Crown Copyright* report expressed concern about the 'uncertainty'[39] created as to who is the Crown and in whom copyright will vest.

The Committee listed three possible interpretations of the word 'Commonwealth' referred to in the sections.[40] One was that the Commonwealth was referred to as a legal person and includes agents or emanations of the Commonwealth. The second was that an entity that is included as the Commonwealth within the 'shield of the Crown' test would own copyright itself under ss 176-178. The third was that copyright vests in the Commonwealth as a legal person but is exercisable by the relevant authority. This third interpretation adopts the first view but accepts that, for administrative purposes, copyright is exercisable by the arm of government to which it relates.

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37 [2007] FCAFC 80 (5 June 2007) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/FCAFC/2007/80.html?query=C>.

38 Sub-sections 183(4) and 183(5) of the Act.

39 Australia. Copyright Law Review Committee, *Crown Copyright*, Canberra 2005, 6, 8, 74, 113.

40 *Ibid* 74–75.

In 2007 a paper produced by the Parliamentary Library of the Victorian Parliament examined the meaning of the term 'State' and concluded that Crown copyright was applicable to all three arms of government, including the Victorian Parliament and its administrative departments.[41] It based its view on s 15 of the *Constitution Act 1975* (Vic) which refers to the legislative power as part of the State of Victoria.

Section 10(1), the interpretation section of the *Copyright Act 1968*, provides:

> ***the Crown*** includes the Crown in right of a State, the Crown in right of the Northern Territory and the Crown in right of Norfolk Island and also includes the Administration of a Territory other than the Northern Territory or Norfolk Island.
>
> ***the Commonwealth*** includes the Administration of a Territory.

Sections 176-178 in Division 1 of Part VII of the *Copyright Act 1968,* dealing with the vesting of copyright, refer to 'the Commonwealth or a State'. They are collectively referred to in the heading and most of the subheadings of Part VII of the Act as 'the Crown'.

A *The Scope of 'the Commonwealth or a State'*

In most practical respects when we think of the Commonwealth or the State, we think of the governments of the Commonwealth or the States or, more precisely, the executive governments of these juristic persons. In essence, the executive governments comprise the departments of government and bodies within Ministerial portfolios which are responsible to Ministers who in turn are responsible to Parliament and are appointed by the sovereign's representative to administer policy portfolios. These executive governments are formally described as the Crown in right of the Commonwealth or in right of the State respectively.

However, unlike the headings, the sections in Part VII generally use the term 'the Commonwealth or a State' and not 'the Crown'. There are some exceptions. In Division 1 of Part VII, s 182A refers to 'any prerogative right or privilege of the Crown' that are expressly preserved by the *Copyright Act 1968* in s 8A(1). In Division 2 of Part VII, which is headed 'Use of Copyright Material for the Crown', s 183(2) uses the expression 'the Government of the Commonwealth'.[42] In the same Division, ss 183A-183C use the terms 'government' and 'government copies'. However, s 182B defines 'government' to mean 'the Commonwealth or a State' for the purposes of that Division. 'State' is defined in s 10(3)(n) of the *Copyright Act 1968* as modified by the *ACT Self-Government (Consequential Provisions) Regulations*[43] to include the Australian Capital Territory, the Northern Territory and Norfolk Island.

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41 Victoria. Economic Development and Infrastructure Committee, Parliament of Victoria, *Inquiry into Improving Access to Victorian Public Sector Information and Data: Discussion Paper (July 2008)* 21.

42 In s 183(2) the reference to 'Government of the Commonwealth' making agreements with the 'Government of some other country' would appear in its context to relate only to the executive government of the Commonwealth, despite the later (1998) insertion of the definition of 'government' in s 182B.

43 Statutory Rules 1989 No 392 (Cth).

The use of 'the Commonwealth or a State' suggests that the 'Commonwealth' or the 'State' is not confined to the Crown in right of the Commonwealth, or the Crown in right of the State, that is, the executive government of the Commonwealth or a State. Neither the Commonwealth nor a State is defined in the *Copyright Act 1968*. Section 17(a) of the *Acts Interpretation Act 1901* (Cth) defines the Commonwealth to mean the Commonwealth of Australia, which is the body politic of Australia.[44] That body politic established by the *Commonwealth of Australia Constitution Act 1900* (Imp)[45] is divided under that Constitution into three broad arms—the executive, legislative and judicial—which comprise the essential functions of government. Section 6 of the *Commonwealth of Australia Constitution* defines 'the Commonwealth' to mean 'the Commonwealth of Australia as established under this Act'.[46] The view that the use of the term 'the Commonwealth or State' refers to the three arms of government in either case is supported in *Linter Group Ltd (in liq) v Price Waterhouse*[47] in which Justice Harper of the Supreme Court of Victoria expressed the view that the Supreme Court 'as one of the three arms of government of the State of Victoria' is, for the purposes of s 176 of the *Copyright Act 1968*, the State.

1 *The Broad Test – 'Organisations or Institutions of Government'*

In *Deputy Federal Commissioner of Taxation v State Bank of NSW*[48] it was argued by the State Bank of New South Wales that it was the State of New South Wales and was thus not subject to a law of the Commonwealth imposing a tax on its property in contravention of s 114 of the *Constitution*. The High Court of Australia rejected arguments that the State Bank must show it is the Crown 'in right of the State' or that it is entitled to the privileges or immunities of the State that is, 'within the shield of the Crown' in respect of the application of the taxing statute. The Full Bench of the High Court stated:

> 19. The plaintiff submits … that the question is to be determined by asking whether the State Bank is entitled to "the privileges and immunities of the Crown" in accordance with the approach adopted in Townsville Hospitals Board v. Townsville City Council. Again, this submission has little to commend it. The "shield of the Crown" doctrine has evolved as a means of ascertaining whether an agency or instrumentality "represents" the Crown for the purpose of determining whether that agency or instrumentality is bound by a statute enacted by the legislature. … The question which arises here is not to be answered by reference to a doctrine which has evolved with the object of answering questions of a different kind. The question here "depends upon the meaning and operation of an unalterable constitutional

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44 Section 17(a) of the *Acts Interpretation Act 1901*: *Australia* or *the Commonwealth* means the Commonwealth of Australia and, when used in a geographical sense, includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, but does not include any other external Territory.

45 63 & 64 Vict, c 12, s 9.

46 Section 6 of the *Commonwealth of Australia Constitution Act 1900* (Imp): *'The States'* shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called a *State.*

47 [2000] VSC 90 (20 March 2000) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/vic/VSC/2000/90.html?query=Linter%20Group>.

48 [1992] HCA 6; <http://www.austlii.edu.au/au/cases/cth/HCA/1992/6.html>; (1992) 174 CLR 219.

> provision which the intention of the legislature cannot affect" *Bank of NSW v The Commonwealth* (1948) 76 CLR per Dixon J at p 359.
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> 20. Once it is accepted that the Constitution refers to the Commonwealth and the States as organizations or institutions of government in accordance with the conceptions of ordinary life, it must follow that these references are wide enough to denote a corporation which is an agency or instrumentality of the Commonwealth or a State as the case may be. The activities of government are carried on not only through the departments of government but also through corporations which are agencies or instrumentalities of government. Such activities have, since the nineteenth century, included the supply on commercial terms of certain types of goods and services by government owned and controlled instrumentalities with independent corporate personalities.[49]

The concept of the Commonwealth or a State 'as organizations or institutions of government in accordance with the conceptions of ordinary life' is wider than the concept of what constitutes a part of the executive government of the Commonwealth or a State. As the majority of the High Court in *Austral Pacific Group v Airservices Australia* stated:

> 10. … Airservices was established as a body corporate by s 7 of the Airservices Act to perform such functions as the provision of facilities to permit safe aircraft navigation within Australian-administered airspace (s 8(1)(a)). This and other provisions of the statute indicate that Airservices is a Commonwealth agency or instrumentality which is included in the term "the Commonwealth" in s 75(iii) of the *Constitution*.
>
> …
>
> 14. Airservices is a body corporate which, while it is charged with the performance of what may be classed as governmental functions, is not part of the executive government of the Commonwealth. Airservices is sued by Austral Pacific as the Commonwealth within the meaning of s 75(iii) of the *Constitution* but it does not necessarily follow that Airservices attracts the preferences, immunities and exceptions enjoyed by the executive government in respect of State laws and identified with the *Cigamatic* doctrine.[50]

While it is relatively easy to identify the legislative and judicial arms of the Commonwealth as falling within the meaning of the 'Commonwealth' under s 75(iii) of the Constitution, it may be seen from these cases that determining the precise scope of the 'Commonwealth' within the meaning of the *Constitution* is not so clear-cut. The views expressed by the High Court of Australia on the scope of s 75(iii) of the *Constitution* suggest that what constitutes the 'Commonwealth' clearly extends beyond those bodies which constitute the executive government.[51]

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49 Ibid paras 19-20 (joint judgement of Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

50 [2000] HCA 39; 203 CLR 136, paras 10, 14 per Gleeson CJ, Gummow and Hayne JJ.

51 This wider view extends to 'the State'–refer *SGH Ltd v Commissioner of Taxation* [2002] HCA 18; 210 CLR 51; 188 ALR 241; 76 ALJR 780 (1 May 2002) para 13. 'Against the background of these other provisions of the Constitution, it is evident that references in s 114 to the Commonwealth and a State are not to be understood narrowly. Reinforcement for that view comes from other provisions of the

In *Australian Securities and Investments Commission v Edensor Nominees*, the Full Bench of the High Court of Australia held that the Commission (ASIC) was an agency or instrumentality of the Commonwealth[52] and thus answers the description of 'the Commonwealth' in s 75(iii) of the *Constitution*. This is one of more than 60 Commonwealth agencies presently subject to the *Public Governance, Performance and Accountability Act 2013 (Cth)* and the *Public Service Act 1999 (Cth).*

There are few court decisions that directly address the question of what constitutes the Commonwealth or a State for the purposes of the *Copyright Act 1968.*

All judges of the Full Court of the Federal Court of Australia in *Re Australasian Performing Right Association Ltd; Re Australian Broadcasting Commission* were of the view that the primary task in determining whether a public corporation is an emanation or instrumentality of the Commonwealth for the purposes of the *Copyright Act 1968*, is to determine the intention of the legislature which appears from the statute under which the body is established.[53] In the absence of an express provision on the question, matters to be considered,

> … include the question whether the corporation fulfills a governmental or non-governmental function; the capacity of the Government to control its activities; financial autonomy; the right of appointment and dismissal of the members of the body and of its staff by the Government; whether it has duties to furnish information or accounts to the Government; and its power over assets in its ownership or control.[54]

2 The Narrower Test – 'Shield of the Crown'

The Full Court of the Federal Court took the view that the Australian Broadcasting Commission did not fall within the word 'Commonwealth' nor was it an agency or instrumentality of the Commonwealth for the purposes of s 183 of the *Copyright Act 1968*. In reaching that conclusion, the Full Court examined those matters in relation to the *Broadcasting and Television Act 1942* (Cth) the most important of which was the degree of legal control exercisable by the Minister or Government over the body in question. In reaching their conclusion, however, the judges of the Full Court considered both cases dealing with whether bodies fell within the scope of the 'Commonwealth' under s 75(iii) of the *Constitution*, such as *Inglis v Commonwealth Trading Bank of Australia*,[55] and whether they were an instrumentality or agent of the Crown in right of the Commonwealth or State, that is, is entitled to exercise the privileges and immunities of the Crown, including

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Constitution and, in particular, s 75. It was in the context of s 75 and its provisions for the original jurisdiction of this Court, that Dixon J referred to the Constitution going "directly to the conceptions of ordinary life" and said that: "From beginning to end [the Constitution] treats the Commonwealth and the States as organizations or institutions of government possessing distinct individualities. Formally they may not be juristic persons, but they are conceived as politically organized bodies having mutual legal relations and amenable to the jurisdiction of courts upon which the responsibility of enforcing the Constitution rests." (per Gleeson CJ, Gaudron, McHugh and Hayne JJ).

52 [2001] HCA 1, para 39.

53 Refer (1982) 45 ALR 153 at 158, 167.

54 (1982) 45 ALR 153 at 158, per Bowen CJ and Franki J.

55 [1969] HCA 44; (1969) 119 CLR 334.

Townsville Hospitals Board v City of Townsville.[56] While both questions are determined by statutory interpretation based on similar tests, the latter is a narrower question than the former.

The interpretative tests were also applied in *Allied Mills Industries v Trade Practices Commission*[57] where the Federal Court held the Trade Practices Commission was an emanation or agency of the Crown in right of the Commonwealth and thus fell within the meaning of the 'Commonwealth' for the purposes of s 183 of the *Copyright Act 1968*.[58]

Sheppard J in that case examined the purposes and objects of the *Trade Practices Act 1974* (Cth) and the power of ministerial control over the Commission set out in s 29 of the Act in reaching the view that the Commission was an emanation or agency of the Crown. He stated:

> 121. Section 183 of the *Copyright Act* provides that the copyright in a work is not infringed by the Commonwealth or a State, or by a person authorized in writing by the Commonwealth or a State, doing any acts comprised in the copyright if the acts are done for the services of the Commonwealth or State. As a matter of precaution the Commission obtained an authority from the Commonwealth to use the various documents. But I have held that the Commission is an agency or emanation of the Crown. The authority was not therefore necessary. I am satisfied that the use to which the Commission has put the documents or to which it will put them in the future has been or will be for the services of the Commonwealth.[59]

The difficulty in the narrower 'shield of the Crown' test is that courts have recognised that it may be possible for an agency or instrumentality to be endowed with the attributes of the Crown for one purpose but not for others or that the legislature could explicitly endow a private corporation carrying on business for private purposes with the privileges and immunities of the Crown and yet that corporation would not answer the description of the 'State' or 'Commonwealth' for constitutional purposes.

Commonwealth and State enactments establishing bodies corporate do not usually include any express provision endowing the attributes of the Crown either in respect of some or all of the functions of the particular body. The few examples in the Commonwealth sphere where statutory reference is made to the privileges and immunities of the Crown in fact only negate the attributes of the Crown.[60] There are no Commonwealth enactments that contain a specific provision giving a corporation the character of an emanation or agency of the Commonwealth or a State for the purposes of the *Copyright Act 1968*. In a direct sense, the tests of statutory

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56 (1982) 42 ALR 319 (HC).

57 *Allied Mills Industries Pty Ltd v Trade Practices Commission (No 1)* [1981] FCA 11; (1981) 55 FLR 125.

58 Per Sheppard J, paras 32, 34, 121.

59 Sheppard J stated at para 34. 'Since reserving my decision my attention has been drawn to the joint judgment of Deane and Fisher JJ. in *Thomson Publications (Australia) Pty. Ltd. v Trade Practices Commission* (1979) 40 FLR 257. They reached the conclusion that the Commission was "plainly an instrumentality or agent of the Crown in right of the Commonwealth" (1979) 40 FLR, at p 275. Their decision in that respect is, of course, binding on me'.

60 Examples are s 8 of the *Christmas Island Agreement Act 1958* (Cth), s 8 of the *Snowy Hydro Corporatisation Act 1997* (Cth) and s 6 of the *Housing Loans Insurance Corporation (Transfer of Assets and Abolition) Act 1996* (Cth).

intention whether a body is entitled to be considered the 'Commonwealth' or 'State' for the purposes of the *Copyright Act 1968* have been used to determine the scope of the executive government of the Commonwealth or State and the legal person of the 'Commonwealth' or the 'State'. While there is some lack of clarity in the case law on the question, it is submitted the better view in law is that the terms the 'Commonwealth' or the 'State' comprise the legal persons identified in the *Australian Constitution* 'as organizations or institutions of government in accordance with the conceptions of ordinary life', that is, comprising the three elements of governance identified in the *Constitution* exercising legislative, executive and judicial power.[61]

III INTERRELATIONSHIP BETWEEN CROWN COPYRIGHT AND THE PREROGATIVE RIGHT

The significance to the present discussion of the scope of the terms 'Commonwealth' and 'State' is particularly apparent when considering the interrelationship between Crown copyright and the prerogative right.

The prerogative right of the Crown in the nature of copyright is the oldest basis of Crown ownership of works. This right extends to the printing and publication in Australia of various works of state. These works include Acts of Parliament, proclamations, orders in council and instruments made under an Act of Parliament such as regulations and ordinances. Judgments of the Crown's judicial officers also arguably fall within the right.

The prerogative right is a common law right and is derived from the prerogative right in the nature of copyright held by the British Crown which dates back in time to the early development of printing. As a consequence of the reception of English law into the Australian colonies, the prerogative right has been inherited by the Crown in right of the colonies before federation and by the Crown in right of the several States and the Commonwealth of Australia upon federation. The right is exercisable by the executive government of the Commonwealth and the several States.[62]

Bills and Acts of State and federal Parliaments, written judgments of State and federal judges and other legal works covered by the prerogative would normally satisfy the requirements of protection as original literary works under the *Copyright Act*. In the case of Bills and Acts of Parliament, there would normally be a number of joint authors but they would in almost all cases be draftsmen employed by the Commonwealth or State acting within the scope of their employment and copyright in these works would therefore vest in the Commonwealth or State under sub-section 176(2) of the Act. Private Member Bills are also normally drafted

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61 The Copyright Law Review Committee in its *Crown Copyright* report at 6-7 stated that the scope of what is meant by the Crown is somewhat uncertain and outlined arguments for both the broader view that it encompassed the legislative, executive and judicial arms (an inclusive view) or the narrower view that it refers only the executive arm of government. It did not express a concluded view on the question: Australia. Copyright Law Review Committee, *Crown Copyright*, Canberra 2005, 6,7 [paras 2.04-2.06].

62 *Attorney-General for New South Wales v Butterworth and Company* (1938) 38 SR (NSW) 195.

with the assistance of staff or draftsmen employed by the Commonwealth or State[63] although in odd cases the responsible Member of Parliament may draft a Bill and in this situation copyright would vest in the author of the document personally. The Member would not in his capacity as a Member of Parliament be an employee or agent of the executive government or of the Parliament, since he is merely a representative in the Parliament and copyright would not therefore vest in the Commonwealth or State. It should be pointed out that the enactment of a Bill does not except in the most minor way, alter the form of the literary work which receives protection under the *Copyright Act*.

A written judgment produced by a judge of a State or federal court would also fulfil the requirements of an original literary work and be protected under the Act. Although the author of a judgment is a judge, Lahore suggests the owner of copyright is the Crown.[64] It is, however, difficult to characterize a judgment as having been produced 'by, or under the direction or control of, the Commonwealth or the State' unless the wider meaning of 'Commonwealth' or 'State' previously described is adopted by a court. If the terms were construed as merely referring to the executive government, that is, the Crown in right of the Commonwealth or in right of the State, it could not be said that a State or federal judge in writing a judgment is acting under the direction or control of the Crown since there is no contract of service and such a notion is clearly contrary to the independent position of the judiciary.

Formal court orders would also be the subject of copyright vesting in the Commonwealth or State. The position with respect to oral judgments, however, is that copyright would vest in the reporter (usually the Commonwealth or State)[65] subject to any contribution or review by a judge to the report which may have the effect of vesting copyright in the report jointly between the Commonwealth or State and the reporter.

The marrying of copyright and the prerogative right is achieved by section 8A of the *Copyright Act*. Sub-section (1) of that section provides:

> Subject to sub-section (2), this Act does not affect any prerogative right or privilege of the Crown.

The provision is ambiguous. It may imply only that the prerogative right has been preserved and that copyright co-exists with the prerogative right. It may also imply that copyright cannot subsist in any works which are subject to the prerogative of the Crown. A comparative

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63 JA Pettifer et al (eds), *House of Representatives Practice* (AGPS, Canberra, 1981) 522; BC Wright and PE Fowler (eds), *House of Representatives Practice* (Department of the House of Representatives Canberra 2012) 582.

64 Refer James Lahore, *Intellectual Property Law in Australia: Copyright* (Butterworths, Sydney, 1977) 100 and K Lindgren,WA Rothnie and JC Lahore, *Copyright and Designs* (Sydney, Butterworths, 2004) vol 1 looseleaf [20,230, 20,235].

65 Refer Walter v Lane [1900] AC 539 and G Sawer 'Copyright in Reports of Legal Proceedings' 27 *ALJ* 82, 84-86. As to edited reports refer James Lahore, *Intellectual Property Law in Australia: Copyright* (Butterworths, Sydney, 1977) 100 and K Lindgren,WA Rothnie and JC Lahore, *Copyright and Designs* (Sydney, Butterworths, 2004) vol 1 looseleaf [20,230, 20,235].

analysis of the rights, though, suggests an interpretation of the provision which a court is likely to adopt.[66]

The nature of the prerogative right to print and publish certain works is not consistent with those statutory rights subsisting under the *Copyright Act* in original literary works. For instance, the prerogative right is merely restricted to the printing and publication of certain works, whereas the rights in original literary works under the *Copyright Act* include the right to reproduce the work in a material form, to publish the work, to perform the work in public, to communicate the work to the public and to make an adaptation of a work. Only in a very limited sense could the right to print and publish include the right to make an adaptation of a work, that is, merely with respect to the right to print and publish a translation of a work. The definition of adaptation in the *Copyright Act* however is much wider in scope.[67]

It is an infringement of copyright to do or authorize the doing of an act comprised in the copyright in relation to a substantial part or more of a work, although the Act provides certain statutory defences to infringement which enable limited dealings with a copyright work without infringement of copyright. There is no authority for the proposition that the Crown's prerogative right in a work may be infringed by a substantial reproduction of such a work, or that, apart from the effect of s 8A(2) the specified lawful uses which would otherwise be an infringement do not infringe the prerogative right. Indeed it has already been suggested[68] that the making of one or up to a few copies of the prerogative work would not be an infringement of the right of printing and this in itself goes beyond the extent of legal copying permitted under most defences to infringement in the Act.

The question of ownership of rights also leads to inconsistency. If, for example, a State Government first publishes a judgment produced by a judge of a State court when exercising federal jurisdiction or a publisher publishes such a judgment under the direction or control of the State then copyright would vest in the State under s 177 of the Act, but the prerogative right to print and publish the judgment would vest in the Crown in right of the Commonwealth. Such a situation could occur under existing publishing arrangements in Western Australia and Tasmania for the publication of judgments. In particular the Law Reporting Advisory Board in Western Australia which advises that State's Attorney-General[69] is an emanation of the executive government of the State and therefore must be

66 In *Butterworth's* case Long Innes C J. in Eq. declined to express an opinion on the question whether Crown copyright subsisted in statutes in which the Crown has a prerogative right, although counsel for the informant in the case argued that the statutory and common law rights existed concurrently. Long Innes C J. did, however, express the view that if the Crown had no prerogative right over the Acts of Parliament in question, the informant would have been entitled to succeed on the *Copyright Act*, that is, that a copyright existing under section 18 of the Act in the Acts of Parliament of New South Wales would vest in the Crown in right of the State of New South Wales. Refer (1938) 38 S.R. (NSW) 195, 258-259.

67 See s 10(1) of the Act.

68 Refer Dr John Gilchrist 'Origins and Scope of the Prerogative Right to Print and Publish Certain Works in England (2012) 11(2) *Canb LR* 4, 17-18.

69 The Western Australia Reports are published by Butterworths Pty Ltd for the Law Reporting Advisory Board of Western Australia established under the *Law Reporting Act 1981*. The Reports would be published under the direction of the State within the meaning of section 177 of the Act.

regarded as part of the State under the Act. Similarly both State Supreme Court Libraries, which must also be regarded as part of the irrespective States, publish certain judgments of their Supreme Courts.[70]

The civil remedies available to the Crown for infringement of both rights are nevertheless similar. Indeed the *Copyright Act* to a large extent represents a codification of the principal legal and equitable remedies available to the Crown for infringement of the common law right, namely the equitable relief of an injunction (the normal remedy) and an account[71] or the legal remedy of damages. There are, however, some differences of detail. For instance, a final injunction in respect of a published prerogative right work would, of course, be enforceable in perpetuity since the right so exists although such an injunction in respect of a published Crown copyright work will only be enforceable for a period of 50 years from the year of first publication. Under s 116 of the Act, the Crown as copyright owner is also entitled in respect of any infringing copy, or plate used or intended to be used for making infringing copies, to the rights and remedies by way of an action for conversion or detention, to which he would have been entitled if he were the owner of the infringing copy or plate.[72] This right extends beyond a court's inherent equitable jurisdiction to order delivery up of infringing copies and plates for the purpose of destruction,[73] not only because it enables possession of the copies and plates by the copyright owner but also because it provides a further basis for a claim of

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70 The Supreme Court Libraries of the States of Tasmania and Western Australia publish unreported judgments within the meaning of the word publish (s 29) in the *Copyright Act*. In Western Australia the Supreme Court Library provides a subscription service (PLEAS) under which persons and organisations can, upon payment of a fee, receive copies of all judgments of Western Australian courts. It also provides a catchwords alerting service for all unreported judgements from the Supreme and District Courts, which alerts practitioners to judgements which they can then request by document delivery, or view via website. Those websites contain 'Conditions of Use' which state that copyright in the material vests in the State of Western Australia. From 1996 Supreme and from 1999 District Court decisions have been made available online through AustLII. AustLII states in respect of Supreme Court decisions that the copyright is owned by the 'Crown in right of the State of Western Australia'.
The Council of Law Reporting for Tasmania has authorized the data base of full text decisions of the Supreme Court from 1985 to be made available online through AustLII. AustLII states that the 'data is owned by the State of Tasmania'. 1929-1985 unreported judgements are made available by the Supreme Court Library to requesters through the Library's catchwords index. There are a few exceptions to the post 1985 AustLII dissemination involving issues of de-identification of minors and victims of crime which, once processed, are made available by the Supreme Court to requesters through the Library's catchwords index: refer Tasmania. Supreme Court of Tasmania <http://www.supremecourt.tas.gov.au/libraries/supreme_court_library>. It would appear that at least many unreported judgments have been published in the copyright sense by the Supreme Court since those judgments have been widely distributed and available to subscribers for many years. Both Tasmanian and the Western Australian Supreme Court judgments described would be published by a State within the meaning of section 177 of the *Copyright Act 1968*. The Tasmanian State Reports are published by the Law Book Company for the Council of Law Reporting in Tasmania which was originally established by prerogative Order-in-Council (Council of Law Reporting Order 1978, No. 82 of 1978) and is now established as a body corporate by the *Council of Law Reporting Act 1990* (Tas). The Council would be regarded as an emanation of the State for the purposes of the *Copyright Act 1968*.

71 Refer generally K Lindgren,WA Rothnie and JC Lahore, *Copyright and Designs* (Sydney, Butterworths, 2004) vol 1 looseleaf [36,025-36,370].

72 Section 116(2) of the Act provides that in the case of innocent infringers, the plaintiff is not entitled to relief by way of damages or other pecuniary remedy, other than costs.

73 Refer K Lindgren,WA Rothnie and JC Lahore, *Copyright and Designs* (Sydney, Butterworths, 2004) vol 1 looseleaf [36,370].

damages over and above those remedies for infringement. Apart from these differences, it should be also pointed out that the Act creates offences for certain commercial dealings with works which provide another and a practically important means of relief for the Crown,[74] unavailable at common law.

Although the similarities between the statutory and common law rights are apparent, those inconsistencies mentioned suggest that if the prerogative right was not affected by the *Copyright Act* the statutory and common law rights could not co-exist. The incorporation of s 8A(2) in the Act in the 1980 Amendments to the *Copyright Act* does not suggest a contrary view.

It is thus suggested that as a matter of statutory interpretation the clause '... this Act does not affect any prerogative right or privilege of the Crown' implies that the prerogative is unaffected by the statutory right and that statutes, judgments and other legal works are not the subject of rights provided by the *Copyright Act* which pertain to their protection as literary works. That is, such protection may subsist in Bills but not subsist in Acts of Parliament although as related works they are substantially the same literary work. In the case of judgments copyright protection should never arise. There is, however, no reason that copyright in a published edition of a statute or judgment should not co-exist with the common law right and that the Commonwealth or a State as well as private publishers of such works should be able to prevent the unauthorised reproduction of the typographical arrangement of those works, by means that include a photographic process, by virtue of rights subsisting in the published edition of the works under s 100 of the Act. The co-existence of this statutory right does not lead to any interference in the exercise of the common law right since a private publisher could not acquire a copyright in an edition of a legal work which merely reproduces the published edition of the State or Commonwealth produced legal work assuming the private publisher published the work without the permission of the Crown. This would be the case regardless of whether the Commonwealth or State was entitled to copyright in the published edition of its works under s 100 of the Act.

One other aspect of the co-existence of these rights is that the copyright in published editions of the prerogative legal works owned by the Crown, for example the Crown in right of the Dominion of Canada,[75] would, regardless of the question of the enforcement of the prerogative right in Australia, be enforceable in Australia by virtue of the operation of the

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74 Refer ss 132AC – s 132AM of the Act.

75 Refer Dr John Gilchrist 'The Extent to which the Prerogative right of the Crown to Print and Publish Certain Works Exists in Australia' (2012) 11(2) *Canb LR* 32, 48. I stated at page 48 that 'it is arguable therefore, though the subject of some doubt, that the prerogative right of the Crown in right of the United Kingdom to print and publish the Commonwealth of Australia *Constitution Act 1900* and other statutes of the British Parliament is enforceable in Australia. That statement should be qualified by the words 'until the coming into force of Parts I-III of the *Copyright Designs and Patents Act 1988 (1 August 1989)'*. Section 164 of the *Copyright Designs and Patents Act 1988* replaced all prerogative rights in Acts of Parliament with a copyright which subsists for 50 years after the year Royal Assent was given. This copyright is enforceable in Australia. The UK Crown owns copyright in published editions of works it publishes under that Act and would also be entitled to copyright in the published edition of UK Acts of Parliament, in Australia.

Copyright (International Protection) Regulations.[76] As with published edition rights vesting in the Commonwealth and a State, these rights exist only in respect of published editions of works produced after 1 May 1969.

[76] Refer regs 4 and 8 of the Copyright (International Protection) Regulations.