CROWN USE OF COPYRIGHT MATERIAL

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An important differentiating feature of government under the law of copyright in Australia are those statutory provisions dealing with the government's use of other copyright material it receives or deals with in the course of its work. No similar rights are given to other institutions or persons under the *Copyright Act 1968* (Cth). These Crown use provisions provide wide entitlements to the Commonwealth and the States to do any acts comprised within the copyright without the express permission of the copyright owner, but subject to compensation. Similar Crown use provisions are also found in other intellectual property enactments of the Commonwealth.[1]

The Crown use provisions in the *Copyright Act* emanate from a recognition of the needs of government to use copyright material in the exercise of its fundamental responsibilities to the community it serves, such as defence, policing, essential communications and emergency relief, without the need to seek prior agreement from copyright owners and without the risk of an injunction to restrain it. The Crown use provisions in the *Copyright Act 1968* are couched in broad language which enable any acts done for 'the services of the Commonwealth or State'. This broad language is a reflection of the broad functions of modern government which has assumed important regulatory, law enforcement and information-gathering roles across a wide spectrum of community activity in pursuit of goals such as economic efficiency, better planning,

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1 Refer s 163 of the *Patents Act 1990* (Cth) and s 96 of the *Designs Act 2003* (Cth). It would appear that the Crown use provision s 183 of the *Copyright Act 1968* is consistent with the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS). Article 13, Section 1 (Copyright and Related Rights), which is headed *Limitations and Exceptions*, provides that Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder, which is consistent with Berne Convention obligations Australia has long adhered to. Article 31(b), Section 5 (Patents) is more limited and stipulates that 'other use' (that is, use without the authorization of the right holder) is only permitted if prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable terms and such efforts have been unsuccessful within a reasonable period of time (except in cases of national emergency or public non-commercial use).

budgeting and development. It is impractical, and sometimes inappropriate, to seek prior agreement with copyright owners if these functions are to be performed effectively.

The government's entitlement to use material for its services without infringement of copyright does not solely arise under the Crown use provisions. It may arise in three ways.

One way is through an implied licence to the Commonwealth or a State to reproduce or even publish copyright material, such as letters, sent to it. For example, a licence to reproduce a letter would normally be implied from the sender of a letter to government, to enable proper consideration of the contents of the letter by Ministerial or Departmental officers and to assist in the preparation of a reply. This entitlement is further discussed in Part II of this article.

There are also a number of statutory provisions in various Australian jurisdictions which enable the Commonwealth or a State to do acts in relation to copyright material which provide immunity from civil and criminal proceedings. One example is s 90 of the *Freedom of Information Act 1984* (Cth) which provides that where access is given to a document under the Act or where access is given in the bona fide belief that access was required to be given under the Act, then no action for defamation, breach of confidence or infringement of copyright lies against the Commonwealth by reason of the authorizing or giving of access. Access may be given in the form of a copy of the document.[2] These provisions are discussed further in Part III of this article.

Of greatest importance, however, is a provision in Part VII, Division 2 of the *Copyright Act 1968*, which enables the Commonwealth and the States to do any act comprised in the copyright in a work or other subject matter if the act is done 'for the services of the Commonwealth or State'.[3] This 'Crown use' provision - s 183 of the *Copyright Act* - and its ancillary provision s 183A operate as a statutory licence providing an unfettered

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2 Refer s 20 of the *Freedom of Information Act 1984* (Cth).

3 Under the Act, *the Commonwealth* includes the Administration of a Territory: s 10 (1), and a reference to a State includes the Northern Territory and Norfolk Island…: s 10(3)(n).

entitlement to the Commonwealth and the States to do acts comprised in the copyright in works and other subject matter protected by the *Copyright Act*.

The nature, scope and operation of the Crown use provision in the *Copyright Act*, the extent to which licences may be implied to government to reproduce or publish copyright material it receives, and the breadth of other statutory rights held by government and their relationship to s 183 of the *Copyright Act 1968*, are discussed in more detail in the remainder of this article. In particular, the author examines arguments for construing s 183 to complement, rather than override, the special defences to infringement such as s 40 (fair dealing for research or study) which users of copyright material may rely on generally under the *Copyright Act*. The author concludes that there are good reasons in law and policy for construing s 183 to complement these special defences.

Acts comprised in the copyright in material and most importantly the reproduction of copyright information within government agencies and across them, is a management demand required for the effective review and consideration of material, and for government agency co-ordination and inter-operability, and such acts are also necessary to fulfil the basic right of all citizens in a democratic society to be informed of, and to have access to, government information. Increased engagement with the community online and the internal transfer of agency information will inevitably increase. These practices of government may test the effectiveness of relying on an implicit licence from the provider of information and the present defences to infringement under the *Copyright Act*. The author concludes that the High Court decision in *Copyright Agency Limited v New South Wales*,[4] and the changing technology in the way we communicate, suggest a need for an express special defence outside the operation of s 183 permitting certain public uses of copyright material deposited or registered in accordance with statutory obligations under State or Commonwealth law.

I CROWN USE

A *The Scheme of Crown Use under the Copyright Act*

The scheme of s 183 is in essence set out in sub-ss (1), (4) and (5).

The scheme may be summarized as follows. Section 183(1) provides that the copyright in a work or other subject matter is not infringed by the Commonwealth or a State, or by a person authorized 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.

Section 183(4) provides that where an act comprised in a copyright has been done under sub-s (1), the Commonwealth or State shall, as soon as possible, unless it appears to the Commonwealth or the State that it would be contrary to the public interest to do so, inform the owner of the copyright of 'the doing of the act'.

Section 183(5) provides that where an act comprised in a copyright has been done under subsection (1), the terms for the doing of the act are such terms as are, whether before or after the act is done, agreed, or as may be fixed by the Copyright Tribunal.

Section 183(1) is thus expressed as a defence to infringement of copyright as are the special defences to infringement provided in Divisions 3, 4, 5 and 7 of Part III of the Act and in Division 6 of Part IV of the Act but principally ss 40 - 53 and ss 103A-104A.[5] One example is s 40 (fair dealing for the purposes of research or study).

Unlike the special defences, the requirements in s 183(4) and s 183(5) oblige the government to inform the copyright owner and to seek agreement on the terms for the doing of the act. This provides a mechanism for securing compensation for the copyright owner. Compensation is also a feature of other statutory licences under the Act, such as those dealing with the copying of works in educational establishments and the copying of works in institutions assisting handicapped readers in Divisions 2 and 3 of Part VB of the Act. It is distinguished from those statutory licences under the Act

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4 *Copyright Agency Limited v State of New South Wales* [2008] HCA 35.

5 The description 'special defences' is used in this article to describe those defences which are available in limited and specified circumstances and which apart from a few exceptions, do not enable large scale or multiple acts in relation to copyright such as reproduction. The special defences do not provide a right of remuneration to copyright owners. I exclude from the description 'special defences' all the statutory licence schemes under the Act such as those for the manufacture of records of musical works (ss 54 - 64), multiple copying of works for the teaching purposes of an educational institution (Div 2, Part VB) and copying by institutions assisting handicapped readers (Div 3, Part VB), as well as the Crown use provisions.

because the defence to infringement provided by s 183 is not expressed to be conditional on the giving of notice or on any other undertaking to the copyright owner.[6]

The *Copyright Amendment Act (No 1) 1998* also inserted provisions aimed at facilitating the payment of equitable remuneration for the copying of material under s 183(1). This is effected through the sampling of copying rather than notifying each instance of copying in accordance with the requirements of ss 183(4) and 183(5). The principal provision is s 183A which enables the Commonwealth or a State to enter into arrangements with an approved collecting society acting on behalf of copyright owners to make payments to the collecting society in relation to copying under s 183(1). Where such arrangements have been made, they override the application of s 183(4) and s 183(5) and are capable of applying to nearly all copyright material covered by s 183(1). A significant exception is the Crown use of computer programs which can only be subject to the requirements of ss 183(4) and (5).

Neither s 183A nor its related provisions inserted by the *Copyright Amendment Act (No 1)1998* alter the defence to infringement of copyright provided by s 183(1). Section 183A simply provides a sampling scheme for calculating and making payments of equitable remuneration to copyright owners for the copying of their copyright materials in lieu of the notice requirements of ss 183(4) and (5). But other related provisions inserted by the *Copyright Amendment Act (No 1)1998* facilitate the rights of copyright owners by enabling the recovery of equitable remuneration under the sampling scheme as a debt due to the collecting society. The operation of s 183A and its related provisions is further discussed in Part I A (4)(c) of this article below.

B *The Scope of Crown Use under the Copyright Act*

The defences to infringement provided in the *Copyright Act* have historically been a part of copyright law and represent the balance struck between the rights of the copyright owners and the interests of the users of copyright material - the public - in their access to and dissemination of information. This has been a feature of the growth of this quasi-

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[6] Refer for example to s 135ZJ or s 135 ZL of the Act, where copying is expressed to be conditional on copying being made solely for the educational purposes of the institution (or of another educational institution), a remuneration notice having been given to the relevant collecting society and the body complying with the marking and record-keeping requirements set out in s 135ZX of the Act.

monopolistic right from its inception. That is, the law has for many years recognized that there is a strong public interest in the free flow of information in areas covered by these defences. Governments generate large amounts of information from material supplied to them in their regulatory, statistical, research, law enforcement, management, budgetary, fiscal and other governing roles and also receive large amounts of copyright information and material voluntarily. Information is regularly reproduced into data bases, evaluated, dissected and manipulated to produce new information of value to the community or to a segment of it. It is manifestly impractical to seek permission from each copyright owner to use this copyright information in each case, nor should government be fettered in carrying out this work in the public interest by a copyright claim. On the other hand, the use by government of copyright information and material may be substantial and have a significant impact on the exploitation of that material. The balance arrived at in the Crown use provision is to subject the Crown use defence to later agreement on the terms for the doing of the act. The terms almost invariably lead to financial compensation to the copyright owner, although this is not expressed as a requirement in the section.

A fundamental question in relation to the scope of the Crown use is whether the government is obliged to use s 183(1) in circumstances where an act would otherwise fall within the protection of the special defences to infringement provided in Divisions 3, 4, 5 and 7 of Part III of the Act and in Division 6 of Part IV of the Act but principally ss 40-53 and ss 103A-104 (the fair dealing provisions and acts done for the purposes of a judicial proceeding). One illustration of this question is where an officer of a Commonwealth Department copies on a Departmental copier a reasonable part of a copyright work for the purpose of that officer's research or study within the scope of the fair dealing provision s 40, and the research or study concerns that person's official duties. In these circumstances, is the officer entitled to rely on s 40 of the *Copyright Act* as a defence to infringement, or must the Commonwealth rely on s 183(1) and thus be required to give notice of the copying to the copyright owner in accordance with the requirements of s 183 or have that copying sampled and subject to equitable remuneration in accordance with s 183A?

This question goes to the heart of the balance between copyright owners and government users.

The answer to this question in law is not absolutely clear. As a matter of statutory interpretation it is arguable from a reading of the *Copyright Act* that acts involving the use of copyright material which fall within the special defences to infringement but which are done for the services of the Commonwealth are nonetheless 'acts comprised in the copyright' in the material within the scope of s 183 (1). Thus, the procedural requirements of s 183 or s 183A must be adhered to in relation to such acts.

The alternative view, and it is suggested the better view, is that s 183(1) complements the special defences to infringement so that the Crown and citizen alike can rely on those special defences; and that s 183(1) confers on the Crown entitlements to the use of copyright material which are additional to the special defences available to all. That is, only if the use of copyright material for the services of the Commonwealth or State goes beyond that permitted by the special defences is the Commonwealth or State obliged to rely on s 183(1) as a defence to infringement.

The Copyright Law Committee on Reprographic Reproduction (the Franki Committee) stated in its report in 1976:

> 7.10 We think that the Crown, or a person authorised by the Crown, should be entitled to copy a work in the circumstances where a private individual would be entitled to copy it without obligation to the copyright owners. If it be accepted that this is the result presently achieved by s 183, no change in the Act would be required.[7]

There have been a small number of minor amendments made to s 183 since the original passage of the 1968 Act, the most significant of which is s 183(11) inserted by the *Copyright Amendment Act 1980*. This amendment Act implemented much of the Franki Committee recommendations. No amendment to clarify the operation of s 183 was inserted in the *Copyright Amendment Act* 1980 in response to the recommendation contained in paragraph 7.10. No subsequent clarification has been made.[8]

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[7] Copyright Law Committee on Reprographic Reproduction (the Franki Committee), Australia, *Report of the Copyright Law Committee on Reprographic Reproduction* (1976) 57 [7.10].

[8] Section 183A and its related provisions which were inserted by the *Copyright Amendment Act 1998* are directed at providing a more practical alternative to the notice requirements under ss 183(4) and 183 (5) and do not address this question.

The High Court of Australia in *Copyright Agency Limited v State of New South Wales* appears to have accepted the complementary view of the Crown use provision:

> The State did not suggest that any of the fair dealing provisions (ss 40-42) or other provisions in Pt III, Div 3 (ss 43-44F) which provide that certain acts do not constitute an infringement, had any application to the uses of the survey plans described … . In cases where these provisions do apply, Pt VII, Div 2 respecting Crown use and equitable remuneration is not engaged.[9]

However, the joint judgment of the High Court in this case did not explore the question beyond that statement, as the application of the special defences was not argued by counsel for the State of New South Wales. Technically the statement is obiter dicta and can be read equivocally.

1 *Arguments in support of the wide scope of Crown Use*

There are a number of arguments, based on a reading of s 183 in the context of the Act as a whole, which support the interpretation of s 183(1) that it covers all acts comprised in the copyright in a work or other subject matter if done by the Commonwealth or State for the services of the Commonwealth or State.

The test of infringement in works and other subject-matter is described in ss 36 and 101 of the Act. These sections are expressed in similar terms and together provide that the copyright in a work or other subject-matter is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of copyright, does in Australia, or authorises the doing in Australia of, any act comprised in the copyright. The special defences to infringement (such as s 40 and its equivalent s 103C of the Act) are not expressed to limit the exclusive rights but in various circumstances enable acts comprised within the copyright, such as reproduction or communication to the public, to be undertaken beyond a substantial part of a work or other subject-matter.

Part VII of the *Copyright Act* is headed 'The Crown' and Divisions 1 and 2 of that Part purport to define the position of the Commonwealth and the States in relation to copyright. An act done 'for the services of the Commonwealth or State' is the subject of s 183 and such an act would not arguably cease to be so characterised simply because

[9] *Copyright Agency Limited v State of New South Wales* [2008] HCA 35 [11].

the Commonwealth or a State could rely on a special defence to infringement. And s 183 appears to contemplate that acts done for the services of the Commonwealth or the State may otherwise not be an infringement by the person doing them. Under s 183(3):

> (3) Authority may be given under subsection (1) ... to a person notwithstanding that he has a licence granted by, or binding on, the owner of the copyright to do the acts.

An act done for the services of the Commonwealth or State therefore falls within, and is governed, by s 183(1) even though it may also be for a purpose specified in one of the special defences to infringement. However, if the act was not done for the services of the Commonwealth or State then the Commonwealth or State may be able to rely on the special defences to infringement of copyright if acting in accordance with those defences.

If this was not the proper interpretation of s 183(1), then it may be argued that it would not have been necessary to insert s 183(11) in the *Copyright Act* by the *Copyright Amendment Act 1980*:

> (11) The copying of the whole or a part of a work or other subject-matter for the educational purposes of an educational institution of, or under the control of, the Commonwealth, a State or the Northern Territory shall, for the purposes of this section, be deemed not to be an act done for the services of the Commonwealth, that State or the Northern Territory.

That is, if s 183(1) did not apply to the doing of acts by the Commonwealth or a State which would otherwise be excluded from infringement by virtue of the educational copying provisions in the Act, then it would not have been necessary to insert s 183(11). Following the *Copyright Amendment Act 1980*, a Commonwealth or State educational institution could only rely on those educational copying provisions.

2 *Arguments in support of the complementary scope of Crown Use*

The alternative view is that s 183(1) complements the special defences to infringement and does not overlap them.

While s 31 and ss 85-88 describe the rights created by those provisions as 'exclusive rights' the operation of each of those provisions is prefaced by the words 'unless the contrary intention appears'. Those special defences in the *Copyright Act* which provide

that the doing of certain acts does not constitute an infringement of copyright and do not provide any entitlement to compensation to the copyright owner, such as s 40 (fair dealing with a work for the purpose of research or study), may be construed as constituting a contrary intention for the purposes of ss 31 and 85-88 and therefore limit the exclusive rights otherwise conferred by those sections. On this basis the doing of an act which by virtue of the special defences does not constitute an infringement of copyright is not the doing of an act comprised in a copyright to which s 183(1) applies. It follows that a notice under s 183(4) is not required to be given in respect of the doing of an act, which is not, apart from s 183, an infringement of copyright and which is not therefore within the exclusive rights of the copyright owner.

Consistently, while s 183(3) provides that authority to do acts may be given to a person notwithstanding the person has a licence granted by, or binding on, the owner of the copyright, the acts in contemplation are acts comprised in the copyright within the meaning of s 183(1) described. That is, what is done pursuant to a licence granted by the copyright owner would apart from that licence amount to an infringement of copyright. It does not follow that because s 183(3) expressly contemplates acts which would not amount to an infringement of copyright as a result of the grant of a licence, the section has the effect of more broadly encompassing acts which would not be an infringement of copyright under the special defences in the *Copyright Act*. There are other rationales for the express contemplation of licensed acts in s 183(3). For example, s 183(3) could be relied on in relation to defence activity when it is in the public interest not to notify the copyright owner of the doing of the acts for some time or when the terms of the licence may be unreasonable in the circumstances. In *Copyright Agency Limited v New South Wales*[10] both the Full Court of the Federal Court of Australia and the High Court of Australia accepted that the Crown may rely on an implied licence to do acts comprised in the copyright in material submitted to it, without reliance on s 183.

Similarly, the insertion of s 183(11) does not suggest the section more broadly encompasses acts which would not be an infringement of copyright under the special defences in the *Copyright Act*. The insertion of s 183(11) followed a Franki Committee

[10] [2007] FCAFC 80 (5 June 2007) and [2008] HCA 35 [46, 47]. This case is later discussed in Part II of this article.

recommendation that the Crown should not be permitted to rely on s 183 for the making of multiple copies of copyright works for use in government schools and that their recommendations in respect of multiple copying in non-profit educational establishments (which first became s 53B and is now embodied in ss 135ZJ and 135ZL of the Act) should apply to government and non-government schools alike.[11] The insertion was directed at multiple copying and not at the limited copying which may be undertaken under the special defences to infringement of copyright. Section 183 has unlimited scope and, apart from s 183(11), a Commonwealth or State school would be unfettered in its capacity to use copyright material and subject only to the notice and terms requirements of s 183. The purpose of the recommendation which led to the insertion of s 183(11) was to ensure similar treatment of government and non-government schools.[12]

The complementary view is also taken by Campbell and Monottti in their examination of immunities of agents of government from liability for infringement of copyright:[13]

> If agents of government are sued for infringement of copyright, but are not able to rely on any of the statutory exceptions mentioned above, they may nevertheless rely on the provisions in the Act that allow for fair dealing with copyright material. The circumstances in which the fair dealing exceptions operate are limited but they include cases in which copyright material is reproduced for research or study. … An act of fair dealing may also be one for the services of the Crown. For example, an officer of a government department may have dealt fairly with copyright material by photocopying an article in a periodical publication for the purposes of the research required of him or her in the course of official duties. In such a case, the fair dealing exception will probably apply rather than the exception created by s 183 of the Act, and its attendant obligation to pay compensation.

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11 *Report of the Copyright Law Committee on Reprographic Reproduction*, above n 7, 57 [7.11].

12 Curiously, s 183(11) does not cover acts by institutions assisting handicapped readers and institutions assisting intellectually handicapped persons which are not educational institutions but which are nevertheless emanations of the Commonwealth or the States.

13 Enid Campbell and Ann Monotti, 'Immunities of Agents of Government From Liability for Infringement of Copyright' (2002) 30 *Federal Law Review* 459. The major professional works on Australian copyright law, Lahore and Ricketson, do not address the interrelationship between the special defences and s 183 – refer JC Lahore and WA Rothnie, Lexis Nexis Australia, *Copyright and Designs*, Vol 1 [28,561) and S Ricketson and C Creswell, Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, Vol 1 [12, 275].

The complementary view finds some support from an examination of extrinsic materials concerning the history and purpose of s 183.[14]

Section 183 was inserted in the *Copyright Act* following a Spicer Committee recommendation.[15] The Committee considered the Gregory Committee recommendation that the Crown should be empowered to reproduce copyright material in connexion with the equipment of the Armed Forces and possibly also for civil defence and essential communications, subject to compensation.[16] This recommendation had, to a large extent, been given statutory effect in the United Kingdom.[17] A majority of the Spicer Committee agreed with the view expressed by the Solicitor-General of the Commonwealth that the Commonwealth and the States should be empowered to use copyright material for any purposes of the Crown, subject to the payment of just terms to be fixed, in the absence of agreement, by the Court.

> The occasions on which the Crown may need to use copyright material are varied and many. Most of us think that it is not possible to list those matters which might be said to be more vital to the public interest than others. At the same time the rights of the author should be protected by provisions for the payment of just compensation to be fixed in the last resort by the Court....
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> We note that the Commonwealth and the States have a right to use inventions, subject to the payment of compensation, under section 125 of the Patents Act 1952-1955. We recommend the enactment of a provision on similar lines in respect of Crown use of copyright material.[18]

The purpose of the equivalent provision in the *Patents Act 1952* – s 125 – was described by Barwick CJ in *General Steel Industries v Commissioner for Railways (NSW)* as

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[14] By virtue of s 15AB of the *Acts Interpretation Act 1901* (Cth) extrinsic materials may be referred to in order to determine the meaning of a provision when the provision is ambiguous or obscure.

[15] Refer second reading speech for the Copyright Bill 1968: Australia, *Parliamentary Debates (Hansard)*, House of Representatives, 16 May 1968, 1536 (N Bowen, Attorney-General), and Copyright Law Committee, Australia, *Report to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth* (1959) 77 (Spicer Committee Report) [404-406].

[16] United Kingdom, Board of Trade, *Report of the Copyright Committee* (Gregory Committee),Cmd 8662 (1952) [75].

[17] By provisions of the *Defence Contracts Act 1958* (UK).

[18] Spicer Committee Report, above n 15, [404-405]. Two members of the Committee were of the view that the Crown's right to use copyright material without the consent of the copyright owner should be confined to use for defence purposes only.

providing ‘a means of securing the untrammelled use of the inventions by the Governments and the authorities of the Commonwealth and of the States’.[19]

The object s 183 would appear to be aimed at unfettered use of copyright materials, such as in times of national exigency, where permission of the relevant copyright owners would otherwise need to be obtained.

The basis of the arguments in favour of the wide scope of s 183(1) ultimately lies in the view that Part VII represents the Crown's position under the *Copyright Act* and overrides the operation of other provisions in the Act. That is, if, say, an officer of a Commonwealth Department copies on a Departmental copier a reasonable part of a copyright work for the purpose of that officer's research or study within the scope of the fair dealing provision s 40 of the Act, and the research or study concerns that person's official duties undertaken within the Department, the copying must be characterised as for the services of the Commonwealth rather than for that person's research or study. In the absence of such a view, the insertion of s 183(11) in the Act begs the question whether the copying of the whole or a part of a work or other subject-matter for the educational purposes of an educational institution of the Commonwealth or a State could have been undertaken in reliance on the educational copying provisions, rather than s 183(1), where that copying was for the services of the Commonwealth or a State. The insertion simply prevents reliance on s 183(1).

Part VII of the Act does not represent a complete code of the Crown's position under the *Copyright Act*. Evidence in support of that proposition is that at least some of the special defences expressly contemplate the Crown. For example, ss 49-51A enable acts to be undertaken by an officer in charge of a library, such as the making of a copy of an article in a periodical publication for a user or for another library, and the scope of these provisions expressly contemplates that the libraries may be administered by the Crown.[20] In addition, s 48A (and its equivalent provision s 104A) provide that

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[19] (1964) 112 CLR 125, 134.

[20] Section 195A(1)(c) defines ‘officer in charge’ in relation to a library referred to in the sections to mean the officer holding, or performing the duties of, the office or position in the service of the body administering the library the duties of which involve that person having direct responsibility for the maintenance of, and the provision of services in relation to, the collection comprising the library. By virtue of s 10(3)(b) a reference to a body administering a library or archives shall be read as a reference to the body (whether incorporated or not), or the person (including the Crown), having ultimate

copyright is not infringed by an officer of a Parliamentary library by anything done for the sole purpose of assisting a member of Parliament in the performance of that person's duties as a member. This does not oblige Parliamentary libraries to pay any compensation to copyright owners and would apply to both Commonwealth and State Parliamentary libraries.

The consequences of the wide construction of s 183(1) are significant. It would mean that an individual or a person other than the Crown would be able to do certain acts comprised in the copyright free of compensation to the author while in similar circumstances the Crown would be subject to agreeing on terms or having terms determined by the Copyright Tribunal. That is, expressed generally, the acts which others may make lawfully without compensation would attract a right to compensation under s 183 or s 183A of the Act if done for the services of the Crown.

It is more reasonable in the light of the non-exclusive nature of Part VII dealing with the Crown to adopt the complementary construction of the operation of s 183(1). That is, those entitlements expressed in s 183(1) in broad terms and which comprise acts which extend far beyond the scope of the limited special defences to infringement are additional to the entitlements enjoyed under other sections of the Act. Additionally, if it is accepted s 183(1) conflicts with the specific provisions that comprise those limited special defences to infringement in respect of acts undertaken for the services of the Commonwealth or a State – that is, the doing of an act which by virtue of the special defences does not constitute an infringement of copyright is the doing of an act comprised in a copyright to which s 183(1) applies – it would appear that the maxim of statutory interpretation *generalia specialibus non derogant* applies. This Latin maxim expresses the principle that provisions of general application give way to specific provisions when in conflict. The maxim applies more strictly in the interpretation of provisions in a particular Act, such as the *Copyright Act*, than in the case of conflict

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responsibility for the administration of the library or archives. Further, s 51AA enables the making of single working, reference and replacement copies of copyright works by the officer in charge of Australian Archives in certain circumstances. The functions, the strong capacity for executive control, budgetary dependency and accountability to Government inter alia evidenced under the Australian Archives' constituent legislation, the *Archives Act 1983*, suggest the Australian Archives is an emanation of the Commonwealth for the purposes of the Part VII of the Act.

between separate enactments.[21] In this case it follows that s 183(1) gives way to the special defences when in conflict and that s 183(1) gives additional benefits to the Commonwealth and the States beyond the scope of the special defences.

If the Commonwealth and the States are unable to rely upon the special defences to infringement then government would be placed in a disadvantageous position with respect to its use of copyright material when compared with all other copyright users such as private institutions, corporations and individuals. Despite the breadth of government functions and powers, and the calls and demands upon it in comparison with other legal users of copyright material, governments would be obliged to remunerate copyright owners in circumstances when other users would not. This would amount to inconsistent policy between the private and public users of copyright material.

Notwithstanding these arguments, since the late 1980s, the Copyright Agency Ltd on behalf of copyright owners in published works has entered into licensing arrangements with the Commonwealth and the States for the reproduction of these works under s 183. The Copyright Agency Ltd's present agreement with the Commonwealth is based on the premise that the Crown is able to rely on the special defence to infringement of copyright under s 43 – reproduction for the purposes of a judicial proceeding or for the purposes of the provision of professional legal advice – but the agreement expressly states that reliance is not placed on other exemptions in the *Copyright Act*.[22] The Copyright Agency Ltd's agreements with the States and Territories also do not appear to include the special defences to infringement as 'copying exempt from payment' within

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[21] DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6TH ed, 2006) 145; *White v Mason* [1958] VR 79; *Purcell v Electricity Commn of New South Wales* (1985) 60 ALR 652.

[22] Copying is recorded on a sampling basis. Clause 12 of Schedule 8 which deals with survey data protocols provides -

> *Exempt - this includes all Commonwealth published and unpublished material as well as material for which a licence has been obtained(subject to verification) or is otherwise exempt from payment because of the utilisation of section 43 of the Copyright Act being a reproduction for the purposes of judicial proceedings or for the purposes of the provision of professional legal advice. (Reliance is not placed on other exemptions in the Copyright Act.)*

There is also no express allowance presently made for copying of an insubstantial part of a work. Refer: Australian Government: Attorney-General's Department, *Agreement between Copyright Agency Limited and the Commonwealth for copying of literary works by the Commonwealth - June 2003* <http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_IssuesandReviews_Governmentuseofcopyright material>.

the Data Processing Protocols in those agreements.[23] This appears to be largely attributable to practical difficulties in accurately identifying particular defences when surveying copying.[24]

3 *The effect of Section 183(1) on the special defences to infringement*

There is a suggestion in other contexts within the *Copyright Act* that the extent to which Crown servants may able to rely on one of the special defences to infringement – s 40 - could be limited simply because of the existence and effect of s 183(1).

In *Haines v Copyright Agency Ltd*[25] the New South Wales Director-General of Education had sent a memorandum to school principals containing a statement that s 40 of the *Copyright Act* (fair dealing for research or study) allowed for virtually the same amount and type of copying as s 53B or s 53D without imposing any need to keep records or make payments. Sections 53B and 53D[26] then enabled the multiple copying by an educational establishment of copyright works for teaching purposes but imposed record-making and retention requirements and subjected the educational establishment to claims for payment by copyright owners in respect of that copying. Fox J of the Federal Court, in a judgment with which Bowen CJ and Deane J agreed, made it clear that it was wrong to say that s 40 allowed for virtually the same amount and type of copying as s 53B. Fox J stated:

> What is fair dealing is not fixed by reference to the number of copies, but is to be determined by reference to the facts of each case. An answer to the question must take into account the existence and effect of s 53B (and s 53D). Moreover it is important to the proper working of the sections that a distinction be recognized between an institution

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[23] Refer, for example, to the Agreement between the Crown in right of the State of New South Wales and the Copyright Agency Limited dated 14 March 2005, Clause 1.1 (definition of copy) and Annexure C to that Agreement, Clause 9 'Copying Exempt from Payment'. <http://www.copyright.com.au/states_territories.htm> and the Interim Rate Agreement between Copyright Agency Limited and Crown in Right of the State of New South Wales [2009] <http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/>. These Agreements are referred to Clauses 3.5-3.6 of the current Remuneration Agreement between the Crown in Right of the State of New South Wales and Copyright Agency Limited [2010]
<http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/pages/lp_copyrightnews>.

[24] Email from Peter Treyde, Commonwealth Attorney-Generals Department, to John Gilchrist, 31 January 2008. However, the Copyright Agency Ltd takes the wide view of the operation of s 183(1) (email from Phillip Stabile, Copyright Agency Ltd, to John Gilchrist, 4 April 2008).

[25] (1982) 42 ALR 549.

[26] Section 53B and is now embodied in ss 135ZJ and 135ZL of the Act and Section 53D is now embodied in ss 135ZP and 135ZQ of the Act.

> making copies for teaching purposes and the activities of individuals concerned with research and study. The memorandum was in relevant respects addressing itself to the former situation.[27]

The Court ordered that the memorandum be withdrawn and destroyed and its reproduction or distribution be restrained.

McLelland J, at first instance, also considered that the availability to schools of the right to make copies under s 53B, upon compliance with conditions designed to provide 'equitable remuneration' to the owners of copyright, must necessarily have an influence upon what amount and type of copying done in a school could properly be regarded as a fair dealing under s 40. He stated:

> By way of example, it might be anticipated that a teacher who, even if he procured himself to be appointed as agent for every member of his class, made multiple copies for the purpose of classroom study, of substantially the whole of some separately published book, or sheet music, the subject of copyright, would not in ordinary circumstances be likely to be regarded as engaged in 'fair dealing" under s 40, whereas if the teacher were satisfied after reasonable investigation that copies (not being secondhand copies) of the work could not be obtained within a reasonable time at an ordinary commercial price, such multiple copying could legitimately be carried out on behalf of the school under s 53B if the records required by that section were kept.[28]

It is important to note that the Court in *Haines v Copyright Agency Ltd* did not express a view on whether ss 40 and 53B overlapped. It simply stated that it was wrong to say that s 40 allowed for virtually the same amount and type of copying as the statutory licence s 53B. However it does not follow from the decision that some copying may not be undertaken legitimately under s40 which might also be undertaken in pursuance of that statutory licence or in pursuance of s 183. The issue is essentially whether, on the facts of the case, the dealing is fair and for the purposes described and this must take into account the number of persons a copier is acting on behalf of as well as the extent of the copying. Both are relevant to the factors set out in s 40(2) of the Act in determining whether a dealing is fair.

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[27] *Haines v Copyright Agency Ltd* (1982) 42 ALR 549, 556.
[28] *Copyright Agency Ltd v Haines* [1982] 1 NSWLR 182, 191.

It may be fair to make a copy of a reasonable portion of a book for the purpose of research or study of the copier or to make a copy each for two persons for their research or study in accordance with their request but unfair for the copier to make a copy each for sixty persons for their research or study in accordance with their request, despite the fact that individually each person could make such a copy for himself or herself. It is submitted that the nature of the dealing in the last example is not fair because the scale of the copying affects the character of the dealing. It carries it beyond the notion of individual copying contemplated by s 40.

The copying of a journal article or a reasonable portion of another published work by an individual for that individual's research or study is deemed to be a fair dealing with that work for the purpose of research or study by s 40(3) of the Act. If that individual is a Crown servant acting in the course of that servant's work for the Crown and the copying is for either of those purposes of the Crown servant, then the extent to which Crown servants may be able to rely on s 40(3) is not limited simply because of the existence and effect of s 183. Likewise, there is nothing in the *Haines* decision to suggest that a Crown servant could not undertake acts which otherwise clearly fall within s 40 of the Act, even if that research or study assisted the Crown servant directly or indirectly in that servant's work for the Crown. What the *Haines* decision does suggest is that courts may be reluctant to construe broadly the scope of the special defences such as s 40 in their application to the Crown.

4 *The operation of Section 183 and Section 183A of the Copyright Act*

Section 183(1) applies when the person doing the otherwise infringing act is either the Commonwealth or a State or a person authorised in writing by the Commonwealth or a State, and the act is done for the services of the Commonwealth or a State.[29]

Two rights of a copyright owner whose work or other subject-matter is effected by acts under s 183(1) are expressly protected by s 183(8). That provides that any act done under s 183(1) does not constitute publication of a work or other subject-matter and is

[29] An agreement or licence fixing the terms upon which a person other than the Commonwealth or State may do an act comprised in a copyright under s 183(1) is inoperative with respect to the doing of that act after the commencement of the 1968 Act unless it has been approved by the Attorney-General of the Commonwealth or a State (s 183(6)).

not to be taken into account in relation to the duration of any copyright. As any act done under s 183 is done without consent of the copyright owner the effect of subsection (8) is to avoid subsection (1) being unfairly determinative of the subsistence of copyright in works that would have protection only on the basis of first publication in Australia and unfairly determinative of the duration of copyright for example in the case of a cinematograph film or a sound recording that upon publication have a limited term of protection to 70 years after the year of publication. Acts done under subsection (1) are simply acts over which the copyright owner has no control.

Successors in title to any articles sold to them under s 183(1) are protected from any possible infringement action from subsequent resale by reason of s 183(7). By virtue of that provision, successors in title are entitled to deal with the article as if the Commonwealth or State were the owner of copyright.[30] These provisions apply regardless of whether the act is notified under s 183(4) or recorded under s 183A.

(a) The meaning of 'for the services of the Commonwealth or State'

Section 183 provides some assistance in determining the meaning of the phrase 'for the services of the Commonwealth or State' by specifying acts which fall within and outside of the phrase. Section 183(2) deems

- the doing of any act in connexion with the supply of goods in pursuance of an agreement or arrangement between the Commonwealth and the Government of another country for the supply to that country of goods required for the defence of that country and
- the sale to any person of such of those goods as are not required for the purposes of the agreement or arrangement,

to be 'for the services of the Commonwealth'.

On the other hand, s 183(11) excludes from the phrase the copying of the whole or a part of a work for the teaching purposes of an educational institution of, or under the control of, the 'Commonwealth, a State or the Northern Territory'.

[30] For the purposes of these and all other provisions in s 183, references to the owner of copyright include references to an exclusive licensee where there is an exclusive licence in force in relation to any copyright (s 183(9)).

There are very few reported cases dealing directly with s 183(1) of the *Copyright Act* or other similar Crown use provisions.[31] Judicial consideration of the scope of the phrase 'for the services of the Commonwealth or State' has been largely confined to patent cases.

In *General Steel Industries Inc v Commissioner for Railways (NSW)*[32] a single judge of the High Court considered whether the defendants in that action could rely on the Crown use provision s 125 of the *Patents Act 1952* (Cth) as a defence to an action for infringement of a patent over certain railway vehicle bearing structures.[33] This Crown use provision was similar in language and operation to s 183 and the major provisions are set out below. The *Patents Act 1952* (Cth) has since been repealed, but there is a revised Crown use provision – s 163 – in the current *Patents Act 1990* (Cth).[34]

Section 125 of the *Patents Act 1952* in part provided:

> (1) At any time after an application for a patent has been lodged at the Patent Office or a patent has been granted, the Commonwealth or a State, or a person authorized in writing by the Commonwealth or a State, may make, use, exercise or vend the invention for the services of the Commonwealth or State.
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> ...

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[31] Refer comments by Cooper J in *Stack v Brisbane City Council* (1995) 131 ALR 333 at 345 on the meaning of 'the services of'. In *Allied Mills Industries Pty Ltd v Trade Practices Commission (No 1)* (1981) 55 FLR 125 Sheppard J of the Federal Court of Australia held that the Trade Practices Commission was an emanation or agency of the Commonwealth and simply concluded that the use by the Commission of documents in which copyright might subsist in favour of Allied Mills would not be a breach of the *Copyright Act 1968* (Cth) by reason of s 183 as such acts would have been done for the services of the Commonwealth. Most of the documents were relevant to proceedings brought by the Commission against Allied Mills for penalties for breaches of s 45 of the *Trade Practices Act 1974* (Cth). As a matter of precaution the Commission obtained an authority from the Commonwealth to use the various documents.

[32] (1964) 112 CLR 125.

[33] 'THE COMMISSIONER FOR RAILWAYS ... HEREBY pursuant to s 125(1) of the *Patents Act* 1952 of the Commonwealth of Australia AUTHORIZES AE GOODWIN LIMITED a Company duly incorporated and carrying on business in the State of New South Wales ... (herinafter called the Contractor) and any of its Subcontractors IN RELATION to the supply by the Contractor to the Commissioner of any article to be used by the Commissioner in or in relation to the exercise of his powers and the operation of the said railways TO MAKE USE EXERCISE OR VEND any invention to which the provisions of the said s 125(1) relate AND TO USE any model plan document or information relating to any such invention which may be required for that purpose....' (1964) 112 CLR 125, 128.

[34] The defence provision is s 163 but ss 163-165 set out a broadly similar notification scheme to that contained in s 183. Exploitation rights are dealt with in Ch 17 Part 2 of the Act: Exploitation by the Crown. Wider rights are provided to the Commonwealth to acquire patents under the Act in Part 3 of Ch 17.

(3) Authority may be given under sub-section (1) of this section either before or after a patent for the invention has been granted, and either before or after the acts in respect of which the authority is given have been done, and may be given to a person notwithstanding that he is authorized directly or indirectly by the applicant or patentee to make, use, exercise or vend the invention.

(4) Where an invention has been made, used, exercised or vended under sub-section (1) of this section, the Commonwealth or State shall, unless it appears to the Commonwealth or State that it would be contrary to the public interest to do so, inform the applicant or patentee as soon as possible of the fact and shall furnish him with such information as to the making, use, exercise or vending of the invention as he from time to time reasonably requires.

(5) Subject to sub-section (2) of this section, where a patented invention is made, used, exercised or vended under sub-section (1) of this section, the terms for the making, use, exercise or vending of the invention are such terms as are, whether before or after the making, use, exercise or vending of the invention, agreed upon between the Commonwealth or the State and the patentee or, in default of agreement, as are fixed by the High Court.

...

(8) No action for infringement lies in respect of the making, use, exercise or vending of a patented invention under sub-section (1) of the section.

Section 132 of the *Patents Act 1952* expressly provided that 'references to the Commonwealth include references to an authority of the Commonwealth and references to a State include references to an authority of the State'. Barwick CJ in *General Steel* took the view that the Commissioner for Railways was an authority of the State within the meaning of ss 125 and 132 of the *Patents Act*.

Barwick CJ summarily terminated the action by the plaintiff with costs after being satisfied that the plaintiff's claim did not disclose a reasonable cause of action and was 'manifestly groundless'. He considered

> Sub-section (8) of s 125, in providing that no action for infringement shall be brought for what would otherwise be an infringement of the letters patent, emphasises the clear intention of sub-s (1) and with sub-s (7) provides a means of securing the untrammelled use of the invention by the Governments and the authorities of the Commonwealth and of the States. On the other hand, sub-ss (5) and (6) ensure that proper compensation shall be

> paid to the owner of the letters patent for the acts of a Government or an authority of Commonwealth or State which makes use of the invention.
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> …
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> The railway system of the State is, in my opinion, undoubtedly a service of the State and the use of the invention in the construction of railway carriages to be used by the Commissioner in that railway system is a use for a service of the State or for the services of the State within the meaning of the expression in the *Patents Act* 1952, whichever may be the proper way to read the final words of s125(1). One could scarcely imagine that sections such as ss125 and 132, with their evident practical purpose, did not extend to include within the expression the use of the services of the Commonwealth or State, the use of an invention for the purposes of one of the Government railway systems in Australia.[35]

The judgment did not consider the phrase 'for the services of the State' beyond this brief conclusion.

Shortly after *General Steel Industries*, the House of Lords in *Pfizer Corp v Ministry of Health*[36] held that the supply of the patented antibiotic drug tetracycline to National Health Service hospitals for administration to out-patients and in-patients was a use 'for the services of the Crown' and accordingly fell within the Crown use provision s 46 of the *Patents Act 1949* (UK). The Ministry of Health had selected a tenderer who had obtained supplies of the drug manufactured in Italy. The United Kingdom patentee claimed first that the Ministry had no power under that section to authorise this method of supply and, secondly, that the supply was used for the benefit of the patients and not for the benefit of any service of the Crown. It is the second claim which is germane to this discussion.

Lord Reid stated in respect of this claim:

> In Victorian times they were the armed services - the navy and the army - the Civil Service, the foreign colonial and consular services, the Post Office, and perhaps some others. Now there are many more Government activities which are staffed and operated by servants of the Crown, and are subject to the direction of the appropriate Minister. But it is not suggested that for this purpose any distinction is to be made between the

[35] (1964) 112 CLR 125, 133, 134.
[36] [1965] AC 512.

> older and the newer services, and it is not argued that the hospital service is not a service of the Crown.
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> ....
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> The real controversy in the present case turns on the meaning of the word ‘’for’’ - what is meant by ‘’*for* the services of the Crown"? I think that it is a false dichotomy to treat some patented articles as made or used for the benefit of the department or service which uses them, and others as made or used for the benefit of those persons outside the service who may derive benefit from their use by the service. Moreover, I think that such a distinction would be unworkable in practice. Most, if not all, activities of government departments or services are intended to be for the benefit of the public, and few can be regarded as solely, or even mainly, for the benefit of the department or of members of the service.
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> .....
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> It appears to me that the natural meaning of "use ... for the services of the Crown" is use by members of such services in the course of their duties. Sometimes, as in the case of the armed services, that use will or is intended to benefit the whole community: sometimes such use will benefit a particular section of the community: and sometimes it will benefit particular individuals. I cannot see any good reason for making a distinction between one such case and another.[37]

Lord Evershed concurred stating:

> As pointed out by the learned judges in the Court of Appeal, there is not and cannot be in this day and age a true antithesis between services of the Crown in the sense of services related to the functions of Government as such and services of the Crown in the sense of the provision of facilities commanded and defined by Act of Parliament for the general public benefit.[38]

Lord Upjohn was also of a similar view. Two judges, Lords Pearce and Wilberforce, dissented, arguing that accepting that view is to withdraw from the benefit of the patent either a large or a preponderant part of the customers for whom the invention was made (and supposedly protected by a monopoly of the right to vend). They suggested a more limited interpretation – that the invention must be for the use of the Crown (that is, the use must be by the Crown or its servants) – and that the use must be for the benefit of

[37] Ibid, 533, 534, 535.
[38] Ibid, 543.

the Crown or its servants.[39] It would not enable the Crown, in competition with the patentee, to enter into the field of supplying the article to the public.[40]

In another patent case, *Stack v Brisbane City Council,* [41] the applicants alleged that they were beneficially entitled to a patent for a water meter assemblies invention. One of the respondents agreed to sell and supply water assembly meters incorporating this invention to the first respondent, the Brisbane City Council (BCC). Another respondent manufactured the meters. The BCC installed the water meters in homes in Brisbane for the purposes of measuring the householders' use of the water supply. The water meters were not resupplied to the land owner but remained an asset of the BCC. The applicants sought an injunction restraining the respondents from infringing the alleged patent, damages or an account of profits and delivery to them of all water assembly meters in the possession of the respondents.

The respondents relied on ss 162 and 163 of the *Patents Act 1990* as a defence to the infringement complaint.

Cooper J of the Federal Court held that the BCC was 'impressed with the stamp of government' and was an authority of the State within the meaning of s 162 of the *Patents Act*. The water meters were not resupplied to the land owner and were not used in the relevant sense by the landowner. They were a component part of the apparatus by which water was supplied by the BCC for consumption in the territorial area, and charged for by the BCC, the supply being a function of local government. He concluded that the use of the water meters by the BCC as part of its supply of water in the Brisbane local authority area was the exploitation by the BCC as an authority of a State of the invention, for the services of it as such an authority. Thus he held that the use of the water meters by the BCC was for the services of the State.

Cooper J referred to the majority and minority views in *Pfizer Corp*, to *General Steel* and to two English decisions - *Pyrene Co Ltd v Webb Lamp Co Ltd* (1920) and

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[39] Ibid, 549, 568.
[40] Ibid, 569.
[41] (1995) 131 ALR 333.

Aktiengesellschaft fur Autogene Aluminium Schweissung v London Aluminium Co Ltd (1923) - referred to in *General Steel*:

> In the reasoning of Lord Wilberforce in *Pfizer Corp* it was the re-supply by the government department in competition to the patentee which underpinned the conclusion that the grant of monopoly rights was not by the exception in s 46(1) of the Patents Act 1949 (UK) to derogate from the monopoly to a greater extent than the right of the Crown to exploit the invention for its own immediate purposes: see [1965] AC at 568.
>
> .....
>
> The law in this country is no narrower than the minority view in that decision. If the facts in the instant case fall within the minority view in *Pfizer Corp* and the first instance cases referred to above, it is unnecessary for present purposes to determine whether the majority view in *Pfizer Corp* is the law of Australia.[42]

In *Re Copyright Act 1968 ; Re Australasian Performing Right Association Ltd,*[43] a case dealing directly with s 183, there was some judicial consideration of the meaning of 'for the services of the Commonwealth' but no decision on the point.

The Australasian Performing Right Association Ltd (APRA) formulated a licence scheme in which it was willing to grant a licence to the Australian Broadcasting Commission of its members' works which was subject to certain conditions, including the payment of a licence fee calculated with reference to the Commission's gross operational expenditure incurred in the provision of radio and television broadcasting services. The scheme was referred to the Tribunal pursuant to s 154(1) of the *Copyright Act 1968.* The Commission took a preliminary objection to the Tribunal's jurisdiction to consider the scheme and to make orders confirming or varying it under s 154(4) on the ground that the Commission was an agent or instrumentality of the Commonwealth and as such was protected by s 183 of the Act from infringing copyright when broadcasting or televising items in which copyright subsists.

The Tribunal referred three questions of law to the Federal Court. One was whether the Commission was an agent or instrumentality of the Commonwealth for the purposes of s 183 of the Act. The second of relevance was whether broadcasts by radio or television

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[42] (1995) 131 ALR 333, 348.
[43] (1982) 65 FLR 437.

which are conducted by the Commission are done for the services of the Commonwealth within the meaning of s 183(1) of the Act.

All judges of the Court – Bowen CJ, Franki J and Sheppard J – were of the view that the Australian Broadcasting Commission did not fall within the word 'Commonwealth' nor was it an agency of instrumentality of the Commonwealth for the purposes of s 183 of the Act.

On the second question, Bowen CJ and Franki J stated at pp 444-445:

> No doubt the broadcasting of radio and television programmes by the Commission constitutes a "service" in the sense that it falls within the words ''postal, telegraphic, telephonic and other like services" used in s 51 (v) of the *Constitution* (*Jones v Commonwealth (No 2)* (1965) 112 CLR 206).
>
> It does not follow that because broadcasting by the Commission is a service within s 51(v), any broadcasting undertaken by the Commission is for the services of the Crown. Indeed, if the Commission is not the Crown, it would seem that it could not properly be said that its broadcasting was "for the services of the Crown". If the Commission is the Crown, then it could be said its broadcasting was "for the services of the Crown" if the view of the majority of the House of Lords in *Pfizer Corporation v Ministry of Health* [1965] AC 512 be accepted for Australian conditions. This was that the phrase "for the services of the Crown" is not restricted to the traditional notion that it relates to services used by the Crown or its servants but in modern times extends also to services provided by the Crown or its servants to members of the public. In view of our conclusion that the Commission is not the Crown it is unnecessary to express a concluded view on this point.

Sheppard J stated at p 457:

> ...[i]t may be possible for an act to be done for the services of the Commonwealth within the meaning of s 183 of the Act, notwithstanding that the Commission is not the Commonwealth nor an agent or instrumentality thereof. Such a situation might arise if there were broadcast or televised something which was plainly broadcast or televised for the services of the Commonwealth, for example, a radio or television programme put on for the purposes of the Commonwealth Government.

While he also referred to the *Pfizer Corp* case no opinion was expressed on the majority and minority views in that case.

In *Copyright Agency Limited v State of New South Wales*, the High Court noted the majority view in *Pfizer Corp* that the formula 'for the services of the Crown' was not limited to the internal activities of government departments but included use by government departments in the fulfilment of duties imposed on them by legislation, and that the expression was broad enough to cover provision of products to the public.[44] The High Court in *Copyright Agency Limited v State of New South Wales* took a wide view of the scope of s 183 and implicitly adopted the majority view in *Pfizer Corp* of what constitutes 'for the services of the Crown'.

As the High Court stated:

> 61. What is important in respect of the submissions made in this case is that no distinctions are made in s 183(1) between government uses obliged by statute and/or government uses which may be "vital to the public interest" on the one hand, and government uses which reflect considerations more closely resembling commercial uses, on the other.
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> 62. Whilst it is not difficult to understand a preference for a policy framed with an eye to such distinctions, no such policy is evinced in the clear and express terms of s 183(1).
>
> …
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> 70. There is nothing in ss 183(1), 183(5) or 183A, or other provisions relating to the statutory licence scheme, which suggests that governments may make, or take the benefit of, arrangements which would have the effect of circumventing those provisions as they apply to the copying, and the communication to the public, of registered survey plans.[45]

That is, the execution of activities by the Commonwealth, or a State, within its lawful powers and authority, constitutes a 'service' of the Commonwealth or State whether that includes a sale or supply to a third party. In other words, an act is done 'for the services of the Commonwealth or State' if it is done for the purpose of performing a duty or exercising a power which is imposed upon or invested in the executive government of the Commonwealth or State by statute or by prerogative. This is consistent with the wide scope of the acts encompassed by s 183(1), the language of

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[44] *Copyright Agency Limited v State of New South Wales* [2008] HCA 35 [56].

ss 183(2) and 183(7) and with the broad intention behind the provision manifested in extrinsic materials.[46]

The fact that in times of peace government chooses to arrange copyright licences in procurements for its Armed Forces rather than rely on s 183 is a reflection of government policy and practice[47] but s 183(1) is intended to secure the untrammelled use of copyright material by the Governments and emanations of the Commonwealth and of the States in all these lawful circumstances. Sections 183(4) and 183(5) and ss 183A and 183B ensure that proper compensation shall be paid to the owner of the copyright for the acts of the Commonwealth or State.

(b) The notice requirement in section 183

Section 183 imposes an obligation on the Commonwealth and the States to inform the relevant owner of copyright of the act undertaken in reliance upon the provision. The prescribed means of doing this is set out in reg 25 of the Copyright Regulations.

Regulation 25(5) requires that a notice be given in the name of the Commonwealth or the State and that it state the International Standard Book Number (if any) or the title or description of the work sufficient to enable the work to be identified. It also requires that the notice specify the act to which the notice relates, state whether the act has been done by the Commonwealth or the State or a person authorized by the Commonwealth or the State and, if the latter, state the name of the person, and state that the purpose of the notice is to inform the owner in pursuance of s 183(4) of the doing of the act.

Regulations 25(2)-(4) require the notice to be served on the owner of the copyright or authorized agent or, where the person giving the notice does not know the address, or the name or address, of the owner of copyright or authorized agent, by notice in the *Commonwealth of Australia Gazette* or *Government Gazette* of the State as the case requires. It is a cumbersome and costly procedure for all but large-scale acts comprised within the copyright in material.

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[45] Ibid. [70].

[46] Refer to judgment of the High Court in Ibid, [8, 55-59,70].

Assuming the acts in question fall outside the sampling arrangements contemplated by s 183A, can the defence provided by s 183(1) be relied on if the Commonwealth or a State undertakes acts which, at some time after the acts are undertaken, it considers are for the services of the Commonwealth or State and then fails to inform the relevant copyright owner? That is, the Commonwealth or the State simply does nothing to notify the owner of the copying.

There is nothing in the language of s 183(1) to suggest that it is necessary to establish an intention to rely on the section at the time of the doing of the act. Indeed, subsection (3) expressly provides that authority may be given under subsection (1) (ie to a person authorized in writing by the Commonwealth or a State) before or after the acts, in respect of which the authority has been given, have been done. Section 183(1) is not dependent on any subjective intention of the actors involved at the time of the acts but on the objective test of whether the copying is in fact done for that purpose. This therefore leads to the conclusion that the defence may be relied on at any time after the acts.

The notice requirements in subsection (4) are not, unlike the notice requirements in other statutory licences, such as ss 135ZJ - 135ZL, expressed to be a condition of the operation of the defence. Section 183 (7) also refers to the sale of an article 'which is not, by virtue of sub-section (1), an infringement of a copyright'. This clearly contemplates that an act done for the services of the Commonwealth or a State is not an infringement of copyright and supports the view that the defence to infringement is not dependent on informing the copyright owner of the act.

However, subsection (4) clearly imposes an obligation to inform the copyright owner of the doing of the act ‘as soon as possible’ unless it appears to the Commonwealth or the State that it would be contrary to the public interest to do so.

There is an ambiguity in the way the notification requirement is expressed in s 183(4). The exception ‘unless it appears to the Commonwealth or State that it would be contrary to the public interest to do so’ is capable of being read as either qualifying the

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[47] It has for more than two decades generally been the practice of the Commonwealth to rely on the provision as a last resort.

immediately preceding words ‘as soon as possible’ or the mandatory verb ‘shall’ preceding those words. The use of commas after ‘shall’ and ‘possible’ promotes this response.[48] Lahore and Rothnie appear to suggest that no notice need be given to the copyright owner where it appears to be contrary to the public interest to do so.[49] There are, for example, public interest circumstances such as the security or defence of the Commonwealth where the Commonwealth may not wish to inform the copyright owner. So long as those public interest circumstances continue to exist then it would seem from either reading of the provision that no notification need be made. Section 183A(6) defines 'excluded copies' from the streamlined arrangements in terms 'where it appears to the government that it would be contrary to the public interest to disclose information about the making of the copies' which is consistent with this view.

If the public interest ceases to exist, such as the cessation of war or armed hostilities or the investigation of terrorist activities, is the Commonwealth then obliged to inform the copyright owner?

It is submitted that notification is required on a reading of s 183(4) in the light of the section as a whole and the underlying economic purpose or object of the Act, which is to protect and reward the originators of certain kinds of creative material by giving them the power to exploit that material. This applies to all excluded copies under the streamlined arrangements. This view has an echo of the Commonwealth's obligations under placitum 51(xxxi) of the *Australian Constitution* to acquire property on just terms. Further two important extrinsic materials – the Spicer Committee Report and the second reading speech of the then Attorney-General on the Copyright Bill – appear to support this view.[50]

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[48] Refer Pearce and Geddes, above n 21, 158-59 [4.46], where the authors point out that punctuation is a relevant consideration in determining the meaning of a provision even though at the Commonwealth level at least there is no statutory clarification of this principle and courts have at times shown a reluctance to pay regard to punctuation.

[49] Refer Lahore and Rothnie, above n 13 [28,561].

[50] Refer Spicer Committee Report, above n 15, [404-05]. ‘The occasions on which the Crown may need to use copyright material are varied and many. Most of us think that it is not possible to list those matters which might be said to be more vital to the public interest than others. At the same time the rights of the author should be protected by provisions for the payment of just compensation to be fixed in the last resort by the Court....’ and second reading speech for the Copyright Bill 1968, above n 15: ‘The Bill puts beyond doubt that the Crown is bound by the copyright law. Provision is made, however, [in Pt VII] for the use of copyright material for the services of the Commonwealth or the States upon payment of compensation to the owner of the copyright.’ There was very little change from the original 1967 Bill: second reading speech, above n 15, 2334-5: ‘Provision is made ... for the use of copyright material for the

(c) The impact of section 183A and its related provisions

From 30 July 1998, the *Copyright Amendment Act (No 1) 1998* amended the *Copyright Act* to streamline the system for owners of copyright to be paid for the copying of their works by government. The amendments followed the regime of the statutory licence schemes for copying by educational establishments by providing for a collecting society to be declared by the Copyright Tribunal to administer sampling, collecting and distributing payments in a similar way to the educational copying schemes.

The amendments avoided the operation of ss 183(4) and 183(5) of the Act by requiring payments for the reproduction of copyright materials by a government to be made the basis of sampling, rather than the statutory method of full record-keeping embodied in ss 183(4) and 183(5), where there is a declared copyright collecting society. The statutory provisions reflected changes in practice that had already occurred between copyright owners and government. These provisions contemplate that a relevant collecting society, which may be declared by the Copyright Tribunal in relation to all government copies or a class of government copies, will distribute the equitable remuneration to the owners of copyright in the material that has been copied and will hold in trust the remuneration for non-members who are entitled to receive it.

The method of working out the equitable remuneration payable may provide for different treatment of different kinds or classes of government copies (s 183A(4)).

Section 183A replicates some of the public interest considerations reflected in s 183. In particular it does not apply to 'excluded copies' which is defined in s 183A(6) to mean 'government copies in respect of which it appears to the government concerned that it would be contrary to the public interest to disclose information about the making of the copies'. This would include copies made for defence or security purposes. A definition section, s 182B, defines 'government copy' to mean a reproduction in a material form of copyright material made under s 183(1) and in turn defines 'copyright material' to cover works and subject-matter other than works. Computer programs are specifically

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services of the Commonwealth or the States upon payment of compensation to the owner of the copyright. These provisions are contained in clause 179 of the Bill, which in this respect follows the relevant provisions of the Patents Act.'

excluded from the definition of copyright material and thus from the streamlined arrangements.

Thus copying of computer programs and copying of any material where there is a public interest in non-disclosure of that copying must be governed by the requirements of s 183(4) and 183(5). In addition, acts comprised in the copyright other than reproduction of works and subject-matter other than works, which are done for the services of the Commonwealth or a State, would also be governed by the notification and determination requirements of ss 183(4) and 183(5). For example, if a State government department made an adaptation of a work such as a translation or cartoon of a literary work, for the services of the State, this act would be governed by ss 183(4) and 183(5).

II IMPLIED LICENCES TO THE COMMONWEALTH OR A STATE TO REPRODUCE OR PUBLISH MATERIAL

Under the *Copyright Act* it is a direct infringement of copyright to do or to authorise the doing of any act comprised in the copyright in a work or other subject matter without the licence of the copyright owner.[51] The effect of a licence given by the copyright owner is to permit what would otherwise have been an infringement of copyright. Licences may be implied from the nature of the work and the surrounding circumstances as well as expressly granted by the copyright owner. Licences may be expressly granted either orally or in writing. Other than in respect of an exclusive licence, there is no requirement under the 1968 Act that a licence be in writing.

An early case dealing with implied licences to government is *Folsome v Marsh*. That case involved the alleged piracy by a commercial publisher, in a 'Life of Washington', of the private and official letters of President Washington (as well as his messages and other public acts). The letters of Washington had been previously published under an agreement with the private copyright owners. The originals of the letters had been

[51] Sections 36 and 101. A similar position applies to those indirect infringements under the Act, such as importation for sale or hire (s 102). These indirect infringements require proof of knowledge by the person infringing.

purchased by Congress. In *Folsome v Marsh*,[52] Story J dismissed a defence that because they were in their nature and character either public or official letters or private letters of business, the letters were not the proper subjects of copyright. He observed that the author of letters whether they are literary compositions, or familiar letters, or letters of business, possess the sole and exclusive copyright therein. Story J went on to say that persons to whom the letters are addressed must have by implication the right to publish any letter or letters addressed to them upon such occasions as require or justify the publication or public use of them. He cited as examples:

- to establish a right to maintain a suit at law or in equity or to defend the same
- if he is misrepresented by the writer or accused of improper conduct in a public manner, he may publish such parts of such letters as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach.

He went on to state:

> In respect to official letters addressed to government, or any of its departments, by public officers, so far as the right of the government extends from principles of public policy to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful whether any public officer is at liberty to publish them, at least in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or on the character of the documents, embracing historical, military, or diplomatic information, it may be right, or even the duty, of the government, to give them publicity, even against the will of the writers. But this is an exception in favour of the government, and stands upon principles allied to, or nearly similar to, the right of private individuals, to whom letters are addressed by their agents, to use them, and publish them, upon fit and justifiable occasions. But assuming the right of the government to publish such official letters and papers, under its own sanction, and for public purposes, I am not prepared to admit that any private persons have a right to publish the same letters and papers without the sanction of the government for their own private profit and advantage. Recently the Duke of Wellington's despatches have, I believe, been published by an able editor, with the consent of the noble duke and under the sanction of the government. It would be a strange thing to say, that a compilation

[52] (1841) 9 F. Cas. 342, 2 Story (Amer.) 100.

> involving so much expense and so much labour to the editor in collecting and arranging the materials, might be pirated and republished by another bookseller, perhaps to the ruin of the original publisher and editor. Before my mind arrives at such a conclusion, I must have clear and positive lights to guide my judgment, or to bind me in point of authority.

In *Copyright Agency Limited v New South Wales*[53] the Full Court of the Federal Court of Australia held that the State of New South Wales did not infringe copyright in survey plans registered with the Land and Property Information Division (LPI) of the New South Wales Department of Lands by making the plans available to the public and to local government and authorities.

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, to copy and to do any other acts required by the Crown's statutory and regulatory planning regime. Copyright in the plans remained with the surveyor. The licence was for the State to do everything that, under the statutory and regulatory framework that governs registered plans, the State was obliged to do with, or in relation to, registered plans.

Emmett J, with whom Lindgren J agreed, and with whom Finkelstein J agreed generally, accepted the notion of an implied licence to government to do acts comprised in the copyright in material submitted to it, regardless of the presence of s 183. To quote from Emmett J's judgement in the case:

> 156 The systems of land holding in New South Wales and the statutory and regulatory framework described above depend in no manner upon the existence of the *Copyright Act*. If s 183 did not exist, it is clear that there would be no utility whatsoever for a surveyor in submitting any of the Relevant Plans for registration unless, by doing so, or assenting to that being done, the surveyor authorised the State to do what it is obliged by the statutory and regulatory regime described above to do, as a consequence of registering the Relevant Plan. Whether or not s 183 has the effect that the doing of the acts, because they are done for the services of the State, are deemed not to be an infringement of copyright, a surveyor must be taken to have licensed and authorised the

[53] [2007] FCAFC 80 (5 June 2007).

> doing of the very acts that the surveyor was intending should be done as a consequence of the lodgement of the Relevant Plan for registration.[54]

However, on appeal, the High Court took a narrow view of the scope of the implied licence in these circumstances.

> 46. … On the one hand, the State uses the plans in direct response to lodgement of the survey plans by an applicant to effect, if appropriate, registration, and to issue title. This includes making a working copy of the plans. These uses are directly connected with private contracts for reward between surveyors and their clients for the preparation of plans for the specific purposes of lodgement, registration and the issue of title. On the other hand, there are uses of survey plans by the State which flow from registration and which involve copying the plans for public purposes or communicating them to the public via a digital system.
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> 47. Whilst CAL is seeking remuneration and terms only in respect of those latter uses, the submissions did not always distinguish between the two types of uses. As will be explained in these reasons, the statutory licence scheme applies in the circumstances of this case to authorise the State to make copies of the survey plans after registration, for public purposes and for communication to the public, and provides for terms upon which that can be done. The scheme is compulsory in the sense that an owner cannot complain of the permitted use, but the use is allowed on condition that it be remunerated.[55]

The High Court considered that there was nothing in the express terms of s 183(1) (or its history) which could justify reading down the expression 'for the services of the State' so as to exclude reproduction and communication to the public pursuant to express statutory obligations. The High Court further held that:

> 92. … 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."
>
> 93. Such necessity does not arise in the circumstances that the statutory licence scheme

[54] Ibid [155-156].

[55] *Copyright Agency Limited v State of New South Wales* [2008] HCA 35 [46,47].

> excepts the State from infringement, but does so on condition that terms for use are agreed or determined by the Tribunal (ss 183(1) and (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 "backup" copy of the survey plans after registration, will not attract any remuneration.[56]

This narrow view suggests copies made for internal administrative purposes as well as backup copies would be covered by the implied licence. It is clear in the circumstances of that case that the use which involved copying of the plans for public purposes or communicating them to the public via a digital system is not.

Two of the factors the High Court thought were significant in its decision were that the State imposed charges for copies issued to the public, and that equitable remuneration for government uses, which involve copying and communication of the plans to the public subsequent to registration, did not undermine or impede the use for which the plans were prepared, namely lodgement for registration and issue of title. It is dangerous to generalize from the circumstances surrounding the lodgement of these survey plans under the system set by State planning laws more broadly to copyright works received by government in other circumstances, although the decision of the High Court has wider implications for the digitalisation of registration systems and the wider needs of government to disseminate such information, whether enhanced with other information or not.

One simple outcome is that government may increase registration fees to take into account any remuneration payable to the authors of the plans for any public uses or communication of such copyright material and consequent administrative costs. The wider implications for government in its own management of information are discussed in Part IV of this article below.

Implied licences to reproduce or publish copyright material may also arise in a wide variety of circumstances unconnected with government. Licences have been implied by the courts from conduct or from custom of the trade or to give a dealing between the parties ordinary business efficacy. For example, the editor of a newspaper would

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[56] Ibid, [92,93].

normally be regarded as having an implied licence to publish, and to edit, a letter sent to him on a public matter.[57]

As the High Court stated in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd*:

> A nonexclusive licence to use architectural plans and drawings may be oral or implied by conduct, or may be implied, by law, to a particular class of contracts, reflecting a concern that otherwise rights conferred under such contracts may be undermined, or may be implied, more narrowly, as necessary to give business efficacy to a specific agreement between the parties. A term which might ordinarily be implied, by law, to a particular class of contracts may be excluded by express provision or if it is inconsistent with the terms of the contract. In some instances more than one of the bases for implication may apply.[58]

The existence and extent of any implied licence to government to do acts comprised in the copyright in material forwarded to government depends on the nature of the material and the circumstances of its submittal.

Where letters, submissions or other correspondence are sent to government from individuals, organisations and other governments, a licence or consent to officials in government to copy that correspondence would normally be implied to enable it to be given timely and proper consideration by relevant Crown servants, Ministers and Ministerial staff. Frequently, the drafting of responses to correspondence requires input from a number of different areas of administrative responsibility and copies of correspondence are made to enable contemporaneous consideration by those areas.

Such a licence could of course be negated by an express prohibition on copying. It is unusual or even rare for letters or submissions or other correspondence to government to be marked 'not to be copied'. In some more sensitive areas of government, such as the Commonwealth Department of Defence, the confidentiality of material may be expressly marked, access may be expressed to be restricted to particular recipients and

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[57] *Springfield v Thame* (1903) 89 LT 242; *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, 302-3.

[58] [2006] HCA 55; (2006) 229 CLR 577 at 595-596 [59] per Kirby and Crennan JJ; see also Gummow ACJ at 584 [16].

there may be an obligation to number copies made, particularly in the case of tender documents. But it would be unrealistic to suggest that governments like other large institutions and organisations should not normally copy a document received by it to enable it to receive timely and proper consideration.

It is just as strongly arguable that a licence would normally be implied to make a copy of a letter, submission or other correspondence sent to governments to ensure the immediate preservation of the document.[59] For example, a letter sent to a Minister, which is usually forwarded to the Minister's Department for the preparation of a reply, may be copied in the Minister's office for that purpose. When the letter ceases to have currency and is placed in archives, governments may rely on ss 51AA and 51A of the *Copyright Act* to undertake such copying.[60]

In some limited circumstances, governments may have an implied licence to publish or to place publicly online. One circumstance where a licence may be implied is in respect of a public submission on a matter of public moment sent to, or given before, a government Committee or Commission by a member of parliament or a peak body representing a community interest. An example is a submission on a law reform issue.

The implication of a licence could only arise in the case of a public submission, that is, a submission made in response to the calling of public submissions by the Committee or body concerned and which is submitted on that basis. This is akin to the implication of a licence to an editor of a newspaper to publish a letter on a public matter sent to the editor.[61] There are other circumstances where correspondence received from members of Parliament or constituents on matters of public moment may carry an implied licence to publish or place online. But an implied licence would almost certainly not extend to cover correspondence sent on private constituent affairs or private commercial matters.

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[59] This gives business efficacy to the relationship established by the submission of the correspondence.

[60] The former permits a single working copy and a single reference copy of a published or an unpublished work kept in the collection of the National Archives of Australia to be made by the Archives where the work is open to public inspection. The latter, which has application to all non-profit archival institutions (as well as libraries), *inter alia* permits a copy of a work in manuscript form or an original artistic work that forms part of the collection of the archives to be made by the archives for the purpose of preserving the manuscript or original artistic work against loss or deterioration.

[61] Refer *Springfield v Thame (*1903) 89 LT 242 and *DeGaris v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, 303-303. An implied licence to publish public submissions sent to Parliamentary and other public inquiries would normally subsist in the convenor of such inquiries.

A claim of confidentiality on a letter or a submission would negate any such licence simply because it is inconsistent with publication. A licence to publish or to place publicly online would clearly not be implied where there was an express restriction placed on the publication of a document or more broadly on its use within government.

Similarly it may still be open to government to publish official letters addressed to government, or any of its departments, by public officers embracing historical, military, or diplomatic information as Story J in *Folsome v Marsh* suggests, on the basis of an implied licence, but many of these documents in the present Australian context are likely to be Crown copyright material, having been made by, or under the direction or control of, the Commonwealth or a State. In the case of documents emanating from its own public officers of government, no question of an implied licence to government could possibly arise.

Inevitably from the very nature of something which is implied there are likely to be uncertainties about the existence of such a licence. In practice this deters reliance upon them. Section 183(1) offers some protection to the Commonwealth and the States where the position is not clear. Section 183 (3) goes even further in that it extends the protection of the provision to a private licencee where written authority is given by the Commonwealth or a State to that person to do acts comprised in the copyright.[62]

III OTHER STATUTORY ENTITLEMENTS TO DO ACTS COMPRISED IN COPYRIGHT

There are a number of statutory provisions in various Australian jurisdictions which enable the Commonwealth or a State to do acts in relation to copyright material which provide immunity from civil and criminal proceedings. Commonwealth enactments other than the *Copyright Act*, include laws dealing with freedom of information, archives and parliamentary proceedings, in which there are express legal entitlements of government to copy material in its possession without infringing the copyright in the material.

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[62] The agreement or licence providing the authority must be approved by the relevant Commonwealth or State Attorney-General (s 183(6)).

Access to a document may be given to a person under s 20 of the *Freedom of Information Act 1984* (Cth) in one of a number of forms including the provision by the agency or Minister of a copy of the document. Measures passed under the *Freedom of Information Amendment (Reform) Act 2010* also require the publication of documents to which access has been given under the Act (and other specified government information) to enable downloading from a website. Under ss 90, 91 and 92 of the *Freedom of Information Act 1984* where access has been given to a document in good faith in the belief that access was required to be given under the Act, or when publication of a document is undertaken in good faith in the belief publication is required under the Act or otherwise, then no action for defamation, breach of confidence or infringement of copyright nor any criminal action lies against the Commonwealth by reason of the giving of access or the publication of the document.

The measures which require agencies to publish information under the *Freedom of Information Act* are scheduled to come into force on 1 May 2011 and have not yet been matched by reforms to the *Archives Act.* Consequently, there is at present no equivalent in the *Archives Act* to ss 90-92 of the *Freedom of Information Act 1984*. Section 57 of the *Archives Act 1983* merely provides protection from copyright infringement, for defamation, breach of confidence and criminal actions for the giving of access under the *Archives Act*.[63]

No compensation is contemplated by any of these Commonwealth provisions. They operate independently and irrespective of s 183. Neither does s 183 expressly or implicitly refer to these provisions nor do the provisions expressly or implicitly refer to s 183. They have different objects or purposes and are not so wholly inconsistent or repugnant that they cannot stand together.[64] Effect can be given to each provision at

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[63] State Freedom of Information Acts contain bars on actions for defamation and breach of confidence in respect of the giving of access under their several enactments but not bars on actions for copyright infringement although all contemplate the provision of a copy of a document as a form of access. Section 23(3)(c) of the *Freedom of Information Act 1982* (Vic) provides that if the form of access to a document would involve an infringement of copyright, access in that form may be refused and access given in another form. The Commonwealth Parliament under the *Australian Constitution* has exclusive legislative power over copyright.

[64] As Gaudron J stated in *Saraswati v R* (1991) 100 ALR 193, 204,' It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended

the same time.[65] These Acts should thus be accorded independent operation within their given spheres.

Article 9 of The English *Bill of Rights 1689* which applies to the Commonwealth and to the Australian States by statute or by the common law, provides absolute protection against liability for reproduction of copyright material in debates or proceedings of Parliament.[66] Another widely expressed provision is s 4 of the *Parliamentary Papers Act 1908* (Cth) which provides that no civil or criminal action or proceeding shall lie against a person for publishing any document or evidence pursuant to an authorisation given by a House of the Commonwealth Parliament, or a Committee thereof, under ss 2 or 3 of that Act. Similar provisions exist in state jurisdictions under various state enactments.[67]

No compensation is contemplated by any of these statutory provisions applying in the Commonwealth and States.

In the case of the State enactments, the operation and proceedings of State Parliaments are not immune from the laws of the Commonwealth but are generally unfettered by them. Section 106 of the *Commonwealth of Australia Constitution Act 1901* specifically deals with the saving of each State Constitution and provides for its continuance until altered in accordance with the Constitution of the State. However s 106 is expressed to be subject to the *Australian Constitution*, and it has not been treated as invalidating a law which otherwise falls within Commonwealth legislative power.[68] Likewise s 107 of the *Commonwealth of Australia Constitution Act 1901* provides that every power of the Parliament of a Colony which has become or becomes a State shall unless it is by

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that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other'.

65 Refer *Rose v Hrvic* (1963) 108 CLR 353, 360.

66 For further discussion see Campbell and Monotti, above n 13.

67 See for example *Parliamentary Papers Act 1891* (WA) s 1 and the *Parliamentary Papers (Supplementary Provisions) Act 1975* (NSW) s 6, *Parliamentary Committees Act 1991* (SA) s 31. Refer also s 11(1) of the *Parliamentary Privileges Act 1987* (Cth) which provides that no action, civil or criminal, lies against an officer of a House in respect of a publication to a member of a document that has been laid before a House.

68 *Attorney-General (Qld) v Attorney-General (Cwth)* (1915) 20 CLR 148, 172; *Engineers Case* (1920) 28 CLR 129, 154; *Melbourne Corporation Case* (1947) 74 CLR 31, 66, 75, 83, *Stuart-Robertson v Lloyd* (1932) 47 CLR 482: *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, *Victoria v Commonwealth* (1996) 187 CLR 416.

the *Constitution* exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the State.

The *Copyright Act* clearly falls within a head of Commonwealth Constitutional power. The principal question therefore is whether s 183 is intended to apply to the publication by State Parliaments of copyright material, that is, to the proceedings of State Parliament. It is clear law that parliamentary privilege is so valuable and essential to the workings of responsible government that express words in a statute are necessary before it may be taken away.[69] In the case of the Parliament of the Commonwealth, s 49 of the *Constitution* requires an express declaration. No express intention to take away either the power of the Federal Parliament or a State Parliament is evident in the *Copyright Act* as a whole or in s 183 specifically and so the provisions of State and Federal enactments which deal with parliamentary publication stand unfettered by the Act.

IV INFORMATION MANAGEMENT AND SECTION 183

If the Crown can rely on special defences to infringement of copyright, which enable use of private copyright material, why should it also have wider entitlements to use private copyright material? How are these rights justified on information management principles and other policy considerations?

The special defence provisions, augmented by s 183, reflect the peculiar status of government and the demands on it, to fulfill in the public interest, a wider variety of governing powers and functions within a modern liberal democratic society. This is reflected in the growth of most western governments, especially in the years after the Second World War.[70] No other body or institution has the breadth of activity and regulatory, financial, managerial and accountability requirements as modern government.

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[69] *Duke of Newcastle v Morris* (1870) LR 4HL 661, 671, 677, 680.

[70] As in most industrialised capitalist democracies, refer generally P S Wilenski, 'Small Government and Social Equity' in Glenn Withers (ed) *Bigger or Smaller Government?: Papers from the Sixth Symposium of the Academy of Social Sciences in Australia* (1982) 37.

The information management principles outlined in *Management of Government Information as a National Strategic Resource* – a Report of the Information Management Steering Committee on Information Management in the Commonwealth Government – published in August 1997 by the Office of Government Information Technology[71] state that:

> In developing systems for the organisation, transmission and transaction of information, agencies should start from the premise that, subject to privacy legislation, all information content will at some time be transferred across agency boundaries, and design access systems accordingly.

Acts comprised in the copyright of information and most importantly the reproduction of copyright information within government agencies and across them, is a management demand required for the effective review and consideration of material, and are also necessary to fulfill the basic right of all citizens in a democratic society to be informed of, and to have access to, government information.

In 2010 the Federal Government's *Response to the Report of the Government 2.0 Taskforce*[72] agreed that Australian Government agencies should enable a culture that gives their staff opportunity to experiment and develop new opportunities for online engagement with their customers, citizens and communities of interest in different aspects of the agencies work and to increase the use of online tools for internal collaboration within and between agencies. Increased engagement with the community online and internal transfer of agency information will increase. These practices may test the effectiveness of relying on an implicit licence from the provider of information and the present defences to infringement under the *Copyright Act.* In particular, the High Court decision in *Copyright Agency Limited v New South Wales* and the changing technology in the way we communicate, raise the question whether there is any need for express special defences permitting certain public uses of copyright material deposited or registered in accordance with statutory obligations under State or federal law, outside

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71 Australia, Office of Government Information Technology, *Management of Government Information as a National Strategic Resource: Report of the Information Management Steering Committee on Information Management in the Commonwealth Government, August 1997*, (1997) xxix,164.

72 Australia, Department of Finance and Deregulation. *Response to the Report of the Government 2.0 Taskforce*, (May 2010) [11] <http://www.finance.gov.au/publications/govresponse20report/doc/Government-Response-to-Gov-2-0-Report.pdf>.

the operation of s 183.[73]

In a 2005 Report, the Australian Government's Advisory Council on Intellectual Property recommended that the Crown use provisions in the *Patents Act 1990* (as well as the *Designs Act 2003*) be amended to align with the requirements of the TRIPS Agreement.[74] Article 31(b), Section 5 (Patents) of TRIPS is more limited than the provisions of that Agreement dealing with copyright and stipulates that 'other use' (that is, use without the authorization of the right's holder) is only permitted if prior to such use the proposed user has made efforts to obtain authorization from the right's holder on reasonable terms and such efforts have been unsuccessful over a reasonable period of time (except in cases of national emergency or public non-commercial use).[75]

The Advisory Council's recommendation has not yet been legislatively adopted. It is inappropriate for copyright usage. For reasons earlier advanced, the requirement of prior consent of the copyright owner for the myriad and complex holdings of rights comprised in most copyright media is impractical and potentially improper for government to exercise. And to restrict exceptions to cases of national emergency, extreme urgency or public non-commercial use is likely to invite disputes over the boundaries of these terms. What the majority of the Spicer Committee foresaw in 1959 were that the needs of government to use copyright material 'are varied and many'; '(m)ost of us think that it is not possible to list those matters which might be said to be more vital to the public interest than others'.[76]

To suggest that the government pay remuneration to copyright owners every time government reproduces their work for another person or communicates a work online enabling public access to the work, where it is a matter of public record, is counter to recent reforms requiring and enabling publication of documents accessed under the

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[73] For example, along the lines of ss 47-50 of the *Copyright, Designs and Patents Act 1988* (UK).

[74] Australia, Advisory Council on Intellectual Property, *Review of the Crown Use Provisions for Patents and Designs* (2005) 3.

[75] Refer n 1 and World Trade Organization. *Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994) < http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm> at 15 June 2010.

[76] Spicer Committee Report, above n 15 [404].

Freedom of Information Act 1982 (Cth).[77] It also places further administrative burdens on government. The balance between copyright ownership and copyright usage in the information age must take account the importance of modern access to, and the wide and free dissemination of, information. This involves practical as well as in-principle considerations. There is a public interest in the electronic capture and in dissemination to the public – to councils, public authorities (such as water and telephone) and other interested institutions and persons – of survey plans, and of their incorporation into a digital cadastral databases with layered and enhanced information from different governmental sources. In the CAL case plans could be accessed through Webgov by registered government users only and a licence fee was charged for delivery of particular plans. There is a clear public interest in accessing that information, and little public interest in remunerating all authors of all components to the digitalized information, which supports the purposes of the deposited works.

What is fair in terms of the usage of copyright material – the proper balance of interests between copyright owners and users – must take into account the character of what is done and the extent to which it is done. It should not simply be a question of seeking payment for any use of the material in question. This argument was put and rejected in the campaign for remuneration for all photocopying of copyright works.[78] In these circumstances reliance upon s 183 smacks of rent-seeking, and given the nature of the Crown use provision, which compulsorily enables unfettered use of copyright material, it is in the interests of copyright owners and of government that s 183 be used as a last resort.

Section 48 of the *Copyright, Designs and Patents Act 1988* (UK) provides:

> 48 *Material communicated to the Crown in the course of public business*
>
> (1) This section applies where a literary, dramatic, musical or artistic work has in the

[77] Refer to the *Freedom of Information Act 1982* (Cth) s 11C. This provision is not to commence until 6 months after s 3 of the *Australian Information Commissioner Act 2010* (Cth) commences (scheduled 1 May 2011).

[78] John Gilchrist 'The Franki Committee (1976) Report', *Copyright Future: Copyright Freedom Conference*, (May 2009), 3. The Australian Copyright Council Ltd had made submissions to the Franki Committee that all copying should be remunerated upon the basis that authors should receive a royalty for each copy page made of any work within copyright. In Britain, the Whitford Committee also reached a similar view by concluding that all reprography be remunerated and that fair dealing be confined to hand or typewritten copies.

course of public business been communicated to the Crown for any purpose, by or with the licence of the copyright owner and a document or other material thing recording or embodying the work is owned by or in the custody or control of the Crown.

(2) The Crown may, for the purpose for which the work was communicated to it, or any related purpose which could reasonably have been anticipated by the copyright owner, copy the work and issue copies of the work to the public without infringing any copyright in the work.

(3) The Crown may not copy a work, or issue copies of a work to the public, by virtue of this section if the work has previously been published otherwise than by virtue of this section.

(4) In subsection (1) "public business" includes any activity carried on by the Crown.

(5) This section has effect subject to any agreement to the contrary between the Crown and the copyright owner.

A special defence of this kind was recommended by one member of the Copyright Law Review Committee in its *Crown Copyright* report.[79] It would facititate the fulfillment of a public duty on government. It should nonetheless be encumbent on government which requires the deposit of plans or other material to make clear in regulatory, statutory or documentary form the uses of the copyright material contemplated by government. No use beyond the purposes expressed should be authorized. It would also change the character of the dealing if the government was exercising the licence to make a profit from the use of other copyright works rather than simply recouping costs. A proviso could be inserted into this special defence to exclude profit-making activities from the operation of the provision. In this way the special defence would not unfairly prejudice the legitimate interests of the copyright owner.

V CONCLUSION

The broad scope of the Crown use provision should be retained. There are compelling arguments in law and policy for clarifying the interrelationship between the special defences to infringement and the Crown use provision so that copyright policy is

[79] The author of this article. Australia, Copyright Law Review Committee, *Crown Copyright* (2005) 187.

consistent and clear. In particular, it should be made clear that s 183 should complement, rather than override, the special defences to infringement such as s 40 (fair dealing for research or study) which users of copyright material may rely on generally under the *Copyright Act*.

Further, the increased engagement with the community by Australian governments online and the inter-operability of information between government agencies which modern information and communication technologies facilitate, will test the effectiveness of relying on an implicit licence from the provider of copyright material to government and the present defences to infringement under the *Copyright Act.* Reliance by government on s 183 in these circumstances is generally not appropriate. The High Court decision in *Copyright Agency Limited v New South Wales* and the changing technology in the way we communicate suggest a need for an express special defence permitting certain public uses of copyright material deposited or registered in accordance with statutory obligations under State or federal law, outside the operation of s 183.