15. Government Use

Contents

Summary

15.1 The *Copyright Act* contains exceptions for parliamentary libraries using copyright material to assist parliamentarians, and copying for judicial proceedings. Other government use of copyright material is carried out under direct licences, or under the statutory licence for government copying.

15.2 This chapter identifies certain government uses that should not be remunerable. It considers whether these uses should be dealt with by way of the statutory licence, or whether fair use or a specific exception should apply. The ALRC concludes that high volume institutional uses that are nearly all fair (according to the four fairness factors) are most efficiently dealt with by way of specific exceptions. Such exceptions, if technology-neutral and clear, can reduce transaction costs by avoiding the necessity of

counting them in surveys, considering the fairness factors or developing protocols and guidelines.

15.3 The ALRC recommends that the current exceptions for parliamentary libraries and judicial proceedings should be retained, and that further exceptions should be enacted. These exceptions should apply to use for public inquiries and tribunal proceedings, uses where a statute requires public access, and use of material sent to governments in the course of public business. Governments should also be able to rely on all of the other exceptions in the *Copyright Act*. These exceptions should be available to Commonwealth, state and local governments.

Current arrangements

15.4 The parliamentary, judicial and executive arms of government all use copyright material. A significant amount is used under direct licence. There are specific exceptions available for parliamentary libraries[1] and for copying for judicial proceedings.[2] Other copying is done under the statutory licence in pt VII div 2 of the *Copyright Act*.[3]

15.5 Under the statutory licence, government use of copyright material does not infringe copyright if the acts are done 'for the services of the Commonwealth or State'.[4] When a government uses copyright material, it must inform the owner of the copyright and agree on terms for the use.[5] However, if a collecting society has been declared in relation to a government copy, the government must pay the collecting society equitable remuneration for the copy.[6]

15.6 Two collecting societies have been declared, Copyright Agency for text, artworks and music (other than material included in sound recordings or films) and Screenrights for the copying of audiovisual material, including sound recordings, film, television and radio broadcasts. The *Copyright Act* requires equitable remuneration to be worked out by using a sampling system to estimate the number of copies made.[7] The method of working out equitable remuneration may provide for different treatment of different kinds of government copies.[8] However, no survey has been conducted since 2003 as governments and collecting societies have been unable to agree on a method for a survey. Since then, governments have paid Copyright Agency and Screenrights on a per employee basis.

1 *Copyright Act 1968* (Cth) ss 48A, 104A.
2 Ibid ss 43(1), 104.
3 See Ch 8.
4 *Copyright Act 1968* (Cth) s 183(1).
5 Ibid s 183(5).
6 Ibid s 183A(2).
7 Ibid s 183A(3).
8 Ibid s 183A(4).

15.7 It is unclear whether the fair dealing exceptions in pt III div 3 of the *Copyright Act* are available to governments in Australia. It is also unclear whether a government can rely on an implied licence to use copyright material.[9]

Changing patterns of government use

15.8 Government use of copyright material has changed significantly in response to the emergence of digital technologies. Governments are much less likely to subscribe to hardcopy newspapers, books, journals and looseleaf services, and government officers are less likely to photocopy these items. Instead, governments subscribe to online libraries and media portals.[10]

15.9 Governments now receive large amounts of copyright material via email and online, scan and digitally store documents sent to them and email documents internally. Legislation and policy related to open government principles (discussed below) means they are now more likely to publish material on external websites.

15.10 The effect of these changes is that government use of commercially available material is more likely to be under direct licence. An increased amount of material is being used under the statutory licence, but most of it is not commercially available. Some of the problems with the statutory licence have been discussed in Ch 8. This chapter considers whether some of the uses now made under the statutory licence would be better dealt with by exceptions.

Options for reform: statutory licensing, fair use or specific exceptions

15.11 There are certain government uses of copyright material that should not be remunerable, because of their public interest nature, and because they largely concern material that is not commercially available. For example, governments and collecting societies agree that internal use of surveys for land title registration, copying and communicating material in response to freedom of information requests, and copying and digitising correspondence to government, should not be remunerable.[11]

15.12 The question for this Inquiry is whether these types of uses should continue to be made in reliance on the statutory licence, or be considered under a fair use exception or a specific exception. The ALRC has concluded that specific exceptions would best achieve the purposes of copyright law.

15.13 Five Australian government agencies called for exceptions for certain government uses.[12] Copyright Agency/Viscopy proposed that these uses should continue to be made in reliance on the statutory licence, with equitable remuneration

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9 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 6–7, 32–42.

10 NSW Government, *Submission 294*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

11 Copyright Agency, *Submission 727*; NSW Government, *Submission 294*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

12 NSW Government, *Submission 294*; DSITIA (Qld), *Submission 277*; Department of Defence, *Submission 267*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

negotiated between the parties, in the interests of 'consistency, simplicity and equity'.[13] Uses that should be free can be 'zero rated', and disagreements can be settled by the Copyright Tribunal.

15.14 The experience since 2003 is that disagreements about which uses are remunerable have led to difficult and protracted negotiations over the amounts payable under the statutory licence.[14] The parties (government agencies and collecting societies) have not reached agreement over whether fair dealing and other exceptions are available to governments, or over how surveys should be conducted and what should be counted.[15] The Copyright Tribunal has not been asked to resolve these issues.

15.15 The ALRC concludes that the statutory licence is not an efficient way of managing uses that do not require remuneration. It would be more efficient for the statute to clearly specify which uses can be freely undertaken. An exception would reduce uncertainty and would avoid the expense of including these uses in surveys and the associated processing costs.

15.16 In the Discussion Paper for this Inquiry, the ALRC proposed that government uses could be made in reliance on a fair use exception.[16] The fair use exception asks of any particular use, 'is this fair?'. In deciding whether a use is fair, four fairness factors must be considered: the purpose and character of the use, the nature of the copyright material, the amount and substantiality of the part used, and the effect of the use upon the potential market for, or value of, the copyright material.[17]

15.17 ALRC considers that fair use could be an efficient way of dealing with government uses. In the US, no specific exceptions or statutory licences are available to government, and even military and security agencies must work within a framework of direct licensing and fair use.[18] In 1999, the Acting Assistant Attorney General noted that 'reported cases involving application of the fair use doctrine to governmental conduct are rare'.[19] Other fair use jurisdictions simply provide for fair use for use:

- 'in juridical or administrative procedures according to law' (Israel);[20]
- 'by or under the direction or control of the Government ... where such use is in the public interest and is compatible with fair use' (the Philippines);[21] or

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13 Copyright Agency/Viscopy, *Submission 249*.
14 See Ch 8.
15 See Ch 8.
16 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013) Ch 14.
17 See Ch 5.
18 G Bowman, 'Application of the Copyright Doctrine of Fair Use to the Reproduction of Copyrighted Material for Intelligence Purposes' (2000) *The Army Lawyer* 20.
19 R Moss, *Memorandum: Whether and Under What Circumstances Government Reproduction of Copyrighted Materials is a Noninfringing 'Fair Use' under Section 107 of the Copyright Act of 1976* (1999), prepared for Department of Justice.
20 *Copyright Act 2007* (Israel) s 20.
21 *Intellectual Property Code of the Philippines*, Republic Act No 8293 (the Philippines) s 184.1(h).

- 'for the purpose of judicial proceedings and of internal legislative or administrative organs' (South Korea).[22]

15.18 Moving from a regime based on a statutory licence, to a less familiar regime based on a standard of fairness, would pose challenges. As discussed in Ch 5, fair use works best when institutions prepare guidelines and protocols to guide officers in their use of copyright material. The Australian public sector possesses the flexibility to manage such a transition.[23] Future Australian governments may consider that fair use is the appropriate exception for government uses that do not require remuneration.

15.19 However, the ALRC considers that, at the present time, the more efficient way of dealing with the particular government uses discussed in this chapter is by way of specific exceptions. Specific exceptions, if technology-neutral and clear, can reduce transaction costs by avoiding the necessity of considering the fairness factors or developing protocols and guidelines. They are particularly suitable for high volume institutional uses where transaction costs could be high if users had to refer to fairness factors or guidelines for each use. They are suitable for categories of uses where all or nearly all uses are fair (such as where the material used has no real market). The government uses outlined below seem to fit into these categories.

15.20 William Patry suggests that furthering culture requires dynamic laws, but where there are 'situations with identifiable fact patterns ... concrete exemptions, whether contained on a list or otherwise, are desirable. Where we can identify recurring problems, we should provide specific guidance'.[24] The exceptions recommended in this chapter are intended to provide specific guidance for situations that have been identified by stakeholders as recurring problems.

15.21 Nearly all the uses covered by the recommended exceptions are likely to be assessed as fair, if judged according to the four fairness factors. The purpose and nature of the use would be given great weight: the uses are intended to serve the public interest in the free flow of information between the three branches of government and the citizen.[25] With regard to the fourth factor, it is not anticipated that the exceptions will have a significant impact on the market for material that is commercially available. There may be an occasional use that affects the copyright owner's market. However, if the use is essential to the functioning of the executive, the judiciary or the parliament, or to the principle of open government, it is likely that the use would be considered fair.

Parliamentary libraries

15.22 There are specific exceptions in the *Copyright Act* that provide that use of copyright material for the purpose of assisting a member of Parliament in the

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22 *Copyright Act 1967* (South Korea) art 23.

23 CSIRO, *Submission 774*; IP Australia, *Submission 681*; ACCC, *Submission 658*; State Records WA, *Submission 585*.

24 William Patry, 'Limitations and Exceptions in the Digital Era' (2011) 7 *Indian Journal of Law and Technology* 1, 13.

25 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 6.

performance of the person's duties does not infringe copyright.[26] There is also an exception for interlibrary loans for the purpose of assisting members of Parliament.[27] These exceptions are not qualified by any fairness requirements.

15.23 The Australian Parliamentary Library reports that these provisions were enacted in 1984 in response to 'a realisation that the copyright obligations on parliamentary libraries were having an increasingly problematic impact on the ability of those libraries to fulfil their function of providing parliamentarians with unimpeded access to quality information'.[28] Those obligations included 'onerous record keeping requirements, the heavy restrictions on copying, the inability to provide audio visual services and build current affairs data bases, and issues of timeliness and confidentiality'.[29]

15.24 Parliamentary libraries indicated that these exceptions are necessary for their work.[30] The exceptions provide the certainty that the libraries need to fulfil their functions in a time-pressured environment.[31] The absence of record keeping requirements allows the libraries to preserve the required confidentiality.[32] The Australian Parliamentary Library also submitted that the Library 'does not abuse the broad and generous exceptions' and noted that the Library has a substantial collection development budget and subscribes to various media services.[33] No rights holders raised any concerns about the parliamentary library exceptions. The ALRC concludes that these exceptions should be retained.

15.25 However, the exceptions in their current form are not adequate for the digital environment. To carry out their duties, parliamentary librarians need to archive material from online sources and provide immediate access to information in digital form. Parliamentary libraries have called for ss 48A and 104 to be extended to include the capture of material in digital form, for s 48A to extend to dealing with copies of works.[34] The ALRC recommends that the parliamentary libraries exceptions should be technology-neutral and should apply to all of the rights encompassed by copyright.

15.26 Similarly, the exception in s 50(1)(aa), which allows a library to supply copies of works to parliamentary libraries, should be retained and updated to include digital works.

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26 *Copyright Act 1968* (Cth) ss 48A, 104A.
27 Ibid s 50(1)(aa).
28 Australian Parliamentary Library, *Submission 694*.
29 Ibid.
30 Queensland Parliamentary Library, *Submission 718*; WA Parliament, *Submission 696*; Australian Parliamentary Library, *Submission 694*; Association of Parliamentary Libraries of Australasia, *Submission 650*; NSW Parliamentary Library, *Submission 626*.
31 Queensland Parliamentary Library, *Submission 718*; WA Parliament, *Submission 696*; Australian Parliamentary Library, *Submission 694*; Association of Parliamentary Libraries of Australasia, *Submission 650*; NSW Parliamentary Library, *Submission 626*.
32 Queensland Parliamentary Library, *Submission 718*; Australian Parliamentary Library, *Submission 694*.
33 Australian Parliamentary Library, *Submission 694*.
34 Queensland Parliamentary Library, *Submission 718*; WA Parliament, *Submission 696*; Australian Parliamentary Library, *Submission 694*; Association of Parliamentary Libraries of Australasia, *Submission 650*; Australian Parliamentary Library, *Submission 107*.

15.27 Parliamentary libraries have also reported concerns about contracts with publishers that appear to limit the scope of the exceptions for parliamentary libraries.[35] In Ch 20, the ALRC recommends that the *Copyright Act* should provide that a contractual term that excludes or limits the libraries exceptions is not enforceable.

Recommendation 15–1 The parliamentary libraries exceptions in ss 48A, 50(1)(aa) and 104 of the *Copyright Act* should be extended to apply to all types of copyright material and all exclusive rights.

Judicial proceedings

15.28 There are specific exceptions in the *Copyright Act* for reproduction for the purpose of judicial proceedings or a report of judicial proceedings.[36] Like the exceptions for assisting members of Parliament, the exceptions for judicial proceedings apply to print and audiovisual material but not digital material or copies of print material. They are not qualified by any fairness requirements.

15.29 These exceptions are necessary for the proper and speedy administration of justice.[37] As the NSW Government noted,

> It is frequently the case that copyright material such as correspondence and a company's internal documents constitute important evidence in litigation, often to support points that may be detrimental to the author or copyright owner. In other cases, it may be necessary to use works owned by third parties or in which ownership is uncertain. Multiple copies are needed of all material brought before a court or tribunal.[38]

15.30 The rationale for these exceptions is the public interest in the smooth functioning of the legal system. They have been uncontroversial. They should be retained and updated to be technology-neutral.

15.31 The NSW Law Society suggested that, 'given government's increasing use of tribunals to resolve disputes, the defence should apply equally to administrative proceedings as well as judicial proceedings'.[39] Tribunals are not part of the judicial arm of government, but are part of the executive. They are characterised by informality, and the laws of evidence do not usually apply.[40]

15.32 The considerations are very similar for use for judicial proceedings, use for tribunal proceedings, and use for statutory inquiries (discussed below). The uses facilitate important public processes, use mostly material that is not commercially

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35 Queensland Parliamentary Library, *Submission 718*; WA Parliament, *Submission 696*; Australian Parliamentary Library, *Submission 694*; Association of Parliamentary Libraries of Australasia, *Submission 650*; Australian Parliamentary Library, *Submission 107*.

36 *Copyright Act 1968* (Cth) ss 43(1), 104.

37 Intellectual Property Committee, Law Council of Australia, *Submission 765*; NSW Government and Art Gallery of NSW, *Submission 740*.

38 NSW Government and Art Gallery of NSW, *Submission 740*

39 Intellectual Property Committee, Law Council of Australia, *Submission 765*.

40 Garry Downes, 'Tribunals in Australia: Their Roles and Responsibilities' (2004) 84 *Reform* 7.

available, and do not affect the market for the original work. The *Copyright Act* should include an exception for use of copyright material for the purpose of tribunal proceedings.

Recommendation 15–2 The *Copyright Act* should provide for a new exception for the purpose of the proceedings of a tribunal, or for reporting those proceedings.

Parliamentary proceedings

15.33 Copyright material is sometimes provided in evidence, in a report, or otherwise presented ('tabled') before a parliament or a parliamentary committee. The *Copyright Act* does not currently include an exception for use of material for parliamentary proceedings or reporting on parliamentary proceedings. Article 9 of the *Bill of Rights 1689* has been adopted in all Australian jurisdictions and provides that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.[41] This privilege protects the publication of papers for the use of members of Parliament from claims of copyright infringement. However, it does not protect wider publication, even if authorised by the Parliament.[42] Wider publication is usually necessary to ensure that the proceedings of Parliament can be scrutinised by citizens.

15.34 Accordingly, each Australian parliament (except Tasmania and South Australia) has enacted legislation protecting a person who publishes parliamentary papers from civil or criminal action.[43] For example, the *Parliamentary Privileges Act 1987* (Cth) provides that, for the purpose of art 9, 'proceedings in Parliament' include acts done for the purposes of:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

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41 *Parliamentary Privileges Act 1987* (Cth) s 16(1); *Imperial Acts Application Act 1969* (NSW) s 6, sch 2; *Parliament of Queensland Act 2001* (Qld) s 8; *Imperial Acts Application Act 1984* (Qld) s 5, sch 1; *Constitution Act 1934* (SA) s 38; *Imperial Acts Application Act 1980* (Vic) ss 2, 8; *Parliamentary Privileges Act 1891* (WA) s 1; *Australian Capital Territory (Self Government) Act 1988* (Cth) s 24; *Legislative Assembly (Powers and Privileges) Act 1992* (NT) s 6(1); *R v Turnbull* (1958) Tas SR 80 , 84.

42 E Campbell and M Groves, 'Parliamentary Papers and their Protection' (2004) 9 *Media & Arts Law Review* 113, 114, discussing *Stockdale v Hansard* (1840) 11 Ad & E 253; 113 ER 1112.

43 *Parliamentary Privileges Act 1987* (Cth) s 16(2); *Parliamentary Papers (Supplementary Provisions) Act 1975* (NSW) s 6; *Parliament of Queensland Act 2001* (Qld) s 8; *Constitution Act 1975* (Vic) s 73; *Parliamentary Privileges Act 1891* (WA) s 1; *Australian Capital Territory (Self Government) Act 1988* (Cth) s 24; *Legislative Assembly (Powers and Privileges) Act 1992* (NT) s 11. In Tasmania, there is protection from defamation for a person who publishes a fair report of public parliamentary proceedings: *Defamation Act 2005* (Tas) s 29, but no protection for copyright infringement. South Australian provisions were contained in the *Wrongs Act 1936* (SA) s 12 but this Act has been repealed and equivalent provisions do not appear in the replacement Act, the *Civil Liability Act 1936* (SA).

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.[44]

15.35 There was some support among stakeholders for a specific exception for parliamentary records.[45] There is a specific exception in the United Kingdom[46] and New Zealand.[47] However, there is insufficient evidence before the ALRC to justify such a recommendation. The current legal protections appear to be sufficient to permit parliaments to publish tabled material and records of proceedings. The Tasmanian Parliament has the power to legislate to protect publishers of parliamentary papers from claims of copyright infringement if it so wishes.[48]

15.36 The Australian Commonwealth, state and territory parliaments have sufficient powers to protect themselves from claims of copyright infringement, and a specific exception in the *Copyright Act* is not necessary.

Public inquiries

15.37 The *Copyright Act* does not contain an exception for the use of copyright material for inquiries or royal commissions. These uses are currently made under the statutory licence.

15.38 Public inquiries are established by the executive to inquire into a matter of public importance.[49] The Commonwealth and all Australian states and territories have enacted legislation that provides for the appointment of royal commissions[50] or other public inquiries with powers and protections.[51] Governments may also establish inquiries, task forces, committees and reviews without statutory foundation.

15.39 The *Royal Commissions Act 1902* (Cth) provides that an authorised person may make copies of any documents produced before a royal commission that contain matter

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44 *Parliamentary Privileges Act 1987* (Cth) s 16(2).

45 Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*.

46 *Copyright, Designs and Patents Act 1988* (UK) s 45.

47 *Copyright Act 1994* (NZ) s 59.

48 While Commonwealth legislation normally overrides state legislation, Campbell & Monotti point out that 'the federal Parliament cannot ... use its legislative powers in ways that impair the capacity of State governments to perform their constitutional functions': E Campbell and A Monotti, 'Immunities of Agents of Government from Liability for Infringement of Copyright' (2002) 30 *Federal Law Review* 459, 469.

49 Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report 111 (2010), 57.

50 *Royal Commissions Act 1923* (NSW); *Royal Commissions Act 1968* (WA); *Royal Commissions Act 1917* (SA); *Royal Commissions Act 1991* (ACT).

51 *Constitution Act 1975* (Vic) ss 88B, 88C; *Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss 14–21C; *Commissions of Inquiry Act 1950* (Qld); *Commissions of Inquiry Act 1995* (Tas); *Inquiries Act 1945* (NT). Also see: *Special Commissions of Inquiry Act 1983* (NSW); *Public Sector Management Act 1994* (WA) ss 3, 24H–24K; *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA); *Inquiries Act 1991 (ACT)*; *Commission of Inquiry (Deaths in Custody) Act 1987* (NT).

that is relevant to a matter into which the commission is inquiring.[52] A document includes 'any book, register or other record of information, however compiled, recorded or stored'.[53] It also provides that a custodian of royal commission records may use the records for the purpose of performing his or her functions or powers.[54] The Act is silent as to the copyright implications. The Act provides certain immunities to commissioners, witness and legal practitioners assisting a royal commission,[55] but it is not clear that these immunities extend to actions for copyright infringement.

15.40 Use of copyright material for investigation, presenting exhibits, briefs and reports is intrinsic to the conduct of an inquiry. These uses serve the public interest in ensuring that matters of public importance are thoroughly investigated and the proceedings made public where possible. Most copyright material used for these purposes, such as letters, file notes, and other internal documents of companies, government agencies and private institutions, are not produced for creative or commercial purposes, and do not have any market value.

15.41 There are exceptions for these uses in the United Kingdom and New Zealand. In the UK, copyright is not infringed by anything done for the purposes of the proceedings of a royal commission or statutory inquiry, or reporting those proceedings.[56] In New Zealand, the exception extends to anything done for the purposes of the proceedings of royal commissions, commissions of inquiry, ministerial inquiries or statutory inquiries, or reports of those proceedings.[57]

15.42 The ALRC considers that the *Copyright Act* should include an exception for use of copyright material for the proceedings of royal commissions and inquiries established under a statute. If the four fairness factors were considered, these uses would generally be fair: they are non-commercial; are in the public interest; and the material used is generally not offered for sale.

15.43 It is not necessary to extend the exception to every inquiry established by government. The inquiries that are of significant public importance will be established under statute. Uses for other inquiries may be undertaken under the fair use exception or under the statutory licence.

Recommendation 15–3 The *Copyright Act* should provide for a new exception for the purpose of the proceedings of a royal commission or a statutory inquiry, or for reporting those proceedings.

52 *Royal Commissions Act 1902* (Cth) s 6F(1)(c).
53 Ibid s 1B Definitions.
54 Ibid s 9(6).
55 Ibid s 7.
56 *Copyright, Designs and Patents Act 1988* (UK) s 46.
57 *Copyright Act 1994* (NZ) s 60.

Statutes requiring public access

15.44 Many statutes require government agencies to give public access to information and documents. Most of the statutes require access to material that has been created by government agencies themselves, but some concern material that has been submitted to governments, and may be subject to copyright. For the purpose of this Inquiry, the most important of these statutes are freedom of information (FOI) laws, planning and environmental protection laws and laws associated with land title registration. This section of this Report will consider these three areas in some detail. Intellectual property statutes, including the *Patents Act 1990* (Cth),[58] the *Trade Marks Act 1995* (Cth)[59] and the *Designs Act 2003* (Cth)[60] also require documents to be made available.

15.45 The ALRC considers that, where a statute requires governments to give public access to copyright material, those uses should not be remunerated. First, because these uses are fair—they are transformative and do not affect the potential market for, or value of, the copyright material. Secondly, if the cost of copyright payments is passed on to the citizen seeking access, this would constitute a burden on public access in a context where public access is highly valued.

15.46 This exception is not intended to apply to libraries and archives. The specific needs of libraries and archives are addressed in Ch 12.

Freedom of information and open government

15.47 FOI laws are intended to promote democracy by contributing to increasing public participation in government processes, promoting better decision making, and increasing scrutiny, discussion, comment and review of the government's activities.[61]

15.48 The 'second generation' of FOI laws implement the open government agenda. The Australian Government has declared that 'it is committed to open government based on a culture of engagement, built on better access to and use of government held information, and sustained by the innovative use of technology'.[62] Open government treats government information as 'a national resource that should be available for community access and use'.[63] Reforms associated with open government include the *Freedom of Information Amendment (Reform) Act 2010* which established the Office of the Australian Information Commissioner and the Information Publication Scheme. This scheme requires agencies to publish certain information, including information released under FOI requests, on their websites.[64] At state and territory level, there are

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58 The *Patents Act 1990* (Cth) provides that reproducing, communicating and translating documents open to public inspection under the Patents Act does not infringe copyright: s 226.

59 *Trade Marks Act 1995* (Cth) s 217A.

60 *Designs Act 2003* (Cth) s 60.

61 *Freedom of Information Act 1982* (Vic) s 3.

62 Australian Government. Department of Finance, *Declaration of Open Government* (2010) http://agict.gov.au/blog/2010/07/16/declaration-open-government at 15 November 2013.

63 Australian Government. Office of the Australian Information Commissioner, *Principles On Open Public Sector Information* (2011).

64 *Freedom of Information Act 1982* (Vic) pt 2.

statutes requiring that information in the possession of a public authority must be provided to a person unless the information is exempt.[65]

15.49 Access to government information in the digital environment means online access, which poses some significant challenges when the information comprises, in part, copyright material that is not owned by the government.

15.50 Copyright law has a different impact on use under FOI laws for each level of government. The *Freedom of Information Act 1982* (Cth) (FOI Act) provides immunity from proceedings for copyright infringement to Australian Government agencies and officers who give access to a document as required by the FOI Act.[66] In 2010, this immunity was extended to cover the publication on a website of information released to an FOI applicant.[67]

15.51 The immunity in the FOI Act only applies to the acts of federal government agencies subject to the FOI Act. For state and territories, providing immunity from copyright infringement for government officials may not be possible. It is arguable that such a state or territory statutory provision would be inconsistent with the *Copyright Act*, and would, to the extent of the inconsistency, be invalid.[68]

15.52 If a state or territory government uses copyright material in compliance with FOI laws, this use is covered by the statutory licence.[69] The situation regarding remuneration for these uses at state and territory level is unclear. Copyright Agency/Viscopy has indicated that remuneration for disclosure under FOI laws is a matter for negotiation[70] and that it does not seek payment for material provided in response to an FOI request.[71] Both the Victorian and NSW governments raised concerns about the risk of being required to pay remuneration for material used as required by FOI laws.[72] As noted earlier, current arrangements between governments and the Copyright Agency require payment per employee, and do not specify which uses are remunerable.

15.53 Local governments are subject to state and territory FOI laws, and they are not covered by the statutory licence in the *Copyright Act*. The effect is that they risk copyright infringement when using copyright material in a way that is required by an FOI law.[73] It has been necessary to make special provision in FOI laws so that, if access to a document in the form requested would breach copyright, then access in that

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65 *Government Information (Public Access) Act 2009* (NSW); *Right to Information Act 2009* (Qld); *Right to Information Act 2009* (Tas).

66 *Freedom of Information Act 1982* (Vic) s 90.

67 *Freedom of Information (Amendment) Reform Act 2010* (Cth) sch 4 pt 1 item 50; *Freedom of Information Act 1982* (Vic) s 90.

68 *Constitution* s 109, see also E Campbell and A Monotti, 'Immunities of Agents of Government from Liability for Infringement of Copyright' (2002) 30 *Federal Law Review* 459, 471–472; Victorian Government, *Submission 282*.

69 J Bannister, 'Open Government: From Crown Copyright to the Creative Commons and Culture Change' (2011) 34 *UNSW Law Journal* 1080, 1097–1098.

70 Copyright Agency/Viscopy, *Submission 249*.

71 Copyright Agency, *Submission 727*.

72 NSW Government, *Submission 294*; Victorian Government, *Submission 282*.

73 Information and Privacy Commission NSW, *Submission 209*.

form may be refused and access given in another form.[74] The only form of access that does not breach copyright is making the document available for inspection,[75] which is an inadequate approach in the digital age.

15.54 Limits on laws requiring governments to make information available proactively have also been enacted—for example, the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act) was amended to provide that an agency is not required to make 'open access information' available if this would infringe copyright.[76] This approach gives blanket and inflexible protection for copyright material, and does not further the aim of open government. The NSW Information and Privacy Commission (NSW) stated that the risk of infringing copyright 'undercuts the transparency and effectiveness of the GIPA Act by limiting councils' ability to provide public access to documents that inform the basis of their decisions'.[77]

Planning and environmental protection laws

15.55 Planning and environmental protection laws often require a person to provide documents to a government agency, and require the agency to provide public access to the documents. For example, the proponent of a development is usually required to submit a development application, which may include surveys, architects' plans and environmental impact statements.[78] The proponent pays the various professionals commercial rates for their work. The purpose of the laws is to facilitate public participation in planning processes,[79] with the expectation that this will improve decision making.

15.56 Providing public access to a development application, including the copyright material contained within it, raises similar issues to disclosure under FOI laws. Commonwealth statutes requiring public access to documents can create immunity for Australian Government agencies. However, state and territory governments cannot take advantage of immunity and may be liable for payment under the statutory licence. Local governments have no immunity and no statutory licence, and risk copyright infringement when providing public access to documents.[80]

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74 See, eg, *Freedom of Information Act 1982* (Vic) s 23(3)(c); *Government Information (Public Access) Act 2009* (NSW) s 72; *Freedom of Information Act 1989* (ACT) s 19. These provisions are expressed generally, but are only relevant to local governments because Commonwealth or state government uses 'for the services of the Commonwealth or State' do not infringe copyright: *Copyright Act 1968* (Cth) s 183(1). Similar provisions are contained in provisions allowing public access to state and territory records, eg: *State Records Act 1998* (NSW) s 60; *Public Records Act 2002* (Qld) s 20; *Territory Records Act 2002* (ACT) s 29.

75 For example, *Freedom of Information Act 1991* (SA) s 22(1)(a).

76 *Government Information (Public Access) Amendment Act 2012* (NSW) sch 1(1); *Government Information (Public Access) Act 2009* (NSW) s 72.

77 Information and Privacy Commission NSW, *Submission 209*.

78 For a useful example, see NSW Government, *Submission 294*.

79 For example, *Environmental Planning and Assessment Act 1979* (Cth) s 5.

80 A voluntary licence is available to local councils, but this licence does not cover placing third party material online: Copyright Agency, *Local Government* <www.copyright.com.au/licences/not-for-profit-sector/local-government> at 9 May 2013. Town planner Tony Proust described the extraordinary difficulties he had in obtaining a copy of a 20 year old building plan because of local government's copyright obligations: T Proust, *Submission 264*.

Land title registration

15.57 The use of survey plans as required by the Torrens System of title registration has been the subject of lengthy litigation between Copyright Agency and the NSW Government. NSW laws provide that transactions relating to land cannot be registered unless a current plan has been registered.[81] Upon registration, the Registrar-General must make copies of plans available to the public.[82] The Land and Property Information division of the NSW Government (LPI) makes the plans available through its online shop and also through information brokers, upon payment of fees.[83]

15.58 In 2003, Copyright Agency Ltd applied to the Copyright Tribunal for orders requiring the NSW Government to pay equitable remuneration for copying and communicating survey plans to the public.[84] The proceedings were transferred to the Federal Court which found that surveyors who submit plans for registration retain their ownership of copyright, but there is an implied licence for the State to do everything that the State is obliged to do with the plans.[85] On appeal, the High Court held that it is not necessary to imply a licence, because the statutory licence makes provision for the State to use the survey plans.[86] The matter has been returned to the Copyright Tribunal to calculate equitable remuneration, and the Tribunal recently noted that, 'the parties remained, as they have on almost all matters for over a decade, in strident, if polite, disagreement'.[87]

15.59 The High Court decision is directly relevant to the use of surveys in all Australian jurisdictions, and may also be relevant to the use of other copyright material deposited with government and used under statutory obligations, such as environmental impact statements and building plans.

15.60 The ALRC asked if there should be an exception in the *Copyright Act* to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law.[88] The Spatial Industries Business Association (SIBA), a peak industry organisation for surveyors, vigorously objected to such an exception,[89] as did 99 surveyors who responded by supporting the current copyright regime. These submissions emphasised the high level of skills, training and education possessed by surveyors, and the high level of technical expertise and professional judgement that is required to prepare a survey plan. Many of these

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81 See, eg, *Real Property Act 1900* (NSW); *Strata Schemes (Freehold Development) Act 1973* (NSW); *Strata Schemes (Leasehold Development) Act 1986* (NSW); *Community Land Development Act 1989* (NSW).

82 *Conveyancing Act 1919* (NSW) ss 198, 199.

83 Land & Property Information, *Public Registers* (2013) <www.lpi.nsw.gov.au/land_titles/public_registers > at 15 October 2013. Similar arrangements are in place in Queensland. Other states and territories provide survey plans to the public for a fee (but do not use external providers).

84 Copyright Agency Ltd did not seek payment for internal uses including copies made for registration, and these uses are zero rated under the statutory licence: Copyright Agency, *Submission 727*.

85 *Copyright Agency Ltd v New South Wales* (2007) FCR 213.

86 *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279.

87 *Copyright Agency Ltd v New South Wales (No 2)* [2013] ACopyT 2 [3].

88 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 34.

89 SIBA, *Submission 612*

submissions noted that 'similar considerations apply to the creation of other documents, such as environmental plans; design plans and as constructed plans, that are registered or deposited with governments under statutory obligations'. The surveyors also noted that the survey plans were being provided to the public for a fee, and that it is 'fair and equitable' for the creator of the content to receive a payment for this use.[90]

15.61 On the other hand, government stakeholders argued that an exception, similar to the exceptions in the United Kingdom and New Zealand, would be appropriate.[91] They considered that where statutes require copyright material to be made available to the public, these uses should not be remunerable.[92]

Uses under a statute requiring public access are fair

15.62 As noted earlier, the ALRC considers that high volume institutional uses that are all, or nearly all, fair, are best dealt with by way of a specific exception.[93]

15.63 The first fairness factor is the purpose and character of the use. Uses under statutes requiring public access are normally for the purpose of informing the public about government activities, to encourage public participation and scrutiny. These uses have high public interest value and embody 'the general interest of Australians to access, use and interact with content'.[94] They are not usually commercial. They are also transformative, in that the purpose of the use—informing the public—is not the same as the purpose of the creator. The purpose of the creator is usually to obtain a governmental action or approval, rather than to encourage public participation.

15.64 The second fairness factor is the nature of the copyright material. The material released to the public includes surveys, architects plans, environmental impact statements, letters, reports and requests. This material is nearly always factual. Disseminating factual material creates important public benefits and is more likely to be fair than using creative material.[95]

15.65 The third fairness factor is the amount and substantiality of the material used. Statutes usually require use of the entire work, which means the use is less likely to be fair, but this is not conclusive.

15.66 The fourth factor requires consideration of the effect of the use upon the potential market for, or value of, the copyright material. Copyright material used under statute usually has no real market, as it has been created for the purpose of an interaction with government, rather than for a commercial purpose.

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90 See, eg, Gray Surveyors, *Submission 31*; Ferguson Perry Surveying, *Submission 30*; Craig & Rhodes Pty Ltd, *Submission 29*.

91 NSW Government, *Submission 294*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

92 NSW Government, *Submission 294*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.

93 See Ch 5 for discussion of the four fairness factors.

94 Terms of Reference, *Copyright and the Digital Economy*.

95 See Ch 5; *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 563.

15.67 The ALRC concludes that uses under statutes requiring public access are nearly always fair, and serve important public purposes, such as allowing citizens to scrutinise and contribute to government decision making. It is therefore suitable to have an exception in the *Copyright Act*.

Recommendation 15–4 The *Copyright Act* should provide for a new exception for uses where statutes require local, state or Commonwealth governments to provide public access to copyright material.

Fairness, surveys and land title registration

15.68 Particular attention to the use of surveys for land title registration is needed, because of the long standing controversy. The comments above regarding the second, third and fourth factors are relevant to the use of surveys. However, the purpose and character of the use deserves further scrutiny. SIBA and some surveyors described the purpose of the government use of surveys as commercial:

> We do not want to stop governments using surveyors' plans, and we are not seeking payment for every use of such plans by governments, but we think it is fair that surveyors receive a royalty when the government sells the plans on a commercial basis.[96]

15.69 The Copyright Tribunal found that the provision of surveys by the LPI is 'a commercial activity', because the fees were based on direct cost recovery plus 12%.[97] Government agencies are required to recover the cost of services when it is efficient to do so (and does not conflict with government policy objectives).[98] The added 12% is intended to place the LPI in a position of competitive neutrality with private providers of surveys, as is required by the *Competition Principles Agreement* between the Australian Commonwealth, state and territory governments.[99]

15.70 The characterisation of the use of surveys as having a commercial aspect is significant, as commercial uses are less likely to be fair. This commercial aspect coexists with the non-commercial purpose of making information available to the public, and with the ultimate objective of facilitating certainty of title to land.

15.71 When considering the fairness of government use of surveys, it is relevant that the surveyor has already been remunerated by the client for the in-house cost of each plan.[100] Further remuneration by way of royalties is unpredictable. The amount paid depends on the number of activities relating to a parcel of land and those adjacent to it,

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96 For example Association of Consulting Surveyors NSW Inc, *Submission 699*; KLM Spatial, *Submission 587*; O'Reilly Nunn Favier Surveyors, *Submission 468*. See also SIBA, *Submission 612*.

97 The margin or profit made by the State could not be accurately calculated, but it was not likely to be 12%: *Copyright Agency Ltd v New South Wales* [2013] ACopyT 1 [91]-[103].

98 Department of Finance and Administration, *Australian Government Cost Recovery Guidelines July 2005* (2005), 2;

99 *Copyright Agency Ltd v New South Wales* [2013] ACopyT 1 [101]. See also NSW Treasury, *Guidelines for Pricing of User Charges* <www.treasury.nsw.gov.au> at 14 October 2013.

100 *Copyright Agency Ltd v New South Wales* [2013] ACopyT 1 [53].

and is unrelated to the skill and expertise of the surveyor, or the quality of the survey. Demand is largely driven by the condition of the property market.[101] Royalties are not an incentive for the creation of surveys.

15.72 The ALRC acknowledges the submission of Copyright Agency on behalf of its member surveyors, that 'the objectives of the copyright system are reward for the benefits to the community from creative work, and an environment that encourages creative endeavour'.[102] The ALRC view of the objectives of the copyright system is encapsulated by the Inquiry's framing principles, discussed in Chapter 2. While creators should be acknowledged and respected (Principle 1), and incentives for the creation of works should be maintained (Principle 2), rewards should not necessarily flow when those rewards do not maintain incentives for the creation of works.

15.73 The Copyright Tribunal has noted that the payment of royalties for uses associated with land title registration will not result in benefits to surveyors.

> [Copyright Agency] submitted that the State fully recovered its costs ... On the other hand, the State submitted, on the basis of economic evidence, that any remuneration provided to the surveyors for the copyright would be competed away between them. In principle, the Tribunal accepts both of these submissions although neither throws much light on the appropriate remuneration to be set. The submissions do underscore, however, the futility of this litigation. Whatever the Tribunal awards will have little impact on the parties. Economically, it will result in an improvement in the position of the consumers of the services of surveyors … at the expense of the consumers of registered survey plans …
>
> The Australian Taxation Office will also incidentally benefit through the additional income tax payable by surveyors, as will [Copyright Agency] on the commission it charges for the collection of the remuneration. So viewed, this litigation appears to offer little benefit to those whose interests are said to be at stake.[103]

15.74 Having weighed the matters outlined above, the ALRC considers that the copying and communicating of surveys to the public, for the purposes of the land titles registration system, is fair. This activity has a mixed commercial and public interest nature. It disseminates factual material. There is no real market for the surveys—there is an artificial market created by the statute that requires the LPI to provide access to the surveys, but a surveyor could not resell a survey created for a particular client. The LPI use does not affect the potential market for, or value of, the copyright material. These uses should, therefore, be made in reliance on an exception for uses where statutes require public access. Surveyors would continue to own copyright in their surveys, and could continue to assert their exclusive rights to control uses other than those required by statute.

Material that is commercially available

15.75 The recommendation that the *Copyright Act* should contain an exception for uses where a statute requires public access is based, in part, on the evidence that most

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101 Ibid [55].
102 Copyright Agency, *Submission 727*.
103 *Copyright Agency Ltd v New South Wales* [2013] ACopyT 1 [62]-[63].

of the copyright material used under statute is not commercially available and has no real market. Stakeholders to this Inquiry have proposed that an exception for uses required by statute should not be available where the material is commercially available.[104] The ALRC considers that such a limitation should not be contained in the *Copyright Act*, but may be appropriately included in a statute requiring a government to provide public access.

15.76 In the UK, material that is open to public inspection pursuant to a statutory requirement may be copied for the purpose of facilitating inspection of the material.[105] There is a draft amendment being circulated at the time of writing that would both extend this exception to making material available online, but limit the exception to material that is not commercially available.[106] In New Zealand, an exception for material open to public inspection pursuant to a statutory requirement does not include any limitation regarding commercial availability.

15.77 It may sometimes be appropriate to make commercially available material open to public inspection, with appropriate safeguards. In the US, photocopies of patent applications, including copyrighted work, are made available to the public for a fee, and this is considered fair use. However, the US Patent Office has chosen not to make this material available online because of fears of further exploitation.[107] CSIRO advises that the European Patents Office makes material available for viewing only.[108] IP Australia has proposed that the proper functioning of patent laws requires the release of non-patent literature (extracts, and sometimes the whole, of journal articles, books and other copyright material) to the public.[109]

15.78 On the other hand, some public registers function well without the need to include commercially available material. It might not be necessary, for example, to release commercially available material under an FOI law. The Office of the Australian Information Commissioner (OAIC) raised concerns that some publication of material under the FOI Act could have an undesirable impact on the copyright owner's revenue or market. The OAIC indicated that it is considering whether to make a determination that information should not be published under the Information Publication Scheme 'in circumstances where publication on a website would be unreasonable, such as if the document is an artistic work or publication would clearly impact on the copyright owner's revenue or market'.[110]

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104 ALPSP, *Submission 562*; International Association of Scientific Technical and Medical Publishers, *Submission 560*.

105 *Copyright, Designs and Patents Act 1988* (UK) s 47.

106 Intellectual Property Office, *Public Administration* <www.ipo.gov.uk > at 14 October 2013. The Copyright Review Committee (Ireland) has recommended a similar exception: Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013) 70.

107 Bernard J Knight Jr, *Memorandum: USPTO Position on Fair Use of Copies of NPL Made in Patent Examination* (2012).

108 CSIRO, *Submission 774*.

109 IP Australia, *Submission 681*.

110 Office of the Australian Information Commissioner, *Submission 145*.

15.79 The ALRC considers that this question is best dealt with by Parliament when it legislates to require governments to provide public access to material. Parliament may consider that it is in the public interest to place commercially available material on public registers for some purposes, such as patent law, but not others, such as FOI law. Different restrictions on copying, communication and use may be necessary. This should be dealt with on a case by case basis in the statute creating the obligation to release the material.

Correspondence and other material sent to government

15.80 Correspondence and other material sent to governments may be scanned into an electronic file for efficient storage and to provide access to government officers at distant locations. While authors of letters retain copyright, both governments and the relevant collecting society agreed that government use of correspondence should not require remuneration.[111]

15.81 The *Copyright, Designs and Patents Act 1988* (UK) includes an exception for use of material sent to government 'with the licence of the copyright owner ... for the purpose for which the work was communicated ... or any related purpose which could reasonably have been anticipated by the copyright owner'.[112] There is an equivalent provision in s 62 of the *Copyright Act 1994* (NZ). This approach recognises that when citizens send material to governments, permission can be implied for use of the material as necessary to fulfil the objective for which the material was sent. The Australian *Copyright Act* should contain a similar provision.

15.82 The UK and NZ exceptions allow the Crown to copy the work and issue copies of the work to the public, as long as the work has not been previously published.[113] This is intended to avoid damaging the market for published work that is sent to government. However, in the digital age, copying of material sent to government is essential for internal purposes such as scanning and emailing. The Australian exception should allow previously published material to be copied for internal purposes, but should not allow it to be made publicly available.

Recommendation 15–5 The *Copyright Act* should provide for a new exception for use of correspondence and other material sent to government. This exception should not extend to uses that make previously published material publicly available.

111 Copyright Agency, *Submission 727*; CAARA, *Submission 662*; Victorian Government, *Submission 282*; State Records South Australia, *Submission 255*; Queensland Department of Natural Resources and Mines, *Submission 233*; Tasmanian Government, *Submission 196*

112 *Copyright, Designs and Patents Act 1988* (UK) s 48.

113 Ibid s 48(2), (3); *Copyright Act 1994* (NZ) s 62(2), (3).

Local government

15.83 Local government is not covered by the statutory licence in pt VII div 2 of the *Copyright Act*. Councils may use copyright material under direct licence, and may also be able to rely on implied licenses,[114] and on other exceptions in the *Copyright Act*. Some councils hold voluntary licences from collecting societies for music.[115]

15.84 As noted earlier, copyright concerns have inhibited local councils from making material available as required by FOI laws and planning and environmental laws. The Information and Privacy Commission NSW has advised councils not to publish any copyright material on websites without the consent of owners and to provide 'view only' access to plans in development applications.[116] Some councils do make information available, taking a risk management approach. Others do not allow copying, even when it is clearly in the public interest (such as to allow inspection of development applications other than on council premises) .[117] A voluntary licence for copying works is available to local councils, but only about 15 of more than 500 councils have taken up this option.[118] The voluntary licence does not allow material to be placed online.

15.85 The ALRC asked if the statutory licence should be extended to local government.[119] Representatives of rights holders were divided, with some considering such a move would 'enable more comprehensive use of material by local governments on fair terms',[120] while others considered that there was no justification for such an extension.[121] SAI Global, a publisher of Australian Standards, was particularly concerned about the prospect of councils being able to communicate the whole of a work and the potential for under-reporting and infringement.[122]

15.86 The NSW Government submitted that councils need specific exceptions for certain public interest uses.[123]

15.87 In the ALRC's view, specific exceptions are necessary for local government. Councils play an important role in planning, development and environmental management. Public consultation and scrutiny of local government operations are essential, but are hindered by current copyright arrangements. The new exceptions recommended in this chapter (use for public inquiries, uses where a statute requires

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114 The High Court in *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279 said there was no implied licence from surveyors to the NSW government, but was influenced by the existence of a statutory licence. The situation may be different for local governments, which cannot use the statutory licence.

115 APRA/AMCOS, *Submission 247*; PPCA, *Submission 240*.

116 Information and Privacy Commission NSW, *Submission 209*.

117 T Proust, *Submission 264*; K Bowrey, *Submission 94*.

118 Copyright Agency, *Submission 727*.

119 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012) 57.

120 Copyright Agency/Viscopy, *Submission 249*. See also SPAA, *Submission 281*; Australian Copyright Council, *Submission 219*; Screenrights, *Submission 215*; ABC, *Submission 210*.

121 APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*; PPCA, *Submission 240*.

122 SAI Global, *Submission 193*.

123 NSW Government and Art Gallery of NSW, *Submission 740*.

public access, and use of material sent to the Crown in the course of public business) are defined by the purpose of the use, and would be available to councils.

Non-government users

15.88 The statutory licence for uses 'for the services of the Commonwealth or State' covers uses made by non-government users, as long as the user is authorised in writing.[124] The exceptions recommended in this chapter should also be available to non-government users.

15.89 Outsourcing of certain government functions is commonly undertaken in pursuit of innovation and efficiency. For example, both the NSW and Queensland governments provide public access to surveys, as required by statute, via approved providers in the private sector.

15.90 It is also likely that government use of digital technologies, including the cloud, will result in use of copyright material by non-government users. The current exceptions for parliamentary libraries are only available to an authorised officer of a library,[125] while the exceptions for judicial proceedings are not so limited.[126] As already noted, the new exceptions recommended in this chapter are defined by the purpose of the use, rather than the identity of the user. A non-government actor should be able to use material under both the current and the recommended new exceptions.

15.91 Normally, such a person would be acting on the authority of the government agency. In the United Kingdom and New Zealand, the exceptions for use of material open to public inspection are limited to users who are authorised by the 'appropriate person'.[127] The ALRC does not consider such a limitation is necessary. A user who is not authorised by the government agency with the obligation to provide public access could not be said to be using material 'for the purpose of complying with a statute that requires a government agency to provide access to material'.

Government and other exceptions

15.92 The Franki Committee said that governments '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'.[128] The ALRC agrees that governments should not be required to pay for uses that are free to others. The statute should be clear that governments can rely on fair use, or if fair use is not enacted, the new fair dealing exception, and other specific exceptions in the *Copyright Act*.

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124 *Copyright Act 1968* (Cth) s 183(1).
125 Ibid ss 48A, 104A.
126 Ibid ss 43(1), 104.
127 *Copyright, Designs and Patents Act 1988* (UK) s 47; *Copyright Act 1994* (NZ) s 61.
128 Copyright Law Committee, *Report on Reprographic Reproduction* (1976), 7.10, cited in J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 7.

Fair use

15.93 It has been argued above that specific exceptions are useful in the case of high volume institutional uses that are fair or mostly fair. The exceptions recommended in this chapter are intended to facilitate open government and the functioning of the parliament, the judicial system, and the executive. However, there will be other uses that serve these same interests that are also fair. These should be considered under the fair use exception. The recommendations for specific exceptions are not intended to limit the scope of the fair use exception.[129]

15.94 One activity that is likely to fall under the fair use exception is the digitisation of government archives. The NSW Government reports that State Records NSW is considering mass digitisation of the following material:

- letters complaining about the classification of publications;
- progress reports on land improvement sent by First World War veterans in applications for continuing financial aid under the Soldier Settlement Scheme;
- testimonials;
- requests sent to the Colonial Secretary for items, such as canoes;
- requests to the Colonial Secretary for permission for convicts to marry;
- reports on schools, containing examples of students' work.[130]

15.95 To the extent that the uses listed above are not captured by the specific exceptions recommended in this chapter, these uses could be considered under the fair use exception.[131]

15.96 Dr Judith Bannister provided another example of a use associated with open government that is not covered by the recommended specific exceptions:

> In a modern democracy open access to information and government accountability does not end with the release of documents by a government agency to an individual applicant. Recent reforms to freedom of information at the Commonwealth level (and in some States) encourage proactive disclosure to the world at large on agency websites.
>
> Open government goes beyond government use and extends to re-use by the wider public. Whether it is whistleblowers releasing documents, media reporting, community groups engaged in public campaigns, or individuals engaged in online discussions, a wide range of non-government users play an important role in ensuring government accountability and these activities should also be covered by an appropriately worded exception.[132]

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129 See *The Authors Guild Inc v HathiTrust*, WL 4808939 (SDNY, 2012) 12–13 where the US District Court held that the existence of specific exceptions for libraries in s 108 of the *Copyright Act 1976* (US) did not preclude reliance on fair use in s 107.

130 NSW Government and Art Gallery of NSW, *Submission 740*.

131 See Ch 12 regarding mass digitisation.

132 J Bannister, *Submission 715*.

15.97 Such uses would not be covered by the recommended exception for uses under a statute requiring public access. These uses should be considered under the fair use exception.

15.98 If the fair dealing exception recommended in Chapter 6 is enacted, rather than fair use, then some of these government uses could not be held to be fair. The fair dealing exception does not include government use or public administration in the confined list of purposes. Therefore, if a government use is not for one of the other listed purposes (such as quotation), then it could not be held to be fair, under the fair dealing exception. This highlights the flexibility of the open-ended fair use exception over a confined fair dealing exception.

Fair dealing

15.99 If fair use is not enacted, governments should have access to fair dealing exceptions in the *Copyright Act*. The fair dealing exceptions have the purpose of encouraging socially useful activities such as research, study, criticism, review and reporting news. These activities remain socially useful when conducted by governments and should not be burdened by a requirement to pay remuneration.

15.100 There is currently disagreement and uncertainty about whether governments can rely on fair dealing exceptions. John Gilchrist has explained that two views are possible.[133] One construction of the statutory licence scheme in pt VII div 2 is that governments cannot rely upon fair dealing exceptions and must instead adhere to the requirements of the licence.[134] Governments have advised that the declared collecting societies have taken this view.[135] Gilchrist points out that the Australian Government's 2003 agreement with Copyright Agency Ltd (as it was then known) exempted material copied for judicial proceedings and giving professional advice, but expressly excluded reliance on the other exemptions, such as research or study.[136] Copyright Agency has indicated that it does not consider that the fair dealing exception would not apply to a use made for 'government purposes'.[137]

15.101 The Victorian Government said that this approach 'puts the State at a disadvantage compared to most non-government copyright users, such as corporations and individuals, who are entitled to rely on the exceptions to infringement by not remunerating copyright owners for specified copyright acts'.[138]

15.102 An alternative construction is that governments, like individuals and corporations, can rely on the fair dealing exceptions. In this case, the statutory licence is only relevant when government use goes beyond that permitted by the fair dealing

133 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1.
134 Ibid, 7–9.
135 NSW Government, *Submission 294*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*.
136 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 15.
137 Copyright Agency, *Submission 727*.
138 Victorian Government, *Submission 282*.

exceptions.[139] Gilchrist suggested that this is 'the better view' of the relationship between the fair dealing and the government statutory licensing provisions.[140] This approach has wide support.[141]

15.103 The Full Federal Court has indicated that fair dealing is to be determined by reference to the facts of each case, and that determination must take into account the effect of a statutory licence.[142] This does not exclude governments from relying on fair dealing exceptions, but the exceptions may have a narrower scope for governments than they do for private citizens and institutions that do not have the benefit of a statutory licence.[143]

15.104 To avoid any doubt, it should be made clear, either via an amendment or an explanatory note, that the fair dealing exceptions are available to governments.

Other exceptions

15.105 There is similar uncertainty as to whether governments can access existing specific exceptions in the *Copyright Act*. The South Australian Government submission identified a number of relevant exceptions.[144]

15.106 As with fair dealing exceptions, governments should be in the same position as private and institutional users regarding access to specific exceptions. To avoid any doubt, an amendment or explanatory note should clarify that the specific exceptions are available to governments.

Just terms

15.107 Two stakeholders suggested that the ALRC should consider whether the creation of new exceptions would require 'just terms' under s 51(xxxi) of the *Constitution*.[145] This section considers whether the recommended new exceptions for government use would be affected by the just terms guarantee.

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139 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 7. See also E Campbell and A Monotti, 'Immunities of Agents of Government from Liability for Infringement of Copyright' (2002) 30 *Federal Law Review* 459, 464.

140 *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279, [11] cited in J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 8.

141 E Campbell and A Monotti, 'Immunities of Agents of Government from Liability for Infringement of Copyright' (2002) 30 *Federal Law Review* 459, 464; Victorian Government, *Submission 282*; DSITIA (Qld), *Submission 277*; State Records South Australia, *Submission 255*; Tasmanian Government, *Submission 196*; SAI Global, *Submission 193*.

142 *Haines v Copyright Agency Ltd* (1982) 64 FLR 185, 191.

143 J Gilchrist, 'Crown Use of Copyright Material' (2010) *Canberra Law Review* 1, 18.

144 State Records South Australia, *Submission 255*: *Copyright Act 1968* (Cth) ss 14 (insubstantial parts), 43 (judicial proceedings or professional advice), 44 (inclusion of works in collections for use by places of education), 44B (labels for containers of chemical products), 47C (back up copy of computer programs), 47D (reproducing computer programs to make interoperable products), 49 (libraries and archives). See also DSITIA (Qld), *Submission 277* which contains a more extensive list.

145 Arts Law Centre of Australia, *Submission 706*; Australian Copyright Council, *Submission 219*.

15.108 The Commonwealth Parliament has the power to make laws with respect to 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'.[146] It can also make laws for the acquisition of property under heads of power other than s 51(xxxi), and these laws are not necessarily subject to the guarantee of 'just terms'.[147] It is not clear whether a law creating an exception to copyright would be subject to that guarantee. The High Court has indicated that rights under copyright law, because of their susceptibility to modification, are not necessarily protected by s 51(xxxi).[148] The High Court has also held that intellectual property laws inevitably

> impact upon existing proprietary rights. To the extent that such laws involve an acquisition of property from those adversely affected by the intellectual property rights which they create and confer, the grant of legislative power contained in s 51(xviii) manifests a contrary intention which precludes the operation of s 51(xxxi).[149]

15.109 On the other hand, the High Court has held that there is no 'absolute proposition' that changes to rights within copyright do not attract the guarantee,[150] and has confirmed that 'copyright constitutes property to which s 51(xxxi) can apply'.[151]

15.110 Even if the guarantee applies, the creation of a new exception may not amount to an acquisition of property. The High Court has held that creating an exception for private copying reduced the exclusive rights of copyright owners, but did not amount to an acquisition of property, and therefore did not attract the just terms guarantee.[152] In another context, it was held that the use of a person's property by the Commonwealth did not amount to an acquisition.[153] The recommended exceptions for government use do not result in a transfer of ownership of copyright, and the copyright owner's rights remain otherwise unaffected.

15.111 Finally, the new exceptions recommended in this chapter are largely for uses of material with no real market value. If remuneration is currently being received, this is because of the operation of the statutory licence, which can be construed as requiring remuneration even where the material has no real market. Where an exception allows use of copyright material with no market value, it would be difficult to argue that s 51(xxxi) requires payment to the owner.

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146 *Constitution* s 51(xxxiii).

147 *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133, [153]–[154].

148 *Wurridjal v Commonwealth* (2009) 237 CLR 3009, [363]–[364].

149 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, [38].

150 *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* (2012) 286 ALR 61, [96].

151 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1933) 176 CLR 480, 527; *JT International SA v Commonwealth* [2012] HCA 43, [35], [105]. For a detailed discussion of these authorities, see J Clarke, 'Can Droit de Suite be Characterised as a Right Pertaining to Copyright? Discussion of the Necessity of s 11 of the *Resale Royalty Right for Visual Artists Act 2009* (Cth)' (2012) 17 *Media and Arts Law Review* 23, 36–40.

152 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1933) 176 CLR 480.

153 *Australasian United Steam Navigation Co Ltd v Shipping Control Board* (1945) 71 CLR 508, 525–526.

15.112 Should the Government wish to avoid any risk that the exceptions are invalid because of s 51(xxxi), it would be possible to insert a section analogous to s 116AAA, providing that if the exceptions for government use result in the acquisition of property other than on just terms, compensation is payable.