

# Open Access to Judgments: Creative Commons licences and the Australian Courts

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## Abstract

Internet technologies have fundamentally changed the way we obtain access to legal documents and information about the law. However, for judgments of courts and tribunals, copyright management and licensing practices have not kept pace with the digital and online technologies which are now ubiquitous in the web 2.0 era. Under the provisions of the *Copyright Act 1968* and the licensing statements on the Australian courts' websites, judgments may generally be read online, downloaded, reproduced and printed out for personal, non-commercial use or "in house" use by an organisation. However, beyond these permitted acts, the extent to which judgments can be copied and distributed in digital form online remains unclear. Open content licences (in particular, the Creative Commons (CC) licences) offer an effective mechanism for managing copyright in judgments in a manner that supports their wide public dissemination and reuse while also protecting their integrity and accuracy.

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## I. Introduction

Internet technologies and the development of digital repositories of legal materials<sup>1</sup> have fundamentally changed the way we obtain access to legal documents and information about the law. Web-accessible and freely searchable databases which aggregate legal materials, often from numerous jurisdictions, enable users to readily locate and retrieve a comprehensive range of legal documents. No longer do we need to have access to a law library or pay hefty subscription fees in order to be able to consult and read the legal documents that set out the laws governing our activities.

In the interactive, networked web 2.0 era members of the community have an expectation that they will be able to legally use and reuse documents retrieved through these free, online, publicly available legal portals in a range of ways. As well as being able to read, copy, print and download legal documents located through the websites, users of these websites expect to be permitted to further distribute a digital copy of a legal document they have retrieved through an online repository. This electronic dissemination may be done by attaching a digital file to an email message sent to an individual or members of an email mailing list or it may involve posting a copy of a downloaded judgment on a website (for example, a law blog which provides comments or updates on specific areas of law) where it can be accessed by the public.

This paper considers whether – and the extent to which – such expectations regarding access and reuse are being met presently with respect to judgments. Specifically, this paper is concerned with written judgments in the form in which they are originally delivered or handed down by the courts. Excluded from the scope of this discussion are the versions of judgments published in authorised series of law reports. Although the judgments contained in the authorised reports precisely replicate the original text (apart from typographical corrections), they also typically include features added to the original text, such as headnotes, key words, case citations, formatting, standardised page numbering and the typographical layout. The publisher of the authorised law reports may own copyright in these added features, quite independently of copyright in the judgment itself.

This paper examines current arrangements for access to and use of judgments. It considers the provisions of the *Copyright Act 1968* that authorise specific uses of judgments, and examines the permissions to use judgments that are granted to members of the public by the courts of the various Australian jurisdictions. In this exercise, we leave aside the question of who owns copyright in judgments, an issue which has been described as “academic”<sup>2</sup> and has been much debated elsewhere.<sup>3</sup>

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<sup>1</sup> Such as the Australasian Legal Information Law Institute web portal (AustLII), established by the Faculties of Law at the University of Technology Sydney (UTS) and the University of New South Wales (UNSW) (<http://www.austlii.edu.au>) and Jade (Judgments and Decisions Enhanced), a current awareness service run by Bar Net, a specialist communications management company (<http://jade.barnet.com.au/Jade.html>).

<sup>2</sup> United Kingdom, Lord Chancellor’s Committee on Law Reporting, ‘The Report of the Committee on Law Reporting’, 1940, para 17.

<sup>3</sup> See e.g. Copyright Law Review Committee (CLRC), *Crown Copyright*, 2005. The CLRC supported the abolition of copyright in primary legal materials, including ‘judgments, orders and awards of any court or tribunal’: at p 138, recommendation 4, para 9.38; CJ Bannon, ‘Copyright in Reasons for Judgment and Law Reporting’ (1982) 56 *ALJ* 326; ‘The Crown and copyright in publicly delivered judgments’ (1982) 56 *Australian Law Journal* 326; Michael Taggart, ‘Copyright in Written Reasons for Judgment’ (1984) 10(2) *Sydney Law Review* 319; Mark Perry, ‘Judges’ reasons for judgments: to whom do they belong?’ (1998) 18(2) *New Zealand Universities Law Review* 257; Catherine Crawford, ‘Caselaw and Legislation Databases and Copyright Issues in Australia’ [2000] *AULawLib* 7; (2000) 8(1) *Australian Law Librarian* 53. The nature of the Crown prerogative in relation to legislation and judgments has also been debated: see CJ Bannon, ‘Copyright in Reasons for Judgment and Law Reporting’ (1982) 56 *ALJ* 326; ‘The Crown and copyright in publicly delivered

Rather, the focus is on the management of copyright in judgments by the relevant agencies or entities that are authorised or required to publish them (referred to in this paper as “custodians” of judgments), with the objective of ensuring widespread, public accessibility to, and the right to use, this important source of law.

Under current arrangements, public online access to judgments is provided through the various Courts’ websites and AustLII, with users permitted to download, copy and print them for personal, non-commercial or in-house use within an organisation. However, further distribution of judgments online is either not permitted, or is, at best, uncertain. The adoption of improved copyright licensing policies and practices which make it clear that further electronic distribution is permitted would enable now ubiquitous web technologies to be more effectively harnessed so that judgments can be more readily accessed, distributed and read by members of the general public. By applying open content licences (in particular, the Creative Commons (CC) licences), which expressly permit digital online distribution, copyright in judgments can be managed in a manner that enables their wide public dissemination while also protecting their integrity and accuracy.

## II. Access to and promulgation of laws

It has long been recognised that every citizen should be able to know the laws by which our lives and society are governed. In the late 18<sup>th</sup> century, jurist and philosopher Jeremy Bentham contended that it was not sufficient for laws to be merely declared or distributed to the public. Rather, laws should be available so that individuals can continue to consult them, in order that they may familiarise themselves with, and comprehend, them.<sup>4</sup>

That a law may be obeyed, it is necessary that it should be known: *that it may be known, it is necessary that it be promulgated*. But to promulgate a law, it is not only necessary that it should be published with the sound of trumpet in the streets; not only that it should be read to the people; not only even that it should be printed: all these means may be good, but they may be all employed without accomplishing the essential object. *They may possess more of the appearance than the reality of promulgation*. To promulgate a law, is to present it to the minds of those who are to be governed by it in such manner as that they may have it habitually in their memories, and *may possess every facility for consulting it*, if they have any doubts respecting what it prescribes.

There are many methods of attaining this end: none of them ought to be neglected; but it has been too common to neglect them all.<sup>5</sup> [emphasis added]

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judgments’ (1982) 56 *Australian Law Journal* 326; Catherine Bond, ‘Reconciling Crown Copyright and Reuse of Government Information: An Analysis of the CLRC Crown Copyright Review’ [2007] *UNSWLRS* 32; *Attorney General of New South Wales v Butterworth & Co (Australia) Ltd* (1938) 38 NSWSC 195. On the nature of Crown copyright, see Anne Fitzgerald, ‘Crown Copyright’ in Brian Fitzgerald and Benedict Atkinson (eds), *Copyright Future: Copyright Freedom* (Sydney University Press, 2011), 162; John Gilchrist, *Crown Copyright: An analysis of rights vesting in the Crown under statute and common law and their interrelationship*, Monash University LLM Thesis, 1983.

<sup>4</sup> Jeremy Bentham, ‘Of Promulgation of the Laws and Promulgation of the Reasons Thereof’, in *The Works of Jeremy Bentham*, John Bowring (ed), vol. I (Edinburgh, Tait; London, Simpkin, Marshall; 1843) (first published in *Traité de législation civile et pénale*. Ed. Etienne Dumont. 3 vols. Paris: Bossange, Mason, and Besson, 1802), available at <http://www.laits.utexas.edu/poltheory/bentham/promul/index.html>.

<sup>5</sup> *Ibid.* See also Jeremy Bentham, ‘Truth versus Ashhurst; or, law as it is, contrasted with what it is said to be’ (1792) in *The Works of Jeremy Bentham*, John Bowring (ed), vol. 5 (Edinburgh, Tait; London, Simpkin, Marshall; 1843), 235-37 (responding to Mr Justice Ashhurst’s statement that “Happily for us, we are not bound by any laws but such as every man has the means of knowing”).

By the beginning of the 19<sup>th</sup> century the importance of ensuring wide dissemination of information about court proceedings as integral to the administration of justice was increasingly supported, as evidenced by the submissions of counsel in *Gurney v Longman*<sup>6</sup> in 1807:

The first principle of the administration of justice is free access to every Court; of which the liberty of communicating to the public what passes is a consequence. The public nature of the transactions in Courts of Justice would be of little value, if the means were not afforded of letting all the world know the fairness of their proceedings. The same principle, that requires a Court to be open, authorises the widest dissemination of what passes...<sup>7</sup>

More recently, at the dawn of the digital era, the need to ensure that legal documents are available for study and use as of right by members of the public was emphasised by the (then) Chief Justice of the Supreme Court of New South Wales, Sir Laurence Street in *R v Greciun-King* (1 October, 1981; unreported):

In a free and democratic society, the law and all its documentation, both statutory and interpretive, that is to say both in Acts of Parliament and in judgments, must be *publici juris* – available to all to be studied, to be used and to be quoted as a matter of public entitlement.<sup>8</sup>

According to Chief Justice Street, “the great principle of administration of justice ... *of necessity* includes free access to the basic material for public discussion and evaluation of our legal system.” [emphasis added]<sup>9</sup>

Over the years, Australian governments have acknowledged the importance of knowledge of the law for the functioning of the justice system. The relationship between knowledge of the law and access to justice was emphasised in the Australian Government’s Justice Statement<sup>10</sup> published in May 1995 in response to a review by the Access to Justice Advisory Committee.<sup>11</sup> The Justice Statement declares that ‘[a]ccess to justice starts with knowledge of the law’.<sup>12</sup> The ready availability of legal materials was seen as essential to improving access to justice because it would contribute to greater community awareness and understanding of the law. Further, the price charged for legal materials should not present a barrier to public access and dissemination.<sup>13</sup> In the *Crown Copyright* report, the CLRC stated that ‘in view of the public interest in promoting the widest possible public access to laws

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<sup>6</sup> (1807) 13 Ves. Jun. 493; 33 E.R. 379.

<sup>7</sup> *Gurney v Longman* (1807) 13 Ves. Jun. 493 at 495-6; 33 E.R. 379, 380.

<sup>8</sup> *R v Greciun-King* (1 October, 1981; unreported), quoted in ‘The Crown and copyright in publicly delivered judgments’ (1982) 56 *ALJ* 326, 327.

<sup>9</sup> Street CJ’s speech at the Opening of the Law Term Dinner in Sydney on 2 February 1982, quoted in ‘The Crown and copyright in publicly delivered judgments’ (1982) 56 *ALJ* 326, 327-28.

<sup>10</sup> Attorney General’s Department, ‘The Justice Statement’ May 1995, available at <http://www.austlii.edu.au/austlii/articles/scm/jcontents.html> (accessed on 1 June 2012).

<sup>11</sup> Access to Justice Advisory Committee (Chair: Ronald Sackville), *Access to Justice: An Action Plan* (AGPS, Canberra, 1994). The review of Australia’s justice system was commissioned in October 1993 by then Attorney-General, Michael Lavarch MP and the Minister for Justice, Duncan Kerr MP.

<sup>12</sup> Justice Statement, 1995, Chapter 7 – Accessing Laws, available at <http://www.austlii.edu.au/austlii/articles/scm/jchap7.html> (accessed on 1 June 2012).

<sup>13</sup> On this point, see for example, the Australian Prices Surveillance Authority, *Inquiry into the publications pricing policy of the Australian Government Publishing Service (AGPS)*, December 1992, 92: “The Authority is committed to unhindered public access to any legislation passed by Parliament. Legislation establishes rights and obligations of citizens.... There should be no restriction on the dissemination of such information.”

applying in Australia', the government arguably has a common law duty, and should be under a statutory duty, to disseminate legislation and judgments.<sup>14</sup>

The laws in force in any Australian jurisdiction are embodied in an almost bewildering array of documents published by legislatures, executive governments, courts, tribunals and administrative bodies. As well as primary legal materials such as judgments, Acts and legislative instruments, much authoritative commentary is contained in secondary materials such as Explanatory Memoranda, Hansard, reports of law review and reform committees, books and academic and professional journals. Given the very broad scope of materials through which the law is *promulgated*, in this paper the term "legal documents" is used to refer to those primary materials in which the law is expressed (or stated), to distinguish them from the broad category of secondary materials which provide an exposition of laws and their operation.

To date, much of the discussion about access to legal documents has been centred on legislation. For example, the Justice Statement addressed only measures relating to access to legislation (the 'central and critical part of the system of rules that governs our society')<sup>15</sup> and made no mention of judgments. In February 1996, in the course of the Simplification of the Copyright Act 1968 review, the Copyright Law Review Committee (CLRC) sought public comment on whether the public should 'have free access to and use of all material necessary for a proper understanding of legal rights and duties (such as Acts, Statutory Rules, Bills, Explanatory Memoranda, and Second Reading Speeches)'. Although the CLRC included secondary materials such as Explanatory Memoranda in the category of "all material necessary" for a proper understanding of the law, the question did not specifically refer to judgments.<sup>16</sup> Given the role of court judgments in our common law legal system, to consider only legislation is to provide an incomplete picture of the law in Australia. Indeed, many cases heard by the courts are so keenly followed that some courts (including the High Court) have adopted the practice of issuing summaries of their (often lengthy and legally complex) judgments so they can be better understood by the general public.<sup>17</sup> In enabling access to justice, it is essential that citizens should have access to the full range of legal documents that constitute authoritative sources of law, including judgments.<sup>18</sup>

### III. Copyright and judgments

The *Copyright Act 1968* (Cth) ("Copyright Act") states in section 32 that copyright subsists in original literary works. A "literary work" is not exhaustively defined in the Act, but includes 'a table, or compilation, expressed in words, figures or symbols ... and a computer program or compilation of

<sup>14</sup> CLRC, *Crown Copyright*, 2005, Recommendation 5, para 9.39.

<sup>15</sup> Access to Justice Advisory Committee (Chair: Ronald Sackville), *Access to Justice: An Action Plan* (AGPS, Canberra, 1994), Chapter 7 – Accessing Laws, available at <http://www.austlii.edu.au/austlii/articles/scm/jchap7.html> (accessed on 1 June 2012).

<sup>16</sup> CLRC, *Copyright Reform: A Consideration of Rationales, Interests and Objectives*, February 1996, 22, para 4.6.

<sup>17</sup> See the High Court's Judgment Summaries for 2012 at <http://www.hcourt.gov.au/publications/judgment-summaries/2012-judgment-summaries>. An example is the summary of *Roadshow Films Pty Ltd & Ors v iiNet Limited* [2012] HCA 16, 20 April 2012, available at [http://www.hcourt.gov.au/assets/publications/judgment-summaries/2012/hcasum16\\_2012\\_04\\_20\\_iiNet.pdf](http://www.hcourt.gov.au/assets/publications/judgment-summaries/2012/hcasum16_2012_04_20_iiNet.pdf) (accessed on 28 June 2012).

<sup>18</sup> Note that Copyright Law Review Committee (CLRC) in its final report, *Crown Copyright* (2005) recognised that the Crown may be under a common law duty to meet public demand and disseminate government information, in order to promote the public interests (paras 6.08 & 9.39). The CLRC recommended that such an obligation should be included in statutory form (Recommendation 5).

computer programs.’<sup>19</sup> In *Hollinrake v Truswell*,<sup>20</sup> Davey LJ considered a literary work to be one which ‘intended to afford either information and instruction, or pleasure, in the form of literary enjoyment’.<sup>21</sup>

A judgment, as defined in a technical legal sense, refers to a ‘court’s order or finding in determination of any legal proceeding. A judgment includes an order, and vice versa [...] and any order for the payment of money, including any order for the payment of costs...’<sup>22</sup> This definition is arguably limited to the order of the court or specific outcome of the case.<sup>23</sup> However, for the purposes of this paper, we are not interested in dissecting a judgment using distinctions on matters such as law and fact, or *obiter dicta* and *ratio decidendi*. The High Court refers to judgments as the ‘written reasons for their decisions which are handed down by the Court at a later sitting’,<sup>24</sup> and we shall adopt this broader definition. Therefore, here we are referring to the written judgments released or pronounced by judges which encompass facts, opinions, reasons and decisions, whether directly about the immediate case before them or observations on the law more generally.

A clear distinction exists and needs to be maintained between judgments used in this sense and as applied to the authorised series of law reports. The published editions of the judgments in the authorised law reports have undergone an editing and checking process conducted by or on behalf of the custodian, an authorised office holder such as a Court Registrar or an authorised agency such as one of the Councils of Law Reporting. The editing process typically includes the application of approved fonts, margins and other standardised formatting features, together with entirely new features such as headnotes, summaries of the submissions made on behalf of the parties, catchwords and legal phrases. Whilst publishers or the relevant Councils of Law Reporting may hold copyright in the published editions of judgments as they appear in the official law report series, they do not hold copyright in the written judgments as originally handed down by the courts. This paper is calling for open access to the decisions of the courts in the form handed down by the courts, not the published editions of judgments, or value-added information such as headnotes and case summaries.<sup>25</sup>

<sup>19</sup> *Copyright Act 1968* (Cth), s 10(1).

<sup>20</sup> [1894] 3 Ch 420, 428 per Davey LJ.

<sup>21</sup> This formulation was accepted in *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 5 IPR 213, 232 per Thomas J and *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984, [30] per Bennett J.

<sup>22</sup> Trischa Mann (ed), *Oxford Australian Law Dictionary* (Oxford University Press Australia & New Zealand: 2010), 326. See also Peter Butt & David Hamer (eds), *Lexis Nexis Concise Australian Legal Dictionary* (4<sup>th</sup> ed, 2011), 327: “1. The determination of a court in legal proceedings. 2. Any order of the court for payment of an amount of money or costs or otherwise...”; Bryan A. Garner (ed), *Black’s Law Dictionary* (8<sup>th</sup> ed, 2004), 858: “1. A court’s final determination of the rights and obligations of the parties in a case. The term judgment includes any equitable decree or any order from which an appeal lies. 2. *English Law*. An opinion delivered by a member of the appellate committee of the House of Lords; a Law Lords judicial opinion. – Also termed (in sense 2) *speech*. ...”

<sup>23</sup> See also, *Judiciary Act 1903* (Cth), s 2: “‘Judgment’ includes any judgment decree order or sentence.”

<sup>24</sup> See the High Courts’s description of judgments at <http://www.hcourt.gov.au/about/operation>. See also *High Court Rules 2004*, reg 6.03, which refers to the publications of “written reasons” or “written opinion” of judges.

<sup>25</sup> Note that other authors have used terms such as “unreported judgments” or “raw judgments” to refer to decisions as handed down by the courts: see Catherine Crawford, ‘Caselaw and Legislation Databases and Copyright Issues in Australia’ [2000] *AULawLib* 7; (2000) 8(1) *Australian Law Librarian* 53 (referring to “caselaw”, “unreported judgments” or “reasons for decision” as opposed to “law reports”); Street CJ’s speech at the Opening of the Law Term Dinner in Sydney on 2 February 1982, quoted in ‘The Crown and copyright in publicly delivered judgments’ (1982) 56 *ALJ* 326, 327 (stating “I am not talking about quoting from the law reports—that is a different matter. What I am talking about is quoting from, reporting and copying the raw judgment as delivered in court”).

It is clear that whichever of these two definitions or meanings is used, judgments - which express the reasons of courts and tribunals in written form - fall within the category of literary works under the *Copyright Act*. The owner of copyright in a literary work has the exclusive right to reproduce, adapt, publish and communicate the work to the public in electronic form.<sup>26</sup> The right to communicate to the public, introduced in 2000,<sup>27</sup> is an important right in the online environment. "Communicate" is defined to mean 'make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter, including a performance or live performance within the meaning of this Act.'<sup>28</sup> Making a copyright work available online would be an exercise of the copyright owner's exclusive right to communicate the work to the public.<sup>29</sup> These rights last for 70 years after the death of the author,<sup>30</sup> and unless an exception exists under the *Copyright Act*, permission is needed before the exclusive rights of the copyright owner (including the right to make the work available online) may be exercised.<sup>31</sup>

Therefore, judgments can only be lawfully reproduced or made available online where permission has been granted by the copyright owner(s) to the custodian to do so, or where an exception applies under the *Copyright Act*. Such exceptions include the fair dealing provisions of the *Copyright Act*, which apply to all categories of works and subject matter and to each of the exclusive rights. However, the exceptions are confined to acts done for certain purposes: research or study, criticism or review, parody or satire, reporting of news, judicial proceedings or the reporting of judicial proceedings, or the giving of professional legal and intellectual property advice.<sup>32</sup>

A specific exception applying to legal documents is found in section 182A which provides that it is not an infringement of copyright<sup>33</sup> to make a single copy,<sup>34</sup> by "reprographic reproduction", of legislation, subordinate legislation, a judgment or reasons for a decision of a court.<sup>35</sup> Although section 182A is not limited to copying for a particular purpose, it cannot be relied upon 'where a charge is made for making and supplying' the copy if the amount charged exceeds the marginal cost of making and supplying the copy.<sup>36</sup> The copying permitted under section 182A may be made from a published

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<sup>26</sup> *Copyright Act 1968* (Cth), s 31.

<sup>27</sup> *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

<sup>28</sup> *Copyright Act 1968* (Cth), s 10(1).

<sup>29</sup> Anne Fitzgerald et al, *Building the Infrastructure for Data Access and Reuse in Collaborative Research: An Analysis of the Legal Context*, (The OAK Law Project, Canberra, Australia, 2007), 141.

<sup>30</sup> *Copyright Act 1968* (Cth), s 33. Note that Crown Copyright generally lasts for 50 years from the date the work is published: *Copyright Act 1968* (Cth), s 180.

<sup>31</sup> *Copyright Act 1968* (Cth), s 36.

<sup>32</sup> *Copyright Act 1968* (Cth), ss 40-43 and ss 103C-104.

<sup>33</sup> For the purposes of s 182A, "copyright" includes "any prerogative right or privilege of the Crown in the nature of copyright": s 182A(1).

<sup>34</sup> In *Baillieu and Poggioli of and On Behalf of the Liberal Party of Australia (Victorian Division) v Australian Electoral Commission and Commonwealth of Australia* [1996] FCA 1202, Sundberg J held that s 182A would not permit the making of multiple copies of documents, on behalf of persons the identity of whom is not known to the copier at the time of copying (at [38]).

<sup>35</sup> The prescribed works to which s 182A applies are listed in s 182A(3). Ricketson and Creswell comment that it is not clear what works are within the scope of the prescribed works listed in s 182A(3). It is unclear whether the terms "judgment" or "reasons for decision" should be narrowly interpreted, encompassing only the specific reasons for the decision, or whether the terms are broad enough to include the statement of facts, the relevant law and submissions by counsel or the parties: S Ricketson and C Creswell, *The Law of Intellectual Property: Copyright, Design and Confidential Information*, '[11.356] Analysis of s 182A'.

<sup>36</sup> *Copyright Act 1968* (Cth), s 182A(2). See Enid Campbell and Ann Monotti, 'Immunities of Agents of Government From Liability for Infringement of Copyright' [2002] *FedLawRw* 16; (2002) 30(3) *Federal Law Review* 459.

edition of the legal document.<sup>37</sup> The effect of sections 182A and 112 is that a copy may be made of a judgment by means of reprographic reproduction (including copying from the published edition of the judgment), provided that any charge does not exceed the marginal cost of copying and supplying the copy. However, section 182A would not support the commercial reproduction and distribution of judgments.

A “reprographic reproduction” is defined as ‘the making of a facsimile copy of the document or the whole or that part of the work, being a facsimile copy of any size or form.’<sup>38</sup> This definition has not been amended since section 182A was inserted into the *Copyright Act* in 1980.<sup>39</sup> The meaning of “reprographic reproduction” was raised in the Copyright Law Review Committee’s (CLRC) *Crown Copyright* review in 2005 and a number of submissions proposed that section 182A should be amended to make it clear that the term is to be interpreted in accordance with principles of technology neutrality.<sup>40</sup> Although observing that the means by which materials can be reproduced have greatly expanded as a result of technological developments since section 182A was introduced, the CLRC did not propose that the definition be clarified as, for other reasons, it recommended that the provision be repealed.<sup>41</sup> Adopting a technology neutral approach towards the interpretation of the phrases “reprographic reproduction” and “facsimile copy”, in the current context section 182A may be read as permitting the making of both physical (hard copy) and digital (soft copy) reproductions of legal documents, using mechanical,<sup>42</sup> photographic<sup>43</sup> or electronic<sup>44</sup> means. Whereas at the time section 182A was introduced into the *Copyright Act* the principal means of making facsimile copies of judgments using reprographic technology would have been by photocopying, advances in digital technologies mean that facsimiles are now commonly produced by the use of an image scanner, a personal computer and a digital printer. The possibility of making “facsimile reproductions of copyright works through the use of a computer” was already in contemplation and had been brought to the attention of the Copyright Law Committee on Reprographic Reproduction (the ‘Franki Committee’) in 1976.<sup>45</sup> Acceptance of a technology neutral approach towards “reprographic reproduction” and “facsimile” is implicit in the separate recommendations of a member of the CLRC on the Crown Copyright review, Mr John Gilchrist, who proposed that section 182A should be

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<sup>37</sup> *Copyright Act 1968* (Cth), s 112.

<sup>38</sup> *Copyright Act 1968* (Cth), s 10(3)(g). See also discussion on the meaning of “reprographic reproduction” in the CLRC Simplification of the Copyright 1968 Report, February 1999, available at <http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/SimplificationoftheCopyrightAct1968.aspx> (accessed on 31 May 2012); and the Copyright Law Committee on Reprographic Reproduction (“the Franki Report”), October 1976, available at <http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx> (accessed on 31 May 2012).

<sup>39</sup> *Copyright Amendment Act 1980* (Cth), No. 154 of 1980, s 23.

<sup>40</sup> CLRC, *Crown Copyright*, 2005, 109, at [7.22] and footnote 19, referring to submissions made by the Law Society of Western Australia (submission 44), FLAG (submission 46) and the AVCC (submission 49); at <http://www.ag.gov.au/Documents/CLRC%20Crown%20Copyright%20Report%20-%20Full%20Report.pdf>.

<sup>41</sup> CLRC, *Crown Copyright*, 2005, 106.

<sup>42</sup> For example, a lithograph.

<sup>43</sup> For example, a photocopy machine.

<sup>44</sup> For example, a digital image scanner.

<sup>45</sup> Attorney General’s Department, Report of the Copyright Law Committee on Reprographic Reproduction, AGPS, Canberra, October 1976, at [1.16] and [1.18]; available at <http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx>.

amended to widen its effect, “to enable all forms of reproduction and communication” of the prescribed works and published editions of them.<sup>46</sup>

In several Australian jurisdictions, authority and responsibility for publication of judgments in official or authorised law reports series resides with their Councils of Law Reporting.<sup>47</sup> The NSW Council of Law Reporting website describes its functions, including the selection of judgments for publication in the NSW Law Reports and the production of “reliable headnotes and other editorial material, such as indices and tables of cases cited in judgments”.<sup>48</sup> The legislative charters for the Victorian and Tasmanian Councils of Law Reporting also focus on the publication of judgments in the official authorised law report series of each state.<sup>49</sup> Under the relevant Western Australian legislation, it is the Attorney-General, rather than a court reporting council or a court registrar, who has responsibility for publication of judgments in authorised law report series.<sup>50</sup> The Attorney may delegate functions to a Law Reporting Advisory Board.<sup>51</sup> The focus once again is upon publication of judgments in an authorised series of law reports.<sup>52</sup> An exception to the usual situation is the High Court of Australia as, under 19 of the *High Court of Australia Act 1979* (Cth), the Registrar is responsible for ‘acting on behalf of, and assisting, the Justices in the administration of the affairs of the High Court’. The Registrar’s administrative responsibilities would include the publication of the Courts’ written reasons, in accordance with the Registry’s Service Charter which describes the ‘primary functions of the Registrar’ as including the provision of judgments.<sup>53</sup> The High Court Registry’s Service Charter acknowledges that the Registry is ‘an important source of information for the legal profession, the media and for members of the public seeking information about proceedings before the Court’.<sup>54</sup> None of the charters or statements explicitly address the question of authority to provide open access to judgments, in the form handed down or pronounced by the courts.

#### IV. Australian courts’ copyright policies and statements

Most judgments delivered by Australian courts are now published electronically, whether online on the various courts’ own websites, centrally aggregated on a portal such as AustLII<sup>55</sup> or Jade Net<sup>56</sup> or,

<sup>46</sup> CLRC, *Crown Copyright*, 2005, 190, at <http://www.ag.gov.au/Documents/CLRC%20Crown%20Copyright%20Report%20-%20Full%20Report.pdf>. Mr Gilchrist had earlier participated in the Copyright Law Committee on Reprographic Reproduction, for which he had been the Secretary.

<sup>47</sup> Councils of Law Reporting exist for Tasmania, Victoria, and New South Wales and have legislative authority to publish judicial decisions in authorised legal reports series under *Council of Law Reporting Act 1990* (Tas); *Council of Law Reporting in Victoria Act 1967* (Vic); *Council of Law Reporting Act 1969* (NSW) respectively. In Western Australia, under the *Law Reporting Act 1981* (WA), the Attorney-General is responsible for publication of judicial decisions. The Attorney-General is advised by the Law Reporting Advisory Board on law reporting. The Incorporated Council of Law Reporting for the State of Queensland and the Northern Territory Council of Law Reporting (incorporated) each have responsibility for the publication of judicial decisions in authorised legal reports series. In South Australia, the Attorney-General exercises powers in relation to the publication of judicial decisions in authorised legal reports series.

<sup>48</sup> See <http://nswlr.com.au/council-of-law-reporting-for-nsw/about-us/> (accessed on 5 July 2012).

<sup>49</sup> See *Council of Law Reporting Act 1990* (Tas) and *Council of Law Reporting in Victoria Act 1967* (Vic).

<sup>50</sup> *Law Reporting Act 1981* (WA), s 3.

<sup>51</sup> *Law Reporting Act 1981* (WA), s 5.

<sup>52</sup> *Law Reporting Act 1981* (WA), s 2 (definition of ‘law report’).

<sup>53</sup> High Court of Australia, ‘Service Charter for the Registry of the High Court of Australia’, available at [http://www.hcourt.gov.au/assets/documents/service\\_charter.pdf](http://www.hcourt.gov.au/assets/documents/service_charter.pdf) (accessed on 28 June 2012). See also *High Court Rules 2004* (Cth), Reg 6.03.

<sup>54</sup> *Ibid.*

<sup>55</sup> <http://www.austlii.edu.au/>.

<sup>56</sup> <http://jade.barnet.com.au/Jade.html>.

in some cases, both.<sup>57</sup> Each of the courts' websites displays a copyright policy or statement setting out the conditions on which materials published on the site may be accessed and used. This part examines the licensing policies and statements on the websites of courts, and their related (linked) websites, in each Australian jurisdiction.

### ***High Court of Australia***

The High Court publishes summaries of its judgments on its website.<sup>58</sup> For online access to full judgments, users who click on the "Judgments" heading are automatically re-directed to the AustLII website where the High Court's judgments 'can be viewed and downloaded, worldwide, without cost'.<sup>59</sup> The copyright policy for the High Court website states:

This work is copyright. You may download, display, print and reproduce this material in unaltered form only (retaining this notice) for your personal, non-commercial use or use within your organisation. Apart from any use as permitted under the *Copyright Act 1968*, all other rights are reserved.<sup>60</sup>

While this copyright policy applies to the High Court's website and materials published on it, it is unclear whether it is also meant to apply to the High Court judgments on AustLII. The scope of the permission to users to "display" materials on the High Court website is uncertain, although the qualification that the permitted use be for "personal, non-commercial use or use within [an] organisation" seems to indicate that the permission would not extend to electronic distribution or online publication. The High Court website's copyright policy indicates that the court "is currently exploring the adoption of an appropriate Creative Commons licence for content on this website".<sup>61</sup>

### ***Federal Court***

The Federal Court website publishes courts lists, practice directions and other general information about the court. It does not publish Federal Court judgments, but links users accessing its 'Judgments search' service directly to AustLII.<sup>62</sup> The Federal Court's website copyright policy permits both non-commercial and commercial use. For non-commercial use, it provides that users may 'download, display, print and reproduce' Federal Court judgments 'in unaltered form' for 'personal, non-commercial use or use within [their] organisation'.<sup>63</sup> For commercial use, judgments and excerpts from judgments can be 'reproduced or published in unaltered form, provided it is acknowledged that the judgment is a judgment of the Federal Court of Australia and any commentary/head notes or additional information added is clearly attributed to the publisher/organisation and not the Federal Court'. Where commercial use is made of judgments, it is a requirement that the 'source from which the judgment was copied (e.g. AustLII, etc.) should be acknowledged'. Interestingly, these statements seemingly permit broader reuse in the commercial context as reproduction and publication of excerpts

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<sup>57</sup> It is important to keep in mind that the judgments are being published in the form as handed down or pronounced by the courts and not in the transformed form in which they ultimately appear in the authorised law report series. Throughout this paper, unless the context indicates otherwise, "judgment" has this meaning. Publication in this form avoids the delay inevitably associated with rendering the judgment in the form in which it appears in the authorised law report series.

<sup>58</sup> <http://www.hcourt.gov.au/publications/judgment-summaries/2011-judgment-summaries>.

<sup>59</sup> <http://www.hcourt.gov.au/publications/judgments/judgments-and-pronouncements>.

<sup>60</sup> High Court of Australia website, 'Copyright' statement, at <http://www.hcourt.gov.au/disclaimers/copyright>.

<sup>61</sup> *Ibid* (accessed on 24 August 2012).

<sup>62</sup> <http://www.fedcourt.gov.au/searchjudgments.html>.

<sup>63</sup> <http://www.fedcourt.gov.au/aboutsite/copyright.html>.

is allowed, provided appropriate attribution is given. For personal, non-commercial use however, permission extends only to use of the judgments ‘in unaltered form’.

### ***Commonwealth “Standing Licence”***

In 1983, the Commonwealth government began issuing “standing licences” (also referred to as “blanket licences”) to enable law publishers to reproduce Commonwealth legislative materials and to enable educational institutions to make multiple copies of Commonwealth legal materials for teaching purposes free of charge.<sup>64</sup> The licences permitted educational institutions to make unlimited copies of “whole judgments” of Commonwealth courts and tribunals, for “the teaching or research purposes of the institution concerned”.<sup>65</sup> The educational licence to copy judgments specifically excluded any “privately owned copyright material associated with a judgment or embodied in other material or the copyright of a published edition of a judgment or other material in which the copyright is held other than by the Crown”.<sup>66</sup>

The extent to which these licences have been relied upon is unknown. The Issues Paper published by the CLRC at the beginning of its Crown Copyright inquiry in 2004 commented that “[a]s far as the Committee is aware these licences ... are still current.”<sup>67</sup> This understanding was shared by several universities which apparently continued to rely on the licences.<sup>68</sup> However, in the *Crown Copyright* report in 2005 the CLRC expressed the view that “[i]t is likely that these licences have been replaced by the current licensing regime administered by the [Commonwealth Copyright Administration (CCA)].”<sup>69</sup> At the present time, the question is a moot one. If the licences had not already been supplanted by the licensing arrangements put in place by the CCA or other developments,<sup>70</sup> they would now be superseded by the default open access licensing practices for federal copyright materials introduced by the whole-of-government IP Principles and the IP Management Manual.<sup>71</sup>

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<sup>64</sup> See Catherine Crawford, ‘Caselaw and Legislation Databases and Copyright Issues in Australia’ [2000] *AULawLib* 7; (2000) 8(1) *Australian Law Librarian* 53, 65–66. The licences were announced on 15 December 1982 by the then Acting Attorney General, Mr Neil Brown, QC. The CLRC *Crown Copyright* report (2005), [11.46], states that the licences were issued in 1983. The educational standing licence covered “Commonwealth Acts, Statutory Rules, Bills, Explanatory Memoranda, Ordinances and Regulations of Commonwealth Territories other than the Northern Territory, extracts from parliamentary papers and Hansard relevant to an understanding of a Commonwealth or Territory law, and judgments of courts and tribunals of the Commonwealth and its territories other than the Northern Territory”.

<sup>65</sup> *Ibid*, Crawford. The standing licence for educational institutions is reproduced in the University of Wollongong, *Campus News*, 4 February 1983, 4, available at <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1111&context=campusnews> (accessed on 1 August 2012).

<sup>66</sup> *Ibid*, Educational standing licence, clause (e).

<sup>67</sup> Copyright Law Review Committee, *Issues Paper: Crown Copyright*, February 2004, 23; available at <http://www.ag.gov.au/Documents/CLRC%20Crown%20Copyright%20-%20Issues%20Paper.pdf>.

<sup>68</sup> See e.g. University of New England (<http://www.une.edu.au/copyright/legal-material.php> – “Copying materials under Commonwealth Licence”), Southern Cross University (<http://www.scu.edu.au/copyright/index.php/25/> – “Commonwealth Government Materials”), and University of Canberra (<http://www.canberra.edu.au/copyright/guide#heading10> – “Copying Legal Material”) (accessed on 23 July 2012).

<sup>69</sup> Copyright Law Review Committee, *Crown Copyright*, April 2005, 165, [11.46].

<sup>70</sup> Copyright Agency (also known as Copyright Agency Limited, or CAL) was appointed by the Commonwealth Attorney General in 1990 to manage the PartVB educational statutory licence and by the Copyright Tribunal in 1998 to manage the s 183A government statutory licence.

<sup>71</sup> Statement of Intellectual Property Principles for Australian Government Agencies (revised 1 October 2010), available at <http://www.ag.gov.au/Copyright/Pages/StatementofIntellectualPropertyPrinciplesforAustralianGovernmentAgencies.aspx>; Australian Government, Attorney-General’s Department, *Australian Government Intellectual*

## Queensland Courts

The Queensland Courts website links users searching for Queensland Judgments to the Supreme Court of Queensland Library website.<sup>72</sup> The library website publishes Supreme, District, Planning and Environment, Mental Health and Magistrates Courts' judgments. The library website's copyright statement provides that the library 'supports and encourages the dissemination and exchange of information'.<sup>73</sup> However, copyright in the material resides with the library, and '[a]part from any fair dealings for the purposes of private study, research, criticism, or review as permitted under the *Copyright Act 1968*, no part may be reproduced or re-used for any commercial or other purpose without written permission from the Supreme Court Librarian'.<sup>74</sup> This statement is said to apply to "Supreme Court of Queensland Library materials".

Although there is no clear link from the judgments published on the library website to the Queensland Courts website, it is reasonable to draw the conclusion that the applicable copyright policy or statement should be that which is displayed on the Queensland Courts website. The Courts' website copyright policy commences by stating that '[t]he Queensland Courts and the Department of Justice and Attorney-General supports and encourages the dissemination and exchange of the information'.<sup>75</sup> It goes on to state that 'copyright protects material on this website', and although there is 'no objection to this material being reproduced [...] the right to be attributed as author of [their] original material and have [their] material remain unaltered' is asserted. This part of the copyright policy refers to "material on this website" and "our material". It is not clear whether these conditions apply to judgments, which are located on the Library website, not the Courts' website. Users would benefit from clarity as to which terms apply to judgments.

The opening statement on the Queensland Courts website copyright policy is followed by a statement that 'Copyright of Queensland Government materials resides with the State of Queensland', and that '[a]part from any fair dealings for the purposes of private study, research, criticism or review as permitted under the *Copyright Act 1968*, no part may be reproduced or re-used for any commercial or other purpose without written permission from our department'.

It is unclear whether there is a distinction between the material to which the first statement applies (i.e. information of the Courts and Department of Justice and Attorney General), and material to which the second statement applies (i.e. "Queensland Government materials"). Certain issues arise from this wording. Subject to limited exceptions under the *Copyright Act*,<sup>76</sup> it is an infringement of copyright if the exclusive rights of the copyright owner are exercised without a licence.<sup>77</sup> The

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*Property Manual* (Version 2, March 2012), available at <http://www.ag.gov.au/Intellectualproperty/Pages/IntellectualPropertyManual.aspx> (accessed on 1 August 2012).

<sup>72</sup> <http://www.sclqld.org.au/qjudgment/>. See <http://www.courts.qld.gov.au/media-and-the-public>.

<sup>73</sup> <http://www.sclqld.org.au/terms-of-use.php#copyright>.

<sup>74</sup> <http://www.sclqld.org.au/terms-of-use.php#copyright>.

<sup>75</sup> <http://www.courts.qld.gov.au/u/copyright>.

<sup>76</sup> There are general (fair dealing), specific (time- or format-shifting) and statutory licence exceptions in the *Copyright Act*. Moreover, copyright is infringed only if a substantial part of the work or other subject-matter is used: *Copyright Act 1968* (Cth), s 14. The specific provision permitting certain uses of judgments is s 182A of the *Copyright Act 1968* (Cth).

<sup>77</sup> See *Copyright Act 1968* (Cth), s 36. See also s 136, which defines "licence" to mean 'a licence granted by or on behalf of the owner or prospective owner of the copyright in a work or other subject-matter to do an act comprised in the copyright'. In the copyright context, a licence is the equivalent of consent, approval or authorisation.

statements here merely indicate that use for any “commercial or other purpose” is not permitted. Therefore, it is unclear whether reproduction and reuse for non-commercial purposes is permitted.

Another issue that arises is the meaning of the phrase “or other purpose”. “Other purpose” could conceivably extend to non-commercial uses also, as there is no indication of what “other purpose” is prohibited. It may be arguable by taking a more liberal approach and presuming that “other purpose” is qualified by “commercial”, that reproduction and reuse of “Queensland Government materials” in unaltered form and for non-commercial purposes is permitted.

In summary, the wording of the Queensland Courts website is unclear and it can be difficult to establish just what uses are permitted. Enquiries regarding reproduction of the material are to be directed to a website administration email address.<sup>78</sup>

### ***New South Wales Lawlink***

Lawlink NSW (Lawlink) is a government portal website to law and justice agencies in New South Wales, and is hosted by the Department of Attorney General and Justice. Lawlink publishes various judgments and decisions, including those from the Supreme Court, District Court, Administrative Decisions Tribunal, Industrial Relations Commission and Land and Environment Court.<sup>79</sup> Lawlink’s copyright policy for judicial decisions provides that decisions may be reproduced without infringing Crown copyright, subject to the following conditions:

1. copyright in judicial decisions continues to reside in the Crown;
2. the state reserves the right at any time to revoke, vary or withdraw the authorisation;
3. the publication of the material must not purport to be the official version;
4. the notice does not allow the reproduction of any headnote or summary, footnotes, comments, case lists, cross-references or other editorial material prepared by or for the Council of Law Reporting or other law report agency without the further authority of the Council or agency.
5. the arms of the state must not be used in connection with the publication unless authorisation is provided;
6. the publication of material is required to be accurately reproduced in proper context and to be of an appropriate standard.<sup>80</sup>

Lawlink’s copyright policy grants a broad permission to reproduce judgments, which would extend to commercial use, but is silent as to whether communication to the public is permitted. Points 5 and 4 respectively carve out of the Arms of the State and third party copyright from the scope of this permission.

### ***NSW Copyright “Waivers”***

NSW first waived copyright in legislation in 1993,<sup>81</sup> followed in 1995 by a corresponding general waiver of copyright in decisions of NSW courts and tribunals.<sup>82</sup> The waiver of copyright in judgments

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<sup>78</sup> The notice states that “Enquires regarding the reproduction of our material may be directed to [websitefeedback@courts.qld.gov.au](mailto:websitefeedback@courts.qld.gov.au).”

<sup>79</sup> [http://www.lawlink.nsw.gov.au/lawlink/caselaw/ll\\_caselaw.nsf/pages/cl\\_index](http://www.lawlink.nsw.gov.au/lawlink/caselaw/ll_caselaw.nsf/pages/cl_index).

<sup>80</sup> [http://www.lawlink.nsw.gov.au/Lawlink/Corporate/ll\\_corporate.nsf/pages/LL\\_Homepage\\_disclaimer](http://www.lawlink.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_disclaimer).

<sup>81</sup> NSW Government Gazette, 27 August 1993, No. 94 of 1993, 5115; this was replaced by another Notice in 1996: The Hon JW Shaw QC, MLC, Attorney-General, ‘Notice: Copyright in legislation and other material’

recognised that ‘it is desirable in the interests of the people of New South Wales that access to such decisions should not be impeded except in limited special circumstances’.<sup>83</sup> The notice states that while ‘copyright in judicial decisions continues to reside in the State’, ‘any publisher is by this instrument authorised to *publish and otherwise deal with* any judicial decision’, provided the publication does not indicate directly or indirectly that it is an official version of the material, does not include any headnotes, comments and case lists etc (i.e. value-added material) prepared by or for the NSW Council of Law Reporting, and is published accurately in the proper context. For this purpose, the NSW Government recognises that ‘the authorisation has effect as a licence binding on the State’.

Although Lawlink’s copyright policy for judicial decisions does not refer to the waiver, the permissions granted seem to generally align with the official notice, with one exception. Whereas the Lawlink copyright policy specifically permits “reproduction” and “publication” (provided the later does not purport to be the official version), the waiver permits anyone to “publish and otherwise deal with” any judicial decision. It appears that the uses permitted by the Lawlink copyright policy for judgments may be less extensive than those allowed under the NSW Government’s 1995 waiver.

### ***South Australia Courts***

The South Australian Courts website<sup>84</sup> publishes recent cases from the Supreme and District Courts but for comprehensive collections of Supreme Court and District Court judgments, users of the site are directed by means of hyperlinks to AustLII.<sup>85</sup> The South Australian Courts website also publishes the Environment Resources and Development Court (ERDC) judgments and sentencing remarks, and the findings of coronial inquests.

South Australia’s copyright statement for judgments is the most restrictive of all the Australian jurisdictions. Copyright in judgments is acknowledged to be owned by the Crown in right of the State of South Australia. Those seeking permission for reproduction or publication beyond that permitted by the *Copyright Act* are directed to contact the FOI Officer.<sup>86</sup> It does not positively grant any permission to use the material on the website, nor refer specifically to any exceptions in the *Copyright Act*. As is the case with the statement on the Queensland Courts’ website, the South Australian Courts’ copyright statement refers to “material on these pages” without further explanation, leaving it unclear whether it is intended to apply to judgments published on AustLII.

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NSW *Government Gazette* No. 110 (27 September 1996) p. 6611, which was in turn varied in 2001 (*Gazette* No 20 of 19 January 2001), available at [http://www.legislation.nsw.gov.au/copyleg\\_2001.pdf](http://www.legislation.nsw.gov.au/copyleg_2001.pdf).

<sup>82</sup> The Hon John Hannaford MLC, Attorney General, *Notice: Copyright in judicial decisions*, NSW *Government Gazette* No.23 (3 March 1995) p. 1087, available at *Appendix IV* and [http://www.ag.gov.au/agd/WWW/ClrHome.nsf/Page/RWPE3A8E257D1641333CA256E2D007C541F#\\_Toc62466729](http://www.ag.gov.au/agd/WWW/ClrHome.nsf/Page/RWPE3A8E257D1641333CA256E2D007C541F#_Toc62466729).

<sup>83</sup> The Hon John Hannaford MLC, Attorney General, *Notice: Copyright in judicial decisions*, NSW *Government Gazette* No.23 (3 March 1995) p. 1087, available at *Appendix IV* and [http://www.ag.gov.au/agd/WWW/ClrHome.nsf/Page/RWPE3A8E257D1641333CA256E2D007C541F#\\_Toc62466729](http://www.ag.gov.au/agd/WWW/ClrHome.nsf/Page/RWPE3A8E257D1641333CA256E2D007C541F#_Toc62466729).

<sup>84</sup> [www.courts.sa.gov.au](http://www.courts.sa.gov.au). The South Australian Courts website is maintained by the Courts Administration Authority.

<sup>85</sup> <http://www.courts.sa.gov.au/judgments/index.html>.

<sup>86</sup> <http://www.courts.sa.gov.au/judgments/index.html> (see “Copyright” link).

### **Western Australia Courts**

Western Australian court judgments are published on the Supreme and District courts' respective websites.<sup>87</sup> The Supreme Court of Western Australia (WA) website publishes judgments and sentences. Its copyright statement provides that material presented on the website is owned by the State of Western Australia and is reproduced with the State's permission, but does not purport to be the official or authorised version.<sup>88</sup> Users are allowed to 'download, store in cache, display, print, and otherwise reproduce, the whole or any part of this material in unaltered form only (retaining this notice) for [their] personal, non-commercial use or use within [their] organisation. Reproduction or communication of the material (or a substantial part of the material) for commercial purposes requires written permission from the Attorney-General for WA.

Judgments and decisions made available on the District Court website are subject to conditions of use which state: 'Apart from any fair dealing for the purposes of private study, research, customer feedback or as otherwise permitted under the Copyright Act 1968, no part of this Web Site, an Application or any Material in either of them may be reproduced or re-used for any commercial purpose without the prior written permission of the Court. Requests for authorisation should be directed to the Executive Manager at the Court.'<sup>89</sup> Again, as with the Queensland Courts' copyright statement, the District Court provides that commercial reproduction or re-use are prohibited but does not expressly permit non-commercial use.

Therefore, members of the public appear to be granted the right to personal or in-house use of Western Australian judgments, but there is no right to electronically communicate judgments to the public more generally.

### **Northern Territory Courts**

Decisions of the Supreme Court of the Northern Territory are published on the Supreme Court website.<sup>90</sup> Northern Territory Magistrates Court judgments, on the other hand, are published on a designated Magistrates Court's page located on the NT Government's general website.<sup>91</sup> Both the Supreme Court website and the Magistrates Court's page do not have specifically designated copyright policies or statements, but link to the NT Government's general copyright page.<sup>92</sup> The Government's copyright page states that 'Northern Territory Government materials published on the internet are protected by copyright law. Apart from fair dealing for the purposes of private study, research, criticism or review, as permitted under the Copyright Act 1968, no part may be reproduced or reused for any commercial purposes whatsoever.'

This statement suffers from a similar deficiency to that in the Queensland Courts' and the Western Australian District Court's copyright statements. While the statement expressly prohibits reproduction

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<sup>87</sup> [www.supremecourt.wa.gov.au/](http://www.supremecourt.wa.gov.au/) and [www.districtcourt.wa.gov.au/](http://www.districtcourt.wa.gov.au/). The Magistrates Court site does not appear to publish any judgments, nor link to AustLII. See <http://www.magistratescourt.wa.gov.au/default.aspx>.

<sup>88</sup> <http://www.supremecourt.wa.gov.au/content/copyright.aspx> (accessed on 29 May 2012).

<sup>89</sup> <http://www.districtcourt.wa.gov.au/misc/copyright.aspx>. See also <http://www.districtcourt.wa.gov.au/C/courtsDecisions.aspx?uid=5794-1860-4634-3256> (accessed on 29 May 2012).

<sup>90</sup> <http://www.supremecourt.nt.gov.au/decisions/>.

<sup>91</sup> <http://www.nt.gov.au/justice/ntmc/judgements/2008decisions.shtml>, see also <http://www.nt.gov.au/justice/decisions.shtml>.

<sup>92</sup> <http://www.nt.gov.au/ntg/disclaimer.shtml>.

or reuse for commercial purposes it does not specify the acts that are permitted. Again, it is necessary to infer that reproduction and reuse for non-commercial purposes is permitted.

### ***Northern Territory Copyright Policy Concerning Court Judgments (9 December 1998)***

Similar to the NSW Government, in 1998 the Northern Territory Government, Judges and Magistrates adopted a policy permitting ‘any person to publish or deal with any judgment’, provided the publication does not indicate directly or indirectly that it is an official version of the material, and the material is accurately reproduced in a context that does not mislead.<sup>93</sup> Again, this permission does not apply to headnotes, footnotes, comments, case lists etc prepared by or for the NT Council of Law Reporting.

This broad permission for “any person” to “publish or deal with” any judgment is not limited to non-commercial use. Therefore, there is a discrepancy between what is in fact permitted under the official policy adopted in 1998, and the statement on the Government’s general copyright page that is linked to from the Court’s website.<sup>94</sup> The copyright page refers to material published by the NT Government on the internet in general (i.e. it is not specific to judgments) and is more restrictive when compared with the Government’s policy notice.

A copy of the notice or cross reference to the notice is not readily found on the Supreme Court website or the Magistrates Court’s decisions webpage. Many, including some lawyers, therefore may not be aware of this policy notice issued in the 1998 Government Gazette. As a result, the policy’s objective may not be realised. As with the NSW Lawlink website, the NT Supreme Court website and Magistrates Court’s decisions webpage should either clearly indicate the policy statement of 1998 applies to decisions or accurately repeat the substance of that policy.

### ***Australian Capital Territory Courts***

Supreme Court and Magistrates Court judgments are made available on the ACT Courts’ website.<sup>95</sup> Both Supreme and Magistrates Courts share the same copyright statement,<sup>96</sup> which begins by stating that ‘Copyright of material contained on this site is owned by the Australian Capital Territory Justice and Community Safety Directorate’. The statement grants users a right to “download, display, print and copy any material at this website in unaltered form only, for [their] personal use or for non-commercial use within [their] organisation”. The statement continues: “Except as permitted above [users] must not copy, adapt, publish, distribute or commercialise any material contained in this site

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<sup>93</sup> Northern Territory of Australia, Copyright Policy in Judgments of the Courts of the Northern Territory, as published in the Northern Territory Government Gazette, G48, 9 December 1998, available at Appendix C and Solicitor for NT, Department of Justice, Submission to the CLRC Crown Copyright Discussion Paper, 26 August 2004, available at [http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/%28756EDFD270AD704EF00C15CF396D6111%29~CLRC+Crown+Copyright+Submission+-+Solicitor+for+the+NT.pdf/\\$file/CLRC+Crown+Copyright+Submission+-+Solicitor+for+the+NT.pdf](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/%28756EDFD270AD704EF00C15CF396D6111%29~CLRC+Crown+Copyright+Submission+-+Solicitor+for+the+NT.pdf/$file/CLRC+Crown+Copyright+Submission+-+Solicitor+for+the+NT.pdf).

<sup>94</sup> The text ‘Disclaimer/Copyright/Privacy’ in the footer at <http://www.supremecourt.nt.gov.au/decisions/> (Supreme Court) and at <http://www.nt.gov.au/justice/ntmc/judgements/2011decisions.shtml> (Magistrates Courts) links to <http://www.nt.gov.au/ntg/disclaimer.shtml>.

<sup>95</sup> The judgments are published in HTML format. See <http://www.courts.act.gov.au/supreme/judgment> and <http://www.courts.act.gov.au/magistrates/judgment> (accessed on 27 July 2012).

<sup>96</sup> See <http://www.courts.act.gov.au/magistrates/copyright> and <http://www.courts.act.gov.au/supreme/copyright> (accessed on 27 July 2012).

without the permission of the Australian Capital Territory Justice and Community Safety Directorate”. Requests for further permission are directed to the ACT Justice and Community Safety Directorate.

### ***Victorian Courts***

The Supreme Court of Victoria, provides links to judgments on AustLII, but also publishes a large number of unreported judgments, sentencing remarks (audio recordings) and judgments summaries via its Library Catalogue.<sup>97</sup> Much of this material is not on the court’s website itself, but linked to an externally hosted site.<sup>98</sup> The Supreme Court’s copyright page simply states that “[u]nless stated otherwise, the Copyright © of all material on this site is held by the Supreme Court of Victoria. Reproduction or reuse of this material for commercial purposes is forbidden without written permission.”<sup>99</sup> It is unclear whether the reference to “all material on this site” extends to the materials hosted on any external website.

The Magistrates’ Court website publishes selected judgments from 2006.<sup>100</sup> The copyright statement is almost identical to that on the Supreme Court’s copyright page (but with ‘Supreme Court of Victoria’ substituted for ‘Magistrates’ Court Victoria’).<sup>101</sup> Both the Supreme and Magistrates’ Courts statements explicitly prohibit copying or reuse for commercial purposes, and do not provide any clarity on whether non-commercial reuse is permitted. There is no further permission, for example, for personal or in-house use.

### ***Tasmanian Courts***

The Courts and Tribunals Tasmania website provides users searching for decisions with links to three sources: AustLII, the Supreme Court website and the Magistrates Courts website.<sup>102</sup> For Supreme Court judgments from 1987 onwards, the Supreme Court website links users to AustLII.<sup>103</sup> The Supreme Court Library is in the process of scanning Tasmanian Unreported Judgments from 1970 to 1985, and has published these judgments on the Supreme Court website.<sup>104</sup> The Magistrates Court website does not link to AustLII, but publishes the decisions on its website.<sup>105</sup>

Like the NT courts websites, the websites of the Tasmanian Courts and Tribunals, Supreme Court and Magistrates Court do not have dedicated copyright policies or statements, but link to the Government

<sup>97</sup>

<http://www.supremecourt.vic.gov.au/wps/wcm/connect/justlib/Supreme+Court/Home/Judgments+and+Sentences/>. Note that Victoria has a Courts and Tribunals website. However, judgments, decisions or orders are not published here. The Courts and Tribunals website merely provides links to the various sources (e.g. the Supreme Court of Victoria or Magistrates’ Court websites). See <http://www.courts.vic.gov.au/judgments>.

<sup>98</sup> <http://scv2.webcentral.com.au/sentences/>, <http://vsc.sirsidynix.net.au/uhtbin/cgiirsi/00/0/0/60/83/X>, <http://scv2.webcentral.com.au/vsc/>. See

<http://www.supremecourt.vic.gov.au/wps/wcm/connect/justlib/Supreme+Court/Home/Judgments+and+Sentences/SUPREME+-+Unreported+Judgments+%28WEBLINK%29>.

<sup>99</sup> <http://www.supremecourt.vic.gov.au/wps/wcm/connect/justlib/Supreme+Court/Footer/Copyright/>.

<sup>100</sup>

<http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/Home/Judgments+and+Decisions/>.

<sup>101</sup> <http://www.magistratescourt.vic.gov.au/wps/wcm/connect/justlib/Magistrates+Court/Footer/Copyright/>.

<sup>102</sup> <http://www.courts.tas.gov.au/decisions>.

<sup>103</sup> <http://www.supremecourt.tas.gov.au/decisions/judgments>.

<sup>104</sup> <http://www.supremecourt.tas.gov.au/decisions/judgments>.

<sup>105</sup> <http://www.magistratescourt.tas.gov.au/decisions>.

of Tasmania's generic copyright notice.<sup>106</sup> This notice begins by stating that the government 'encourages public access to government information' and then grants 'users of this site a licence [...] to download, print and otherwise reproduce the information for non-commercial purposes only'. It also provides that if 'it is indicated on a website that specific information may be used for commercial purposes, users are licensed to the extent so expressed and subject to the condition that the copyright owner's name and interest in the information be acknowledged when the information is reproduced or quoted, either in whole or in part'. The notice directs users seeking further permissions to contact the 'relevant Agency or instrumentality of the State, as identified on the relevant web site'.

It is unclear whether the reference to "users of this site" extends to users of the Courts websites. The wording does go on to say that further permissions should be sought from 'the relevant Agency or instrumentality of the State, as identified on the relevant webs site' and on this basis it may be argued that it is intended to apply to other websites. Therefore, under this Tasmanian Government's default copyright notice, it appears that downloads, prints and reproductions of Tasmanian judgments are permissible, for non-commercial purposes (unless otherwise stated). Broader distribution or communication to the public is likely to be beyond the scope of this permission.

A summary of the policies and statements of the various court and related websites considered in this paper is set out in **Table 1**, below.

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<sup>106</sup> <http://www.tas.gov.au/stds/codi.htm>.

**Table 1: Summary of courts' and related website copyright policies and statements**

Website policy	Materials to which website policy applies	Permissions granted	Conditions of use	Mention of s 182A	Mention of Fair Dealing	Mention of right to Communicate
High Court	"This work" / "this material"	"download, display, print and reproduce"	"in unaltered form only...for your personal, non-commercial use or use within your organisation"	✗	✓	✗
Federal Court	"this material" / "judgments and excerpts from judgments"	<ul style="list-style-type: none"> <li>▪ Non-commercial: "download, display, print and reproduce"</li> <li>▪ Commercial: "reproduced or published" or "reproduced or published"</li> </ul>	<ul style="list-style-type: none"> <li>▪ Non-commercial: "in unaltered form...for your personal, non-commercial use or use within your organisation"</li> <li>▪ Commercial: "reproduced or published in unaltered form, provided it is acknowledged that the judgments is a judgment of the Federal Court of Australia and any commentary/ead notes or additional information added is clearly attributed to the publisher/organisation...source from the judgment was copied (e.g. AustLII, etc.) should be acknowledged."</li> </ul>	✗	✗	✗
Qld Courts	"the information" / "material on this website"	Reproduction	"Although we have no objection to this material being reproduced, we assert the right to be recognised as author...and to have our material remain unaltered"... "no part may be reproduced or re-used for any commercial or other purpose without written permission"	✗	✓	✗
NSW Lawlink	"Judicial decisions"	"may be reproduced" / "publication of the material [subject to conditions of use]"	"must not purport to be the official version"... "not allow the reproduction of any headnote or summary ... or other editorial material"... "accurately reproduced in proper context and to be of an appropriate standard" "the state reserves the right at any time to revoke, vary or withdraw the authorisation"	✗	✗	✗

SA Courts	“material on these pages”	No permission.	Not specified.	✗	✓	✗
WA Supreme Court	“material presented on this website”	“download, store in cache, display, print, and otherwise reproduce, the whole or any part ...”	“in unaltered form only (retaining this notice) for your personal, non-commercial use or use within your organisation.” “You may not reproduce or communicate the whole or substantial part of this material for commercial purposes without the express written permission of the State of Western Australia”	✗	✓	✗
WA District Court	“Material”	No permission.	Not specified. (“no part of this Web Site...may be reproduced or re-used for any commercial purpose without the prior written permission of the Court.”)	✗	✗	✗
NT Government copyright notice (linked from NT Supreme Court)	“Northern Territory Government materials published on the internet”	No permission.	Not specified. (“no part may be reproduced or reused for any commercial purposes whatsoever.”)	✗	✓	✗
ACT Courts	“material contained on in this site”	“download, display, print and copy”	“in unaltered form only, for your personal use or for non-commercial use within your organisation” (“Except as permitted above you must not copy, adapt, publish, distribute or commercialise [without permission]”)	✗	✗	✗
Vic Supreme and Magistrates Courts	“all material on this site”	No permission.	Not specified. (“reproduction or reuse ... for commercial purposes is forbidden without written permission”)	✗	✗	✗
Tas Government copyright notice (linked from Tas Supreme & Magistrates Courts)	“all material published on this website” / “the information”	“download, print and otherwise reproduce”	“for non-commercial purposes only” “If it is indicated on a website that specific information may be used for commercial purposes, users are licensed to the extent so expressed and subject to the condition that the copyright owner’s name and interest in the information be acknowledged”	✗	✗	✗

## V. Analysis of copyright policies and statements

The preceding examination of the copyright policies and statements on court websites and related (linked) websites reveals some obvious shortcomings. In particular, the policies and statements on the various websites are inconsistent, lack precision and are incomplete.

### ***Lack of Uniformity***

The most obvious issue arising from an examination of the various website copyright policies and statements is the lack of consistency among them. The range of different permissions and restrictions, in vaguely similar - yet different - language is confusing, even for legal professionals. Most jurisdictions (New South Wales, South Australia, Western Australia (Supreme Court), and Tasmania) assert that copyright is owned by the Crown or the State, while Victoria asserts that copyright in all material on its website is held by the Court. Others are silent on the question of ownership. Where there is a positive grant of permission to use the material, the permissions are listed but not defined or explained.

### ***Lack of specificity***

A second, related problem is that the copyright policies and statements are ambiguous and lack specificity both in relation to the rights granted to users and the materials to which they apply. Some statements are relatively short but this apparent simplicity can be deceptive. In terms of the subject matter to which they apply, some statements refer to “judgments”, some to “material”, and others refer generally to information “on the website”.<sup>107</sup> Some courts do not publish judgments on their own websites, but direct users to AustLII’s webpages. Where the permission to use is expressed as applying to material “on the website”, it is unclear whether it is intended to apply to materials that are in fact available on AustLII and are accessed via a weblink from the court’s website to AustLII.

As for the permitted use of judgments, several of the statements prohibit reproduction or reuse for commercial purposes without permission and contain no positive grant of permission beyond the acts permitted under the general provisions of the *Copyright Act*. By prohibiting commercial use and leaving it to users to ascertain which uses are permitted under the exceptions and limitations provided by the *Copyright Act*, these websites provide no assistance in identifying permitted uses of judgments. Some Courts’ websites permit personal, non-commercial use or use within an organisation for specific acts: downloading, printing, reproducing (copying) and displaying.<sup>108</sup> Although the High court, Federal Court and WA Supreme Court permit users to “display” the material on their websites, in the absence of any further explanation or definition it is unclear whether this permission is intended to encompass electronic communication to the public. None of the Courts’ websites policies unambiguously grants users permission to electronically communicate judgments to the public, such as by posting a downloaded judgment to another website or making it accessible on a blog about legal issues or matters of community interest.

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<sup>107</sup> Only two websites specifically refer to judgments (the Federal Court refers to “judgments”, while New South Wales Lawlink refers to “judicial decisions”). The other websites refer generally to “material” or “information” on the relevant website.

<sup>108</sup> For example, the High Court’s website permits users to “download, display, print or reproduce”. The same permitted acts are specified on Federal Court, ACT and Tasmanian Courts sites (although Tasmania does not include “display”). The WA Supreme Court’s website additionally permits users to “store in cache”.

***No reference to legislative exception or official government waivers***

For uses which are beyond the acts expressly permitted by the copyright owner, the various general and specific exceptions provided by the *Copyright Act* apply. The copyright policies and statements are typically silent on this issue and fail to inform users about, or draw their attention to the existence of, their rights under the *Copyright Act*. A few website policies or statements (those of the Queensland Courts, WA District Court and NT Government copyright page) refer to some of the fair dealing provisions (permitting use for the purposes of private study or research and criticism or review). However, none of the policies or statements mentions fair dealing for the purpose of judicial proceedings or a report of judicial proceedings, or for the purpose of the giving of professional advice by a legal practitioner or a registered patent or trade mark attorney. Nor do any of the copyright statements make reference to section 182A of the *Copyright Act*, a specific exception permitting a single facsimile copy to be made of legal documents, including judgments (and published editions of judgments), by means of reprographic technology, provided that any charge for making and supplying the facsimile copy does not exceed the marginal cost of doing so. Both the NT and NSW governments have issued broad permissions or “waivers” of copyright in judgments but, again, there is no mention of these in their website copyright notices. The result is that the copyright statements are uninformative and do not provide helpful guidance on what uses or activities are permitted under the law or official government policy.

**VI. Access to Judgments in the Web 2.0 Environment**

The administration of justice requires that citizens should be able to access and use legal documents, including judgments, subject only to such restrictions as are necessary to ensure that they are distributed in an accurate and reliable form. While the general policy of access to law is reflected in high level wording on most of the Australian Courts’ websites, examination and analysis of the copyright statements demonstrates that they have not been revised to reflect the uses and practices enabled by web 2.0 technologies. In the web 2.0 environment, users are not limited to simply viewing, downloading, copying or printing out a document retrieved online. A fundamental characteristic of web 2.0 is that it enables interactive and distributed communications, such that digital materials can be reused, shared and distributed by means of widely available platforms and tools (e.g. email, blogs, wikis and social networks).

For judgments, copyright management and licensing practices have not kept pace with the digital and online technology capabilities that have rapidly become ubiquitous throughout the community. In practical terms, the present position under the copyright statements on the various Courts’ websites (and their associated linked websites) represents at best an incremental or minimal acknowledgement of digital and online technologies. The courts in all Australian jurisdictions have used web technologies to publish their judgments online for more than a decade but their copyright statements continue to reflect the early days of internet adoption by governments when websites were static and non-interactive (web 1.0). At a minimum, users are permitted to view, print out and reproduce judgments accessed on the site. Some go further, listing the permitted acts (e.g. the WA Supreme Court’s permission to “download, store in cache, display, print and otherwise reproduce”). The exception provided in section 182A of the *Copyright Act*, permitting one facsimile copy to be made of legal documents, including judgments, has often been translated literally into providing a citizen with the right to access, view, download a copy for personal, non-commercial purposes. A corporate equivalent right is also often granted to enable businesses, firms and companies to download or print a

copy for use only “for internal purposes”. The striking omission from all the Courts’ website copyright statements is any mention of users’ rights to deal with judgments in a manner that utilises the communicative potential of web 2.0 and none expressly permits further online distribution to the public of digital copies of judgments.

Some earlier proposals for achieving wider dissemination of legal documents concentrated their attention on the issue of whether or not copyright in judgments and other primary legal documents should be abolished or waived.<sup>109</sup> However, a more considered and nuanced approach, not involving abolition or waiver of copyright, but still enabling universal access to, and engagement with, judgments has not been fully considered. This paper proposes that the custodians of judgments should implement a copyright-based management strategy that facilitates access to judgments and unambiguously permits them to be used and disseminated in digital form, in accordance with web 2.0 capabilities and practices, while remaining cognisant of the importance of ensuring their integrity and accuracy.<sup>110</sup>

## VII. Creative Commons licences

The emergence of open content licensing models has made it much easier for copyright owners to license their material to a wide range of people, especially where that material is distributed over the internet.<sup>111</sup> Open content licences grant permission to use copyright material, in advance and to the world at large, thereby overcoming the need for the copyright owner to respond to numerous individual requests for permission to use the material. The Creative Commons (CC) licences, a suite of six standardised open content licences, rapidly achieved legal recognition and extensive adoption worldwide following their launch in 2002. An indication of how quickly they were taken up is found in the comments of the United States Court of Appeals for the Federal Circuit in *Jacobsen v Katzer*<sup>112</sup> that by the time that case came before the court in 2008 open source and open content licences such as CC had ‘become a widely used method of creative collaboration that serves to advance the arts and sciences in a manner and at a pace that few could have imagined just a few decades ago.’<sup>113</sup>

By licensing their works under a CC licence, a copyright owner adopts a “some rights reserved” copyright management model, as opposed to an “all rights reserved” model, granting extensive permissions to users while retaining other key copyright interests. Each of the CC licences grants a

<sup>109</sup> See e.g. CLRC, *Crown Copyright*, 2005, Recommendation 7, para 9.46. The CLRC primarily supported the abolition of copyright in primary legal materials (Recommendation 4, para 9.38), but in the alternative, if the Commonwealth Government decides to retain copyright, they should implement a statutory waiver of copyright in primary legal materials because of the interest in their broad public dissemination. See generally Judith Bannister, ‘Open Access to Legal Sources in Australasia: Current Debate on Crown Copyright and the Case of the Anthropomorphic Postbox’ (1996) 3 *JILT*, available at [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1996\\_3/bannister](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1996_3/bannister) (accessed on 1 June 2012).

<sup>110</sup> Anne Fitzgerald, ‘Crown Copyright’ in Brian Fitzgerald and Benedict Atkinson (eds), *Copyright Future: Copyright Freedom* (Sydney University Press, 2011), 167 (citing Copyright Law Review Committee, *Crown Copyright*, 2005, 53).

<sup>111</sup> A Fitzgerald, K Pappalardo, B Fitzgerald, et al, *Building the Infrastructure for Data Access and Reuse in Collaborative Research: An Analysis of the Legal Context*, OAK Law Project, QUT (2007); at <http://eprints.qut.edu.au/8865/>

<sup>112</sup> 535 F.3d 1373 (Fed. Cir. 2008).

<sup>113</sup> The court went on to affirm the effectiveness and enforceability of these licences, stating: ‘Copyright holders who engage in open source licensing have the right to control the modification and distribution of copyrighted material. [...] The choice to exact consideration in the form of compliance with the open source requirements of disclosure and explanation of changes, rather than as a dollar denominated fee, is entitled to no less legal recognition.’

range of baseline permissions that are common to all the licences. These fundamental baseline rights permit users to reproduce, distribute, display and perform the copyright work.<sup>114</sup>

Although the CC licences can be used on works in hard copy form, they are inherently shaped by the online environment, the plasticity of digital works and remix culture.<sup>115</sup> The grant of permission to distribute copyright works electronically is a central and defining feature of the CC licences. “Distribute” is defined as meaning to “make available to the public by any means, including publication, electronic communication, or broadcast”.<sup>116</sup> Together with permission to reproduce the licensed work, the broad distribution right underpins the function of the CC licences in facilitating access to, copying and dissemination of copyright works in the digital, online environment.

The CC licence suite also contains a standardized set of conditions or obligations, upon which the baseline rights are granted. Each of the four standard conditions is represented by a symbol and an abbreviation.<sup>117</sup> A condition that is common to all the CC licences is the Attribution requirement which is abbreviated as “BY” and represented by the symbol:



Simply stated, the Attribution (BY) condition means that whenever a CC-licensed work is distributed, the original creator (or any other nominated person) must be given credit.<sup>118</sup> Further standard, optional conditions in the CC licensing scheme are:



**Non-Commercial (NC)** – the work can be copied, displayed, distributed and performed for non-commercial purposes only;

<sup>114</sup> See for example Creative Commons Attribution 3.0 Australia licence, Clause 3A - *Grant of Rights*, available at <http://creativecommons.org/licenses/by/3.0/au/legalcode>. Additionally, in each of the Creative Commons licences except those containing the No Derivatives (ND) condition, users are granted permission to create and reproduce one or more Derivative Works and to distribute and publicly perform a Derivative Work. “Derivative Work” is defined as “material in any form that is created by editing, modifying or adapting the Work, a substantial part of the Work, or the Work and other pre-existing works. Derivative Works may, for example, include a translation, adaptation, musical arrangement, dramatization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which the Work may be transformed or adapted, except that a Collection will not be considered a Derivative Work for the purpose of this Licence: Clause 1(b), Definitions, Creative Commons Legal Code, Attribution 3.0 Australia licence, available at <http://creativecommons.org/licenses/by/3.0/au/legalcode>.

<sup>115</sup> Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press, 2008).

<sup>116</sup> Creative Commons Attribution 3.0 Australia licence, Clause 1 - *Definitions*, available at <http://creativecommons.org/licenses/by/3.0/au/legalcode>.

<sup>117</sup> Graham Greenleaf has commented on the importance of having easily recognizable licensing information or symbols; referring to the NSW government “waivers” of 1995 and 1996, he cautioned that although publishers may be aware of these permissions, the general public is unlikely to be aware of their rights to reuse judgments. See Graham Greenleaf, ‘Crown copyright in legal materials: Strategies to maximise public use of public legal information’ - submission in response to the Australian Copyright Law Review Committee’s publication *Crown Copyright* (February 2004), on behalf of the Australasian Legal Information Institute (AustLII – <http://www.austlii.edu.au>), available at <http://www.ag.gov.au/Documents/CLRC%20Crown%20Copyright%20Submission%20-%20AustLII.pdf>

<sup>118</sup> Creative Commons Attribution 3.0 Australia, Licence Summary, at <http://creativecommons.org/licenses/by/3.0/au/>.

-  **No Derivatives** (ND) – exact copies of the work can be made, displayed, distributed and performed, but the original work must not be altered, transformed or built upon in any way; and
-  **Share-Alike** (SA) – the work may be remixed, adapted and built upon, provided that derivative works are distributed under the same licence terms as those applying to the original work.

These four conditions, together with the baseline permissions, form the basis of the set of six standardised CC licences. The full suite of licences and their corresponding icons are as follows:<sup>119</sup>



Attribution 3.0 (BY)

[<http://creativecommons.org/licenses/by/3.0/au/>](http://creativecommons.org/licenses/by/3.0/au/)



Attribution No Derivatives 3.0 (BY-ND)

[<http://creativecommons.org/licenses/by-nd/3.0/au/>](http://creativecommons.org/licenses/by-nd/3.0/au/)



Attribution Non-Commercial 3.0 (BY-NC)

[<http://creativecommons.org/licenses/by-nc/3.0/au/>](http://creativecommons.org/licenses/by-nc/3.0/au/)



Attribution Non-Commercial No Derivatives 3.0 (BY-NC-ND)

[<http://creativecommons.org/licenses/by-nc-nd/3.0/au/>](http://creativecommons.org/licenses/by-nc-nd/3.0/au/)



Attribution Non-Commercial Share Alike 3.0 (BY-NC-SA)

[<http://creativecommons.org/licenses/by-nc-sa/3.0/au/>](http://creativecommons.org/licenses/by-nc-sa/3.0/au/)



Attribution Share Alike 3.0 (BY-SA)

[<http://creativecommons.org/licenses/by-sa/3.0/au/>](http://creativecommons.org/licenses/by-sa/3.0/au/)

The Attribution licence (CC BY) permits the broadest reuse and distribution of the licensed material and imposes the least restrictions. It allows the licensed work to be edited, modified or adapted to create one or more derivative works, including for commercial purposes, provided the Attribution requirement and other licence terms are complied with. The Attribution Non-Commercial licence (BY-NC) permits the licensed work to be copied, distributed and displayed and for derivative works to be made from it, provided any such use is not for commercial purposes.<sup>120</sup> “Commercial” is defined as meaning “primarily intended for or directed towards commercial advantage or private monetary compensation.”<sup>121</sup> The Attribution No Derivatives licence (BY-ND) prohibits the alteration or transformation of the licensed work to create derivative works. The Attribution Non-Commercial No Derivatives licence (CC BY-NC-ND) allows others to use exact reproductions of the licensed material for non-commercial purposes.

<sup>119</sup> The only conditions that are incompatible and may not feature in the same licence are the No Derivatives and Share-Alike terms (because the Share Alike term applies to derivative works).

<sup>120</sup> Creative Commons Attribution Non-Commercial 3.0 Australia licence, Clause 4B - *Restrictions on Commercial Use*, available at <http://creativecommons.org/licenses/by-nc/3.0/au/legalcode>.

<sup>121</sup> Creative Commons Attribution Non-Commercial 3.0 Australia licence, Clause 1(b) - *Definitions*, available at <http://creativecommons.org/licenses/by-nc/3.0/au/legalcode>.

It is standard practice for copyright owners when licensing their copyright materials, whether under a CC or any other licence, to include a copyright notice indicating that the work is subject to copyright, and setting out information about the correct title of the work, the identity of the author or another relevant party (e.g. the sponsor or funder) and the terms and conditions governing its use. Increasingly, some of this information about copyright works takes the form of standardized identifiers such as digital object identifiers (or “doi’s”), permanent web addresses (Persistent Uniform Resource Locators or PURLs)<sup>122</sup> and metadata describing the work (e.g. providing information about title, author, subjects, keywords, and publisher) and providing rights management information. When licensing their material under a CC licence, a copyright owner may include in the licence’s Attribution field identifying information relating to the work, along with the copyright notice, details of the author and information about the licensing terms and conditions.<sup>123</sup> Whenever a CC-licensed work is distributed or publicly performed, a copy of the CC licence or the Universal Resource Identifier (URI) for the licence must be included with the work, together with any notices that refer to the licence.<sup>124</sup> Further, the Attribution condition in each of the CC licences requires a user of a CC-licensed work to keep intact any copyright notices that are applied to it, provide the name of the original author or any other party the author has requested should be attributed (e.g. a sponsor or journal), the title and, to the extent practicable, any Universal Resource Identifier referring to the copyright notice or licensing information.<sup>125</sup>

For works distributed under CC licences, the copyright notice and information identifying the work and setting out the licensing conditions usually displayed alongside or in close proximity to the icon representing the licence, in what is often referred to as the Attribution field. For example, the Attribution field for a copyright work licensed under a Creative Commons Attribution 3.0 Australia licence could take the following form:



© Jane Doe 2012. This book is licensed by Jane Doe under a Creative Commons Attribution 3.0 Australia licence. To view a copy of this licence, visit <http://creativecommons.org/licenses/by/3.0/au>.

[In essence, you are free to copy, communicate and adapt the work, as long as you attribute the work to Jane Doe and abide by the other licence terms.]

Internationally, one of the most significant statements recognising the importance of using simple licensing mechanisms to implement policies designed to promote access to government copyright materials is found in the landmark 2008 OECD<sup>126</sup> *Recommendation for Enhanced Access and More*

<sup>122</sup> See <http://purl.oclc.org/docs/index.html>.

<sup>123</sup> Under Australian copyright law, the Attribution and Notice requirements in CC licences are supported by the protection extended to “electronic rights management information”<sup>123</sup> in sections 116B and 116C of the *Copyright Act 1968*. A corresponding performer’s moral right of attribution of performership is conferred by s 195ABA of the *Copyright Act 1968*. Although the Attribution requirement may be seen to be similar to the moral right of attribution of authorship conferred by s 193 of the *Copyright Act 1968* the CC licences are based on the economic – rather than the moral – rights of creators of copyright works.

<sup>124</sup> Commons Attribution 3.0 Australia Licence, Clause 4A – *Restrictions on Distribution and Public Performance of the Work*, paras (b), (e), at <http://creativecommons.org/licenses/by/3.0/au/legalcode>.

<sup>125</sup> Creative Commons Attribution 3.0 Australia Licence, Clause 4B – *Attribution and Notice Requirements*, at <http://creativecommons.org/licenses/by/3.0/au/legalcode>.

<sup>126</sup> Organisation for Economic Co-operation and Development (OECD).

*Effective Use of Public Sector Information*.<sup>127</sup> The recommendation urges that ‘presumption of openness [be adopted] as the default rule to facilitate access and re-use’,<sup>128</sup> encourages ‘broad non-discriminatory competitive access and conditions for re-use of public sector information’ and advocates the removal of exclusive arrangements and ‘unnecessary restrictions on the ways in which it can be accessed, used, re-used, combined or shared, so that in principle all accessible information would be open to re-use by all’.<sup>129</sup> It calls for copyright in PSI to be exercised ‘in ways that facilitate re-use’ and encourages the development of ‘simple mechanisms to encourage wider access and use (including simple and effective licensing arrangements).<sup>130</sup> In other words, open access to PSI involves more than just granting access, but also requires reuse to be enabled through permissive standards in relation to price, format and licensing of legal interests, particularly copyright.

In Australia, the use of CC licences on PSI was first recommended in the *Venturous Australia – Building Strength and Innovation* report on the review of the National Innovation System (chaired by Dr Terry Cutler<sup>131</sup>) in 2008.<sup>132</sup> It recommended the development of a ‘National Information Strategy to optimise the flow of information in the Australian economy’, the aims of which would include ‘maximis[ing] the flow of government generated information, research, and content for the benefit of users (including private sector resellers of information)’.<sup>133</sup> The *Venturous Australia* report recommended that ‘Australian governments should adopt international standards of open publishing as far as possible’ and that ‘material released for public information by Australian governments should be released under a creative commons licence’.<sup>134</sup> These recommendations were considered and further developed by the Government 2.0 Taskforce (chaired by Dr Nicholas Gruen)<sup>135</sup> in 2009. The Government 2.0 Taskforce’s final report, *Engage: Getting on with Gov 2.0* (December 2009) recommended that PSI should be freely reusable and transformable, and should be licensed under the

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<sup>127</sup> OECD, *Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information*, Annex F to “Shaping Policies for the Future of the Internet Economy”, OECD Ministerial Meeting, Seoul, Korea, 17-18 June 2008, available at <http://www.oecd.org/sti/40821729.pdf>. In this context, “public sector information” (PSI) includes:

‘information and data produced by the public sector as well as materials that result from publicly funded cultural, educational and scientific activities. It can include policy documents and reports of government departments, public registers, legislation and regulations, meteorological information, scientific research databases, statistical compilations and datasets, maps and geospatial information and numerous other data and information products produced by government for public purposes.’

Anne Fitzgerald, ‘Open Access and Public Sector Information: Policy Developments in Australia and Key Jurisdictions’ in Brian Fitzgerald (ed), *Access to Public Sector Information: Law, Technology & Policy*, Volume 1, Sydney University Press, 2010.

<sup>128</sup> The “Openness” principle.

<sup>129</sup> The “Access and transparent conditions for re-use” principle.

<sup>130</sup> The “Copyright” principle. In the “Access and transparent conditions for re-use” principle, the recommendation also calls for the development and use of ‘automated on-line licensing systems covering re-use in those cases where licensing is applied, taking into account the Copyright principle’.

<sup>131</sup> See <http://www.cutlerco.com.au/>

<sup>132</sup> Cutler & Company, *Venturous Australia - Building Strength in Innovation*, Report on the Review of the National Innovation System, prepared for the Australian Government Department of Innovation, Industry, Science and Research, Canberra, 2008, <http://www.innovation.gov.au/Innovation/Policy/Pages/ReviewoftheNationalInnovationSystem.aspx>.

<sup>133</sup> *Ibid* (Recommendation 7.7).

<sup>134</sup> *Ibid* (Recommendation 7.8).

<sup>135</sup> Dr Gruen had earlier been a member of the Expert Panel which conducted the review of the National Innovation System in 2008. For further information on the work of the Government 2.0 Taskforce, see <http://gov2.net.au/>

CC BY licence by default.<sup>136</sup> These recommendations were agreed to in principle by the Federal Government in 2010.<sup>137</sup> Consequently, the *Statement of Intellectual Property Principles for Australian Government Agencies* was revised in 2011 to ensure that the Federal Government's copyright management practices would not impede the application of the most permissive CC licence.<sup>138</sup> Principle 11(b) states:

Consistent with the need for free and open re-use and adaptation, public sector information should be licensed by agencies under the Creative Commons BY standard as the default.<sup>139</sup>

The revised *Australian Government Intellectual Property Manual*, released in March 2012, makes it clear that the starting point for a Federal Government agency when considering how to license its PSI is to consider Creative Commons or other open content licences.<sup>140</sup> It specifies that “the default or starting position is that PSI should be released free of charge under a Creative Commons ‘BY’ licence ... following a process of due diligence and on a case-by-case basis”.<sup>141</sup> In short, the most permissive CC licence, CC BY, has been accepted as the default position for Federal Government copyright materials, as it supports their widest dissemination and reuse.

In recent years, CC licences have been adopted by the Australian Federal Government, some State and Territory government departments, governments<sup>142</sup> worldwide and inter-governmental organisations<sup>143</sup> as the appropriate legal tool for encouraging innovative uses of PSI. Australian

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<sup>136</sup> *Engage: Getting on with Government 2.0*, Report of the Government 2.0 Taskforce, Recommendation 6 (6.1 and 6.3), 2009, available at <http://www.finance.gov.au/publications/gov20taskforcereport/index.html> (accessed on 24 April 2012).

<sup>137</sup> See *Government Response to the Report of the Government 2.0 Taskforce*, 2010, available at <http://www.finance.gov.au/publications/govresponse20report/index.html> (accessed on 24 April 2012).

<sup>138</sup> Australian Government, Attorney General's Department, *Statement of Intellectual Property Principles for Australian Government Agencies*, 2011, <http://www.ag.gov.au/Copyright/Pages/StatementofIntellectualPropertyPrinciplesforAustralianGovernmentAgencies.aspx> (accessed 21 August 2012).

<sup>139</sup> *Ibid.*

<sup>140</sup> Australian Government, Attorney-General's Department, *Australian Government Intellectual Property Manual*, at 6.

<sup>141</sup> Australian Government, Attorney-General's Department, *Australian Government Intellectual Property Manual*, Chapter 9 - Sharing and Granting Public Access to IP, 184, available at <http://www.ag.gov.au/Intellectualproperty/Pages/IntellectualPropertyManual.aspx> (accessed 21 August 2012).

The Manual provides a link (at 187) to the Creative Commons Australia webpage on CC and Government (<http://creativecommons.org.au/sectors/government>). See also the Federal Government's *Guidelines on Licensing Public Sector Information for Australian Government Agencies*, 2012, at <http://www.ag.gov.au/intellectualproperty/Pages/IntellectualPropertyManual.aspx>

<sup>142</sup> Governments at local, state and federal level have adopted Creative Commons licences. Examples include the Vienna City's Open Government Data portal, at <http://data.wien.gv.at/nutzungsbedingungen/>; in the United States, the New York State Senate (see <http://www.nysenate.gov/>) and states including Virginia and Washington; Italy (see <http://www.istat.it/it/note-legali>); Korea (see [http://blog.naver.com/mb\\_nomics](http://blog.naver.com/mb_nomics)); and Brazil (see <http://dados.gov.br/>). For further examples and information, see generally, the Creative Commons website at <http://creativecommons.org/government>

<sup>143</sup> A notable example is the World Bank, which in April 2012 announced a new Open Access policy for its research outputs and knowledge product. As part of the policy, which came into effect on 1 July 2012, the World Bank is licensing its own publications under the Creative Commons Attribution (CC BY) licence. See World Bank, *World Bank Announces Open Access Policy for Research and Knowledge, Launches Open Knowledge Repository*, Press Release No. 2012/379/EXTOP, Washington DC, 10 April 2012, at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0..contentMDK:23164491~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html> Other inter-governmental organisations that are using Creative Commons licences include CERN, the Commonwealth of Learning, UNESCO and the United Nations. For further examples and information, see

Government departments and agencies that use CC licences for their digital and online content include, among others, the Treasury,<sup>144</sup> the Australian Bureau of Statistics (ABS),<sup>145</sup> the Bureau of Meteorology<sup>146</sup> and Geoscience Australia.<sup>147</sup> CC licences are used not only on PSI, but also on legal documents, notably Federal legislative materials published on ComLaw,<sup>148</sup> and on secondary materials in the form of parliamentary debates (in Hansard) published on the Parliament of Australia website.<sup>149</sup> Australia is not unique in the adoption of CC licences by the public sector. Prominent examples of CC use are the United States President's White House website which accepts and licenses third party content under a CC BY licence,<sup>150</sup> the United States Government's \$2 billion Trade Adjustment Assistance Community College and Career Training (TAACCT) grant program,<sup>151</sup> and the New Zealand Government Open Access and Licensing framework (NZGOAL).<sup>152</sup>

The legal and policy issues that arise when considering rights to access and use judgments have much in common with those which arise in relation to PSI generally, many of which have already been comprehensively examined and addressed by governments in Australia and elsewhere.<sup>153</sup> While governments and governmental organisations in Australia have already embraced the use of CC licences to support the wide dissemination and reuse of publicly-funded copyright materials, including certain categories of legal documents and resources, an obvious question remains: what about judgments?

### VIII. Creative Commons and judgments

The CC licences are proposed as an appropriate tool for the standardisation of permissions to use judgments, in terms which are readily understood by members of the general public. As a starting point in the process of applying CC licences to judgments, the various Courts' website copyright policies and statements are compared with the CC licences to ascertain how closely the copyright statements correspond to the licences. By necessity, such an exercise can only produce a very rough approximation between the copyright statements and the CC licences. In reality, it is not possible to

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[http://wiki.creativecommons.org/Intergovernmental Organizations#Additional Examples of CC License Use by Intergovernmental Organizations](http://wiki.creativecommons.org/Intergovernmental_Organizations#Additional_Examples_of_CC_License_Use_by_Intergovernmental_Organizations) (accessed 21 August 2012). For further examples and information, see generally, the Creative Commons website at [http://wiki.creativecommons.org/Intergovernmental Organization Case Studies](http://wiki.creativecommons.org/Intergovernmental_Organizations#Featured_Intergovernmental_Organization_Case_Studies).

<sup>144</sup> See the Copyright statement at <http://www.treasury.gov.au/Footer/Copyright>. The first use by the Treasury of CC licences was on the May 2010 Budget Papers, which were released under a CC BY licence; see [http://www.budget.gov.au/2010-11/content/bp1/html/bp1\\_prelims.htm](http://www.budget.gov.au/2010-11/content/bp1/html/bp1_prelims.htm).

<sup>145</sup> <http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/%C2%A9+Copyright?opendocument#from-banner=GB>

<sup>146</sup> <http://www.bom.gov.au/other/copyright.shtml?ft>.

<sup>147</sup> <http://www.ga.gov.au/copyright.html>.

<sup>148</sup> <http://www.comlaw.gov.au/Content/Copyright>.

<sup>149</sup> <http://www.aph.gov.au/legal/copyright.htm>.

<sup>150</sup> <http://www.whitehouse.gov/copyright>. Note that under US federal law, government-produced materials appearing on the website are not copyright protected.

<sup>151</sup> For information on the Trade Adjustment Assistance Community College and Career Training (TAACCT) grant program, see <http://www.federalgrantswire.com/trade-adjustment-assistance-community-college-and-career-training-taacct-grants.html>.

<sup>152</sup> The New Zealand Government Open Access and Licensing framework (NZGOAL) was approved by Cabinet on 5 July 2012; see <http://ict.govt.nz/guidance-and-resources/information-and-data/nzgoal>.

<sup>153</sup> Anne Fitzgerald, 'Open Access and Public Sector Information: Policy Developments in Australia and Key Jurisdictions', in Brian Fitzgerald (ed), *Access to Public Sector Information: Law, Technology & Policy* (Sydney University Press, 2010) 48.

achieve a perfect correspondence between the Courts' copyright policies and the CC licences, as a key permission granted under each of the CC licences – the right to distribute the work electronically to the public – is not expressly granted in any of the copyright policies. Further, the CC licences are fully developed formal legal deeds whereas the Courts' website copyright policies and statements generally take the form of short, succinct website notices. In the absence of any provision in the Courts' copyright statements equivalent to the Share Alike (SA) condition in the CC licence suite, the comparison has focused on the Attribution (BY), Non-Commercial (NC) and No Derivatives (ND) CC licence conditions. Bearing in mind these fundamental differences between the copyright statements and the CC licences, the results of the approximation exercise are set out in **Table 3** below.

The often vague nature of the courts' website copyright policies and statements means that in conducting the comparison it was necessary to engage in an interpretative exercise to infer their intended meaning. For instance, the closest approximation to court website conditions that prohibit use for "commercial or other purpose" or permit reproduction for "personal, non-commercial or in-house" use only is the CC BY-NC licence which restricts the use of the licensed work to "non-commercial purposes".<sup>154</sup> Subject to the limiting factors that have been discussed, the following approximations can be made:

- (1) The conditions of use under the New South Wales and Northern Territory "waivers" of copyright in judgments can be roughly approximated to the Attribution (CC BY) licence;<sup>155</sup>
- (2) The conditions of use under the Federal Court's website copyright statement can be roughly approximated to the Attribution No Derivatives (CC BY-ND) licence;<sup>156</sup>
- (3) The conditions of use under the Victorian and Tasmanian Courts' and Northern Territory Government's website copyright statements can be roughly approximated to the Attribution Non-Commercial (CC BY-NC) licence;
- (4) The conditions of use under the High Court, Queensland, ACT and West Australian Courts' website copyright statements roughly approximate the Attribution Non-Commercial No Derivatives (CC BY-NC-ND) licence.

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<sup>154</sup> The Creative Commons Attribution NonCommercial 3.0 Australia licence provides, in Clause 4B - Restrictions on Commercial Use: "You may not exercise any of the rights granted to You by clause 3 above in any Commercial manner.". "Commercial" is defined in Clause 1(b) as meaning "primarily intended for or directed towards commercial advantage or private monetary compensation. The exchange of the Work for other copyright works by means of digital file-sharing or otherwise shall not be considered to be Commercial, provided there is no payment of any monetary compensation in connection with the exchange of copyright works". See <http://creativecommons.org/licenses/by-nc/3.0/au/legalcode>

<sup>155</sup> *Notice: Copyright in judicial decisions*, NSW Government Gazette No.23 (3 March 1995) p. 1087 and *Copyright Policy in Judgments of the Courts of the Northern Territory*, Northern Territory Government Gazette, G48, 9 December 1998. It should be noted that in both notices, the respective Governments reserve the right to terminate at any time the notice and, therefore, the rights granted under the notice.

<sup>156</sup> The Federal Court website copyright notice in fact permits both non-commercial and commercial use of judgments. The conditions for non-commercial use approximate the Creative Commons No Derivatives condition whereas the conditions for commercial use more closely approximate the Creative Commons Attribution (CC BY) licence. Non-commercial use is permitted of the material "in unaltered form for your personal, non-commercial use or use within your organisation". However, the commercial use permission allows "[j]udgments and excerpts from judgments [to] be reproduced or published in unaltered form, provided it is acknowledged that the judgment is a judgment of the Federal Court of Australia and any commentary/head notes or additional information added is clearly attributed to the publisher/organisation and not the Federal Court". See <http://www.fedcourt.gov.au/aboutsite/copyright.html>

This analysis demonstrates that there are strong parallels between the CC licences and the Courts' copyright policies and statements. Three of the standard conditions in the CC licence suite – Attribution (BY), No Derivatives (ND) and Non-Commercial (NC) – correspond closely to the conditions currently found in the various Courts' website copyright statements and policies. Each of the website copyright statements contains a requirement that is similar to the Attribution (BY) condition, requiring retention of the copyright notice, acknowledgment of the source of the document and correct identification of its author. With the exceptions of the waivers of copyright in judgments issued by the New South Wales and Northern Territory governments, all the website copyright statements include conditions that correspond to either, or both, the Non-Commercial (NC) and No Derivatives (ND) optional conditions in the CC licence suite. A shift from the current website copyright statements to distribution of judgments under CC licences would not involve a great change in the range of permissions that are granted, with the exception of the grant of permission to further distribute the licensed work, including by means of electronic communication, which is the conceptual touchstone of the CC licences.

**Table 2: Courts' and related website copyright policies and approximate Creative Commons licences<sup>157</sup>**

<b>Court/Gov Website</b>	<b>BY</b>	<b>NC</b>	<b>ND</b>	<b>No Endorsement clause</b>	<b>CC licence</b>
High Court	✓	✓	✓	✗	CC BY-NC-ND
Federal Court	✓	✗	✓	✗	CC BY-ND
Qld Courts	✓	✓	✓	✗	CC BY-NC-ND
NSW Lawlink and "waiver"	✓	✗	✗	✓	CC BY
SA Courts	✗	✗	✗	✗	N/A
WA Courts	✓	✓	✓	✗	CC BY-NC-ND
NT Government	✓	✓	✗	✗	CC BY-NC
NT "waiver"	✓	✗	✗	✓	CC BY
ACT Courts	✓	✓	✓	✗	CC BY-NC-ND
Vic Courts	✓	✓	✗	✗	CC BY-NC
Tas Government	✓	✓	✗	✗	CC BY-NC

Notwithstanding these similarities there are important additional advantages to be derived from using CC licences. Distribution under the specific and clearly drafted copyright licensing conditions of the CC licences provides the custodians of legal documents with a means of ensuring their integrity and authenticity, whether by terminating the licences and/or bringing an action for copyright infringement if materials are misused or misrepresented.<sup>158</sup> Upon a breach of any term of the CC licence, the rights

<sup>157</sup> Note that these approximations are subject to the absence of an express right to electronically communicate judgments in any of the Courts' website copyright policies and statements.

<sup>158</sup> See Anne Fitzgerald, Neale Hooper and Brian Fitzgerald, 'Enabling Open Access to Public Sector Information with Creative Commons Licences: The Australian Experience', in Brian Fitzgerald (ed), *Access to Public Sector Information: Law, Technology and Policy* (Sydney University Press, 2011), 80; See J Gilchrist, 'The Role of Government as Proprietor and Disseminator of Information' (1996) 7(1) *Australasian Journal of Corporate Law* 62, 79.

granted to users of the licensed work will terminate automatically,<sup>159</sup> and the ordinary principles of copyright law come into operation. Therefore, any use of the material following termination may be an infringement of copyright that is subject to civil and criminal penalties. In other words, retaining copyright, but licensing certain rights under specific conditions, provides custodians with a means of facilitating and enabling distribution online, while retaining a degree of control.

A licensing approach to facilitate access to judgments is clearly preferable to a no-copyright approach or a general waiver of copyright. Indeed the approach of retaining copyright in legal documents and distributing them under standard, liberal licences was supported by AShareNet,<sup>160</sup> AustLII<sup>161</sup> and Creative Commons Australia<sup>162</sup> in their submissions to the CLRC's Crown Copyright review. If rights (and, in particular, copyright) do not exist or have been waived, users of the material are not constrained as to how they may deal with it. Without recourse to obligations based on other legal grounds, such as contract or trade practices laws, there is no effective means of ensuring compliance with any conditions of use that may be applied. Importantly, for legal documents generally, and judgments in particular, this means that if the materials are not subject to copyright protection there are limited ways of preventing alterations which impair accuracy and integrity, ensuring proper attribution and protecting against false attribution. By contrast, in applying the copyright-based CC licences, custodians of judgments are able to grant liberal rights to use the documents, while also requiring compliance with standardised conditions.

### *Attribution*

The basic Attribution (BY) condition common to each of the CC licences requires proper attribution of the author (or other named person or organisation),<sup>163</sup> correct identification of the work,<sup>164</sup> and inclusion of licensing information<sup>165</sup> and the relevant copyright notice<sup>166</sup> with the work. In applying this condition to judgments, custodians may require that information such as the title of the case, the name of the Court, the date of judgment, the citation and the location of the authoritative source of the document (which may be via a URI or web link) is retained on any copy of the judgment distributed under the CC licence. For example, the custodian of High Court judgments could indicate that Attribution wording must be included with each High Court judgment in the following format: "X v Y [<year of publication>] HCA <sequential number>". This way, courts can ensure the adoption of media neutral citation styles, which were advocated for and supported by AustLII and are now commonly used.<sup>167</sup>

<sup>159</sup> See e.g. Creative Commons Attribution (CC BY) 3.0 Australia licence, clause 7:

This Licence and the rights granted to You under this Licence shall terminate automatically upon any breach by You of the terms of the Licence. ...

<sup>160</sup> AShareNet Ltd, Submission 28, at <http://www.ag.gov.au/Documents/CLRC%20Crown%20Copyright%20Submission%20-%20AShareNet.pdf>.

<sup>161</sup> AustLII, Submission 25, at <http://www.ag.gov.au/Documents/CLRC%20Crown%20Copyright%20Submission%20-%20AustLII.pdf>.

<sup>162</sup> Professor Brian Fitzgerald, Submission 17, at <http://www.ag.gov.au/Documents/CLRC%20Crown%20Copyright%20Submission%20-%20Brian%20Fitzgerald.pdf>.

<sup>163</sup> See, for example, Creative Commons Attribution (CC BY) 3.0 Australia licence, clause 4B(b)(i).

<sup>164</sup> See, for example, Creative Commons Attribution (CC BY) 3.0 Australia licence, clause 4B(b)(ii).

<sup>165</sup> See, for example, Creative Commons Attribution (CC BY) 3.0 Australia licence, clause 4A(b) and (e).

<sup>166</sup> See, for example, Creative Commons Attribution (CC BY) 3.0 Australia licence, clause 4B(a).

<sup>167</sup> See AustLII, Style Guide for Citing Primary Legal Materials (webpage last updated 4 August 1999) at [http://www.austlii.edu.au/techlib/standards/style\\_guide.html](http://www.austlii.edu.au/techlib/standards/style_guide.html); and AustLII, AustLII's Recommendations for the

### *Applying the licence*

The common practice for repositories of judgments or courts websites is to have a general copyright statement or policy webpage, a link to which is provided from the footer of the website. An obvious and perhaps easy way to license judgments under CC would be to amend this copyright statement or notice page, to provide that judgments on the website are licensed under a particular CC licence.

However, this measure in itself is not ideal. Under the Attribution condition, the custodian is requiring that licensing information is included with each copy of their judgments as distributed or communicated electronically. If licensing information is not attached to the original file that is made available on the court or repository website, the custodian is effectively requiring each user (who wishes to on distribute or communicate the judgment online) to manually copy the licensing information from the custodian's copyright statement or policy, and attach this information to the relevant file or display it in a prominent place.

Best practice for a custodian of judgments, in addition to amending the website copyright statement or notice, would be to attach the licensing statement and Attribution information to each judgment. This would involve two things. Firstly, the licence icon and licensing information (including URLs to the relevant source, and copyright notice) should be visible on each document.<sup>168</sup> Secondly, the relevant licence metadata (i.e. an electronic watermark with the licensing information)<sup>169</sup> should be embedded in the digital file (for example, Rich Text Format (RTF) or Portable Document Format (PDF) files from AustLII).<sup>170</sup> These measures would ensure that anyone who receives a copy of the judgment will be put on notice of the express right to electronically communicate to the public under the CC licence, and the relevant conditions which apply. The licensing information and embedded metadata would be considered ERMI under the *Copyright Act*, removal of which would constitute infringement.<sup>171</sup>

### *Optional conditions*

Other restrictions on the use of judgments that are commonly imposed, separately or in combination, in the Courts' website copyright statements and policies correspond to the Creative Commons No Derivatives (ND) and Non-Commercial (NC) conditions. Most of the copyright statements and policies require any reproduction of the material to be in an "unaltered form" and limit use to "personal, non-commercial use or use within your organisation".<sup>172</sup> Consistent with these requirements, adoption of a CC licence containing the ND condition<sup>173</sup> restricts the permitted use of a judgment to reproduction and distribution of the document in its unaltered form, while a CC licence

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Preparation of Decisions (webpage last updated 15 October 2002) at <http://www.austlii.edu.au/techlib/standards/guidelines.html>.

<sup>168</sup> The licence icon and licensing text is accessible through the CC licence chooser at <http://creativecommons.org/choose/>.

<sup>169</sup> More information about embedding CC licence metadata is available at [http://wiki.creativecommons.org/Marking\\_Works\\_Technical](http://wiki.creativecommons.org/Marking_Works_Technical). See e.g. XMP (Extensible Metadata Platform) at <http://wiki.creativecommons.org/XMP>.

<sup>170</sup> See <http://www.austlii.edu.au/austlii/help/download.html>.

<sup>171</sup> *Copyright Act 1968* (Cth), s 116B.

<sup>172</sup> Federal Court website, Copyright notice, at <http://www.fedcourt.gov.au/aboutsite/copyright.html>.

<sup>173</sup> That is, the Creative Commons Attribution No Derivatives (CC BY-ND) and Creative Commons Attribution Non-Commercial No Derivatives (CC BY-NC-ND) licences.

with the NC condition<sup>174</sup> restricts use to non-commercial activities of individuals or in-house use within an organisation.

### ***Other baseline conditions***

Under baseline conditions of each CC licence, custodians of judgments are able to prohibit others from asserting or implying that the courts endorsed the licensed uses.<sup>175</sup> This no endorsement condition aligns with provisions in the NSW and NT government copyright waivers, which state that any publication of court judgments should not purport to be an official version. In addition, custodians can prevent the use of Technological Protection Measures (TPM) which unduly restrict access to the material.<sup>176</sup>

The fully drafted CC copyright licences are a readily available solution to ensure that copyright in judgments is exercised and managed in manner that supports wide public dissemination and reuse. The digital distribution right clearly granted by all CC licences is fundamental to their purpose of facilitating the distribution of content online, while recognising, protecting and enforcing copyright owners' interests. The degree of protection, in turn, can be tailored by choosing the appropriate CC licence with optional conditions such as ND and NC.

## **IX. Conclusion**

The combined effect of the provisions of the *Copyright Act 1968* and the licensing statements on the Australian courts' websites is that judgments may be read online, downloaded, reproduced and printed out for personal, non-commercial use or in-house use within an organisation. Beyond those permitted acts, however, the use that can legally be made of judgments remains unclear. Of most immediate concern is the ongoing uncertainty about whether, or the extent to which, digital copies of judgments can be further distributed online to the public, even in the form of a facsimile copy of the original with all copyright notices and identification information intact. For legal practitioners, librarians, teachers, students or members of the public in general, the lack of legal certainty surrounding the use of judgments is palpable.<sup>177</sup>

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<sup>174</sup> That is, the Creative Commons Attribution Non-Commercial (CC BY-NC) and Creative Commons Attribution Non-Commercial No Derivatives (CC BY-NC-ND) licences.

<sup>175</sup> See e.g. Creative Commons Attribution (CC BY) 3.0 Australia licence, clause 4B(f):

For the avoidance of doubt, You may only use the credit required by this clause 4B for the purpose of attribution in the manner set out above. By exercising Your rights under this Licence, You must not assert or imply:

- i. any connection between the Original Author, Licensor or any other Attribution Party and You or Your use of the Work; or
- ii. sponsorship or endorsement by the Original Author, Licensor or any other Attribution Party of You or Your use of the Work,

without their separate, express prior written permission.

<sup>176</sup> See e.g. Creative Commons Attribution (CC BY) 3.0 Australia licence, clause 4A(f):

When You Distribute or publicly perform the Work, You must not impose any technological measures on it that restrict the ability of a recipient of the Work from You to exercise the rights granted to them by this Licence.

<sup>177</sup> See Catherine Crawford, 'Caselaw and Legislation Databases and Copyright Issues in Australia' [2000] *AULawLib* 7.

Copyright in public sector materials (including legal documents) exists primarily to ensure that they are copied and distributed in an authentic and accurate form.<sup>178</sup> It follows that copyright in judgments should, as general rule, be exercised to ensure the integrity and authenticity of distributed copies, rather than to impose restrictions that limit their availability and re-use. Open content licences such as the Creative Commons (CC) licences offer an effective tool for managing copyright, in a manner that is consistent with both ensuring wide access to and dissemination of legal documents and meeting community expectations in the web 2.0 era. The licensing of judgments under CC licences permits them to be displayed, copied and distributed in digital form, while retaining the right to ensure their authenticity and accuracy by enforcing copyright in the event that they are misused or misrepresented.

CC licences are already being used extensively by Australian public sector agencies and institutions, on a wide range of copyright materials. The step of applying CC licences has also been taken with respect to various categories of legal documents, notably legislation on the ComLaw website<sup>179</sup> and parliamentary materials (including Hansard) on the Parliament of Australia website.<sup>180</sup> It is now an appropriate time for the custodians of judgments to take the next – and obvious – step by applying CC licences to ensure the widest dissemination and reuse possible. The most significant reform to be achieved by taking the step of applying CC licences to judgments is that it would explicitly and unambiguously permit the public, online distribution of judgments, in digital form.

The High Court is currently exploring the adoption of CC licensing for its website content.<sup>181</sup> By adopting the Creative Commons Attribution Non-Commercial No Derivatives (CC BY-NC-ND) licence,<sup>182</sup> the High Court could extend permitted use of its judgments to include digital distribution in a manner consistent with existing restrictions that aim to ensure that only unaltered copies of judgments are made, for non-commercial purposes.<sup>183</sup> Other Australian courts, particularly those which currently impose lesser restrictions on the use of their judgments,<sup>184</sup> may consider the benefits of following a similar path to the High Court and assess the advantages of distributing their judgments under an appropriate CC licence. Permitting digital, online distribution will enable web 2.0 technologies and practices to be harnessed in providing access to judgments, so that the *promulgation* of the law advocated by Bentham some two centuries ago may be fully realised in the internet era.

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<sup>178</sup> Anne Fitzgerald, 'Crown Copyright' In Brian Fitzgerald and Benedict Atkinson (eds), *Copyright Future Copyright Freedom* (Sydney University Press, Sydney: 2011), 163, at 178-179, available at <http://eprints.qut.edu.au/41716/>.

<sup>179</sup> See e.g. ComLaw, <http://www.comlaw.gov.au/Content/Copyright>, (content licensed under an Attribution-NonCommercial-ShareAlike (CC BY-NC-SA) 3.0 Australia licence, <http://creativecommons.org/licenses/by-nc-sa/3.0/au/>).

<sup>180</sup> Parliament of Australia website at [http://www.aph.gov.au/Help/Disclaimer\\_Privacy\\_Copyright#c](http://www.aph.gov.au/Help/Disclaimer_Privacy_Copyright#c). The material on the website is licensed under the Attribution-NonCommercial-NoDerivatives (CC BY-NC-ND) 3.0 Australia licence, at <http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

<sup>181</sup> <http://www.hcourt.gov.au/disclaimers/copyright> (accessed on 24 August 2012).

<sup>182</sup> Note that the CC BY-NC-ND licence has been applied to the Parliament of Australia website; see [http://www.aph.gov.au/Help/Disclaimer\\_Privacy\\_Copyright#c](http://www.aph.gov.au/Help/Disclaimer_Privacy_Copyright#c).

<sup>183</sup> The same proposal may be made for the Queensland Courts and West Australian Supreme Court's websites which impose similar restrictions to those on the High Court's website.

<sup>184</sup> Licensing practices under the waivers issued by the New South Wales and the Northern Territory governments most closely approximate the Attribution condition in the CC licences; the Federal Court's copyright notice approximates the Creative Commons Attribution No Derivatives (CC BY-ND) licence; and the conditions of use under the Victorian and Tasmanian Courts' and the Northern Territory Government's website statements approximate the Creative Commons Attribution Non-Commercial (CC BY-NC) licence.

## Appendix A – Website copyright policies

### AustLII Usage policy

<http://www.austlii.edu.au/austlii/copyright.html>

#### 1. General principles

- e) AustLII places particular restrictions upon the ways in which case-law documents on AustLII can be copied and used. AustLII specifically blocks all spiders and other automated agents from accessing its case-law via the Robots Exclusion Standard. AustLII's policy is the same as nearly all similar organisations internationally. The reasons for this policy include:
- the need to balance personal privacy against open access, particularly in relation to general purpose search engines;
  - the need to allow compliance with take-down, anonymisation and other modification requests from courts and parties; and
  - the need to comply with licence conditions under which data has been provided to AustLII.

#### 2. End Use

- (a) Individual end-users of the AustLII system are free to access, copy and print materials for their own use in accordance with copyright law;(b) In relation to case law, this is subject to (1)(e) above.

#### 3. Copyright in content on AustLII

- (a) AustLII is not the copyright owner in the source documents published on AustLII and is not able to give permission for reproduction of those source documents. (b) AustLII claims copyright in all value-added content that it adds to source documents (including hypertext mark-up, and alternative citations). On request, AustLII usually gives permission for reproduction of examples of this content for teaching, training or similar purposes.”

### High Court

<http://www.hcourt.gov.au/disclaimers/copyright>

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High Court of Australia  
Parkes Place  
Parkes ACT 2600  
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The High Court is currently exploring the adoption of an appropriate Creative Commons licence for content on this website.

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<<http://www.fedcourt.gov.au/aboutsite/copyright.html>>

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## **Queensland Courts**

<<http://www.courts.qld.gov.au/u/copyright>>

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Last reviewed 21 June 2011 Last updated 28 March 2012”

### **New South Wales Lawlink - Judgments**

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Email: [FOI@courts.sa.gov.au](mailto:FOI@courts.sa.gov.au)

Telephone: (08) 8226 1288

Facsimile: (08) 8226 0137 ”

### **Western Australia Supreme Court**

<http://www.supremecourt.wa.gov.au/content/copyright.aspx>

[Supreme Court]

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## Appendix B – NSW Government Notice: Copyright in judicial decisions

**Source:** Copyright Law Review Committee, *Crown Copyright – Issues Paper*, February 2004, Appendix B, available at [http://www.ag.gov.au/agd/WWW/clrHome.nsf/Page/RWPE3A8E257D1641333CA256E2D007C541F#\\_Toc62466729](http://www.ag.gov.au/agd/WWW/clrHome.nsf/Page/RWPE3A8E257D1641333CA256E2D007C541F#_Toc62466729) (accessed on 9 December 2011).

The Hon John Hannaford MLC, Attorney General, 'Notice: Copyright in judicial decisions' *NSW Government Gazette* No.23 (3 March 1995) p. 1087

### Notice: Copyright in judicial decisions

Recognising that the Crown has copyright in decisions of the courts and tribunals of New South Wales, including but not limited to prerogative rights and privileges of the Crown in the nature of copyright, and that it is desirable in the interests of the people of New South Wales that access to such decisions should not be impeded except in limited special circumstances:

I, The Honourable John Hannaford, Attorney General for the State of New South Wales, make and publish this instrument on behalf of the State of New South Wales.

#### Definitions

1. In this instrument:

"authorisation" means the authorisation granted by this instrument;

"copyright" includes any prerogative right or privilege of the Crown in the nature of copyright;

"Council" means the Council of Law Reporting established by the Council of Law Reporting Act 1969 of New South Wales;

"judicial decision" means:

- a. a judgment, order or award of a State court; or
- b. the reasons for any judgment, order or award given by the State court or a member of the State court,

that has or have been publicly delivered, made or given;

"State" means the State of New South Wales, and includes the Crown in right of the State of New South Wales;

"State court" means:

- a. any court constituted or continued by or under a law of New South Wales; or
- b. any tribunal or other body constituted or continued by or under a law of New South Wales and exercising judicial or industrial arbitration functions.

#### Authorisation

2. Any publisher is by this instrument authorised to publish and otherwise deal with any judicial decision, subject to the following conditions:

- a. copyright in judicial decisions continues to reside in the State;
- b. the State reserves the right at any time to revoke, vary or withdraw the authorisation if the conditions of its grant are breached and otherwise on reasonable notice;
- c. any publication of material pursuant to the authorisation must not indicate directly or indirectly that it is an official version of the material or that it is a version of the material published by or for the Council or any other law reporting agency of the State;
- d. any publication of material pursuant to the authorisation must not:
  - o include any headnote or other summary of a judicial decision (or any summary of submissions) prepared by or for the Council or other law report agency, except with the further authority of the Council or agency; or
  - o reproduce any footnotes, comments, case lists, cross-references or other editorial material in any report of a judicial decision prepared by or for the Council or agency, except with the further authority of the Council or agency;
- e. the arms of the State must not be used in connection with the publication of material pursuant to the authorisation, except with the further authority of the Governor (acting with the advice of the Executive Council) or of the Attorney General;
- f. any publication of material pursuant to the authorisation is required to be accurately reproduced in proper context and to be of an appropriate standard.

#### Non-enforcement of copyright

3. The State will not enforce copyright in any judicial decision to the extent that it is published or otherwise dealt with in accordance with the authorisation. For this purpose, the authorisation has effect as a licence binding on the State.

#### Revocation, variation or withdrawal of authorisation

4. Any revocation, variation or withdrawal of the authorisation may be effected generally or in relation to specified publishers or specified classes of publishers. The authorisation may also be revoked, varied or withdrawn in relation to specified judicial decisions or specified classes of judicial decisions. Any such revocation, variation or withdrawal may be by notice in the *New South Wales Government Gazette*, or by notice to any particular publisher, or in any other way as determined from time to time by the Attorney General.

#### Unauthorised Documents Act 1922

5. Attention is drawn to the *Unauthorised Documents Act 1922* of New South Wales, which restricts the use of the State coat of arms.

#### Copyright Act 1968 of the Commonwealth

6. Nothing in this instrument affects the rights of any person (other than the State) under the *Copyright Act 1968* of the Commonwealth. In particular, attention is drawn to section 182A of that Act, which gives any person the right to make one copy, by reprographic reproduction, of a judicial decision.

Dated at Sydney this 28<sup>th</sup> day of February, 1995.

The Hon John Hannaford  
Attorney General

The Hon JW Shaw QC, MLC, Attorney-General, 'Notice: Copyright in legislation and other material'  
*NSW Government Gazette* No. 110 (27 September 1996) p. 6611

## **Appendix C - NT Government and Courts copyright policy**

### **DEPARTMENT OF JUSTICE SOLICITOR FOR THE NORTHERN TERRITORY**

Northern Territory Copyright policy concerning court judgments - as published in the Northern Territory Government Gazette, G48, 9 December 1998

#### **NORTHERN TERRITORY OF AUSTRALIA COPYRIGHT POLICY IN JUDGMENTS OF THE COURTS OF THE NORTHERN TERRITORY**

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- the written reasons for any such judgment, order or award of a Northern Territory court or a member of a Northern Territory court that has been publicly delivered, made or given.

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- the publication must not indicate directly or indirectly that it is an official version of the material;
- the arms of the Northern Territory must not be used in connection with the publication of the material; and
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