

Catherine Bond*

**CROWN OWNERSHIP OF COPYRIGHT:
THE OFFICIAL HISTORY OF AUSTRALIA IN THE
WAR OF 1914–1918 AS A CASE STUDY**

ABSTRACT

Since 1912 Australian copyright statutes have included specific provisions relating to Crown and government ownership of copyright material, though such ownership can also be acquired through either the prerogative right or the general ownership provisions of the relevant statute. However, quite diverse terms of copyright apply according to the different statutory provisions — 50 years for works protected under the specific Crown copyright sections as opposed to life of the author plus 70 years under the general provisions. This article examines the significant ramifications of the gaps between the general and Crown ownership provisions of past and present copyright legislation, employing a case study that exposes the difficulties this can cause. Through an examination of Commonwealth ownership of copyright in *The Official History of Australia in the War of 1914–1918*, published as 12 volumes between 1921 and 1942, this article reveals the significant uncertainty around the application of this dichotomy of ownership continuing to this day. It posits that, despite claims by the Australian War Memorial that copyright continues to subsist in the series, even on a broad interpretation of the law at least three of the volumes are today in the public domain.

I INTRODUCTION

In its 2005 *Crown Copyright* report,¹ the Copyright Law Review Committee ('CLRC') made the following comments on government ownership of copyright material under the *Copyright Act 1968* (Cth):

* Senior Lecturer, Faculty of Law, UNSW Sydney; Visiting Research Fellow, Faculty of Business and Law, Swinburne University of Technology. With thanks to Kathy Bowrey and Michael Handler for their assistance on aspects of this work; Marie Hadley and Georgina Riley for editorial assistance; Nigel Bond for his comments on drafts; and Swinburne Law School, where the bulk of this article was completed. This work was in part supported by the Australian Research Council Grant DP14010017.

¹ Despite having been released 14 years ago at the time of publication of this article, the Commonwealth Government is yet to formally respond to any of the recommendations made by the Copyright Law Review Committee ('CLRC') in this report. However, subsequent legislative amendments indicate a rejection of one aspect of one

3.07 There are three possible sources of government ownership of copyright under the *Copyright Act*:

- the general ownership provisions, particularly those which vest copyright in employees' work in their employer;
- the Crown prerogative in the nature of copyright; and
- the special Crown ownership provisions in Part VII of the Act.

3.08 These categories are not necessarily mutually exclusive: there is authority to suggest that a government may own copyright in a work under either the general provisions of the Act or under the Part VII provisions.²

As support for that final statement the CLRC cited the decision of the Supreme Court of New South Wales in *Director-General of Education v Public Service Association of New South Wales*,³ involving infringement of government-owned copyright in a report produced in the NSW Department of Education. Justice McLelland, considering the issues of subsistence and ownership of the copyright in question pursuant to the *Copyright Act 1968* (Cth), simply noted:

Prima facie, the Report is an unpublished original literary work (in the sense in which that expression is used in the *Copyright Act 1968* (Cth)) in which copyright subsists by virtue of s 32(1) of that Act, and the State of New South Wales (or more formally the Crown in right of the State) is the owner of such copyright pursuant either to s 35(6) or to s 176 of that Act.⁴

of the recommendations: from 1 January 2019, s 180 of the *Copyright Act 1968* (Cth) caps the duration at '50 years after the calendar year in which the material is made': see *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) sch 2 item 12. Removing perpetual copyright for unpublished works of this nature is a rejection of one element of Recommendation 2. See CLRC, *Crown Copyright* (Report, 2005) xxiii, Recommendation 2 <<http://www.austlii.edu.au/au/other/clrc/18.pdf>>.

² CLRC (n 1) [3.07]–[3.08] (citation omitted). The first and third sources are the focus of this article. For further information on the prerogative right of the Crown in the nature of copyright see CLRC (n 1) ch 6; Ann Monotti, 'Nature and Basis of Crown Copyright in Official Publications' (1992) 14(9) *European Intellectual Property Review* 305. Indeed, a very different duration issue arises in relation to the prerogative right of the Crown in the nature of copyright, given it is perpetual in nature: see CLRC (n 1) [6.01].

³ (1985) 79 FLR 15.

⁴ Ibid 18–19. See also *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 54; *Commonwealth v Oceantalk Australia Pty Ltd* (1998) 79 FCR 520, 524 ('Oceantalk').

In a similar vein, in *Insight SRC IP Holdings Pty Ltd v Australian Council for Educational Research Ltd*,⁵ a 2012 decision involving copyright ownership and infringement in a questionnaire, Besanko J commented:

It is clear, I think, that both ss 176(2) and 35(6) may apply to the one factual situation. In some circumstances, s 176(2) may have a wider operation than s 35(6). For example, s 176(2) may apply to a contractor. On the other hand, a work may be made in pursuance of the terms of a contract with the Crown within s 35(6), but not be made under the direction or control of the Crown within s 176(2).⁶

Since 1912 Australian copyright statutes have included specific provisions in relation to Crown and government ownership of copyright material, of the type discussed by the CLRC and in these two judgments. Pursuant to s 18 of the *Copyright Act 1911* (Imp), in force in Australia by virtue of s 8 of the *Copyright Act 1912* (Cth), the Commonwealth or a state or territory government would own copyright in ‘any work ... prepared or published by or under the direction or control of His Majesty or any Government department’.⁷ However, Crown ownership of copyright did not rely solely on that provision, a position that continues to this day.⁸

Under the general provisions of the *Copyright Act 1968* (Cth), copyright may subsist in a work pursuant to s 32(1) or (2).⁹ While the author is generally the first owner of the copyright,¹⁰ an author may prospectively or retrospectively assign copyright to the government,¹¹ or if the work is produced by an employee, as employer the government would be the owner by virtue of s 35(6).¹² At the same time, if a work is ‘made by, or under the direction or control of, the Commonwealth or a State’ and copyright would not otherwise subsist in that work, it will be protected under s 176(1).¹³ A government will also own copyright in works ‘made by, or under ...

⁵ (2012) 292 ALR 741 (*‘Insight’*).

⁶ *Ibid* 750. Justice Besanko ultimately found that neither ss 35(6) nor 176(2) applied in the circumstances: see *ibid* 759–61. On appeal, the Full Court of the Federal Court overturned certain findings made by Besanko J in relation to damages but affirmed his Honour’s interpretation of the ownership issues. See *Insight SRC IP Holdings Pty Ltd v Australian Council for Educational Research Ltd* (2013) 101 IPR 484, 493–4.

⁷ *Copyright Act 1912* (Cth) sch 1, *Copyright Act 1911* (Imp) 2 Geo 5 c 46, s 18 (*‘Copyright Act 1911* (Imp)’). Section 18 was silent on the subsistence of copyright, in contrast to one of the equivalent provisions today: see *Copyright Act 1968* (Cth) s 176(1).

⁸ See, eg, *A-G (NSW) v Butterworth & Co (Australia) Ltd* (1938) 38 SR (NSW) 195, which confirmed the existence of the prerogative right of a government to print and publish legislation.

⁹ *Copyright Act 1968* (Cth) ss 32(1)–(2).

¹⁰ *Ibid* s 35(2).

¹¹ *Ibid* ss 196(1), 197(1).

¹² *Ibid* s 35(6).

¹³ On the application of this provision: see *Oceantalk* (n 4).

[its] direction or control’ pursuant to s 176(2).¹⁴ If first publication of the work is undertaken ‘by, or under the direction or control of, the Commonwealth or the State’, then copyright will also be owned by the relevant government pursuant to the ownership provision in s 177.¹⁵ There may be multiple ownership avenues for the same copyright.

Given the myriad ways through which the Commonwealth or a state or territory government can own and assert ownership of copyright, this has generally been a non-controversial issue. Greater discussion has arisen around whether copyright *should* subsist in a variety of government-produced materials,¹⁶ and avenues for increasing access to and reuse of such material.¹⁷ However, this lack of controversy and focus on other areas has resulted in a failure to examine a number of important gaps that exist between the general and Crown copyright provisions. The most significant of these relates to the duration of protection.

Consider the following example. Dr A, an Australian citizen and independent consultant with a background in the university sector, is approached by State Government B to write a report on Issue C. After negotiations, Dr A and State Government B enter into a written contract, which details the area of the report (Issue C); the length of the report (400 pages); the time Dr A has to write the report (three years); the annual salary to be paid to Dr A; and stipulates that ‘State Government B will own copyright in the report’. Beyond these matters, the content, creation and completion of the report are entirely at the discretion of Dr A, although a number of politicians and high-level public servants provide feedback on the report during its writing. After three years the report has been completed and State Government B organises for Publisher D, a privately-run company, to publish the report. It is released on the website for State Government B, on the personal website of Dr A and in hard copy on the same day at 10am.

The *Copyright Act 1968* (Cth) would apply to this work as follows. On the one hand, copyright would subsist in the report under the general provisions, as an unpublished work, as it is being drafted.¹⁸ A valid assignment of that copyright to the government has also occurred.¹⁹ However, on the other hand, the elements of the general Crown

¹⁴ *Copyright Act 1968* (Cth) s 176(2).

¹⁵ *Ibid* s 177.

¹⁶ 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 *Journal of Information, Law and Technology* <https://warwick.ac.uk/fac/soc/law/elj/jilt/1996_3/bannister/>; CLRC (n 1) [4.16]–[4.89]; Catherine Bond, ‘Reconciling Crown Copyright and Reuse of Government Information: An Analysis of the CLRC Crown Copyright Review’ (2007) 12(3) *Media and Arts Law Review* 343, 346–50.

¹⁷ See generally Judith Bannister, ‘Open Government: From Crown Copyright to the Creative Commons and Culture Change’ (2011) 34(3) *University of New South Wales Law Journal* 1080.

¹⁸ *Copyright Act 1968* (Cth) s 32(1), then upon publication s 32(2).

¹⁹ *Ibid* ss 196–7.

copyright provision, s 176, would also apply, regardless of the existence of the agreement.²⁰ In *Copyright Agency Ltd v New South Wales*,²¹ Emmett J, in addition to defining each of these terms, considered that the phrase ‘made by, or under the direction or control of, the Commonwealth or a State’ may come down to the following analysis:

The question is whether the Crown is in a position to determine whether or not a work will be made, rather than simply determining that, *if it is to be made at all*, it will be made in a particular way or in accordance with particular specifications.²²

Given that the report has also been first published by State Government B, then the section providing for Crown ownership of works first published by government, section 177, would also apply.²³ Again, this would operate regardless of the contract between Dr A and State Government B. Thus, there are three possible avenues for ownership: the general provisions of the Act, ss 176(2) and 177.²⁴

Further examination of the applicable section is required, however, in order to determine the relevant duration of copyright.²⁵ If copyright in a work is owned by the government under either sections 176(2) or 177, then, today, following amendments to section 180 made by the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth), the applicable period of copyright is ‘50 years after the calendar year in which the material is made’.²⁶ If it is owned by virtue of the

²⁰ Ibid s 176(1)–(2).

²¹ (2007) 159 FCR 213.

²² Ibid 238 (emphasis in original).

²³ *Copyright Act 1968* (Cth) s 177.

²⁴ It is worth noting that s 182(1) of the *Copyright Act 1968* (Cth) reads as follows:

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

However, as the CLRC noted, there is still confusion as to the relationship between Parts III, IV and VII of the *Copyright Act 1968*: see CLRC (n 1) xxii.

²⁵ As the CLRC noted, ‘[t]he duration of government ownership of copyright varies according to which of the statutory provisions or the prerogative right in the nature of copyright applies’: see CLRC (n 1) [3.15].

²⁶ Prior to 1 January 2019, pursuant to s 180(1)(b) copyright would expire at 50 years from first publication; under the *Copyright Act 1968* (Cth), as enacted, s 180(1)(b) provided copyright ‘continue[d] to subsist, until the expiration of fifty years after the expiration of the calendar year in which the work was first published’. Under the *Copyright Act 1911* (Imp) (n 7) s 18 the relevant period of protection was also 50 years from first publication. Section 180 was amended pursuant to the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth), changing the triggering date of the duration of copyright; see discussion in (n 1) above. With regard to the expiration of copyright at the ‘calendar year’ mark, a similar proviso was also included in the general duration provisions as enacted and continues today: see

assignment, the period stipulated in s 33(2) item 1 would apply: life of the author plus 70 years after the calendar year in which Dr A dies.²⁷ These are two very different terms of copyright that, to quote Besanko J, ‘apply to the one factual situation’. There is no legislative or judicial guidance as to how these differences should be resolved; such consideration would only occur if the matter of duration was in issue, and thus has not occurred to date.²⁸ More generally, although the position remains unclear, it is assumed that the Crown copyright provisions would trump the application of the general provisions; their very existence suggests that this would be the case.²⁹ Yet, in the circumstances identified here, State Government B has a perverse incentive to seek to deny the application of sections 176(2) or 177 — if the specific Crown copyright provisions do not apply, then it can take advantage of the longer period of protection provided by virtue of Dr A’s assignment.

This example highlights the very real issues that can occur in relation to duration of copyright and government ownership of that copyright. Once additional authors, additional works and shifting dates of publication are factored in, such analysis becomes even more perplexing. Yet, this is what has occurred in the case of one of the most significant works of Australian military, political and social history: *The Official History of Australia in the War of 1914–1918* (‘the *Official History*’).³⁰ It is this example that will be adopted as a case study to further illustrate the complexities existing in this area and the unresolved issues remaining in relation to copyright in this work to this day.

In 1919, following his time as the Official War Correspondent for Australia, Charles Edwin Woodrow Bean was appointed Official Historian and tasked with producing and editing a 12 volume account of the Australian involvement in WWI.³¹ Bean was to write six of the 12 volumes; produce a pictorial volume; and edit the remaining five volumes, which would be penned by different authors. Although Bean predicted the full *Official History* could be written and published within three or so years,

Copyright Act 1968 (Cth) s 33(2), as enacted. This article adopts the shorthand ‘life of the author plus 50 years’ and ‘life of the author plus 70 years’ for the purposes of simplicity.

²⁷ *Copyright Act 1968* (Cth) s 33(2) item 1.

²⁸ In *Oceantalk* (n 4) 572, 573–4 Burchett J ordered the Commonwealth, in its reliance on section 176, to provide particulars as to the originality and current copyright status of certain charts. It appears that the matter did not proceed.

²⁹ In recommending ‘that the special Crown subsistence and ownership provisions should be repealed’, one of the reasons given by the CLRC was that these provisions give the government ‘a privileged position compared with other copyright owners’: see CLRC (n 1) xxi. This article highlights circumstances where the government gains a privileged position from the general ownership provisions.

³⁰ The *Official Histories* can be accessed in full at: ‘Official History of Australia in the War of 1914–1918’, *Australian War Memorial* (Web Page) <<https://www.awm.gov.au/collection/C1416844>>.

³¹ See KS Inglis, ‘Bean, Charles Edwin (1879–1968)’, *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/bean-charles-edwin-5166>>.

Volume I was first published in 1921 and the last volume to be released, Volume VI, was published in 1942. The other ten volumes were released in the intervening period. Multiple editions of each volume were also subsequently published, the last being new editions of Volumes II and VII in 1944.

All involved in the production of the *Official History* — including Bean, the authors of each individual volume, publisher Angus & Robertson and even the printer of the books — had to sign comprehensive contracts with the Commonwealth of Australia. In the case of the Official Historian and the individual authors, the clauses of these contracts detailed delivery dates for manuscripts; payment of fees; copyright ownership of the volumes of the *Official History*; responsibility in the case of actions for libel; and, in Bean's case, a provision explicitly stating the volumes would not be subject to censorship. Despite the rigour of these agreements the 21-year writing of the *Official History* was a legally fraught experience; there were multiple calls for legal action and, in one instance, the threat of an injunction from the High Court of Australia.³²

While the popularity of Bean and the *Official History* has changed in the nearly 100 years that have elapsed since the publication of Volume I, today the series is seen as one of the founding documents of the concepts of the 'Anzac spirit' and the 'Anzac legend'. With the exception of the photographic volume (Volume XII), all volumes of the *Official History* appear in full on the website of the Australian War Memorial ('AWM').³³ That website also features the following copyright notice:

The Australian War Memorial holds copyright for the text, maps and photographs contained in the Official Histories. Reproduction is allowed for private use only. For commercial reproduction, the permission of the Memorial must be obtained.³⁴

³² This threat was made by Seaforth Simpson MacKenzie, author of Volume X of the *Official History* and at that time the Principal Registrar of the High Court. See Letter from CEW Bean to the Secretary, Department of Defence, 9 August 1926 (Australian War Memorial, AWM38, 3DRL 7953/13 PART 2).

³³ See 'Official History of Australia in the War of 1914–1918', *Australian War Memorial* (Web Page) <<https://www.awm.gov.au/collection/C1416844>>.

³⁴ 'First World War Official Histories Copyright Statement', *Australian War Memorial* (Web Page) <https://www.awm.gov.au/official-histories/first_world_war/copyright>. Despite that statement, and while not strictly at issue in this article, it is unclear whether the Commonwealth of Australia or the AWM specifically is the current owner of copyright in the *Official History*. While the website cited indicates the 'Australian War Memorial holds copyright for the texts, maps and photographs contained in the Official Histories', another AWM page previously indicated that the *Official History* is subject to 'Commonwealth of Australia copyright'. See 'First World War Official Histories', *Australian War Memorial* (Web Page, 27 August 2018) <<https://www.awm.gov.au/collection/C1416531>>. In its 'Copyright' section, 'Commonwealth of Australia copyright' and 'Australian War Memorial copyright' are defined as two different concepts. See 'Copyright', *Australian War Memorial* (Web Page) <<https://www.awm.gov.au/about/organisation/corporate/copyright>>. While copyright in photographs

The existence of this statement indicates that the AWM believes copyright continues to subsist in the volumes of the *Official History*. However, when the series was being penned and published, section 18 of the *Copyright Act 1911* (Imp), discussed above, was in force. Section 18 provided that copyright would be owned by a government where a work was ‘prepared or published by or under the direction or control of His Majesty or any Government department’.³⁵ If that section applied, then, regardless of the existence of any contractual provisions, copyright should only have subsisted in the volumes of the series for 50 years from first publication. Although the *Copyright Act 1912* (Cth) was repealed pursuant to the *Copyright Act 1968* (Cth),³⁶ this application would be maintained by sections 176 and 177, in addition to the 50-year duration under section 180.

Still, this cannot be the case if the AWM considers it still ‘holds copyright for the text, maps and photographs contained in the Official Histories’. This interpretation suggests that the longer period of protection applies to the volumes of the *Official History* and that the AWM is seeking to rely on that longer term — at first, life of the author plus 50 years,³⁷ then life of the author plus 70 years following Australia’s 2005 term extension.³⁸

This work unravels the copyright status of the *Official History*, using this as a case study for a broader evaluation of the complex interrelationship of the general and Crown copyright provisions contained in past and present Australian copyright legislation. In undertaking this analysis, this article uses archival material including documents and correspondence today fittingly collated and held by the AWM,³⁹ produced by Bean, the authors of each individual volume and members of government, including multiple Ministers for Defence. These materials shed light on how areas of law,

and maps (see below (n 41) and accompanying text), which constitute separate items, could feasibly be separately owned by the AWM, it is unclear how copyright in the ‘text’ of the *Official History* could be owned without also holding copyright in the collective series.

³⁵ *Copyright Act 1911* (Imp) (n 7) s 18.

³⁶ *Copyright Act 1968* (Cth) ss 5(2), 6.

³⁷ *Copyright Act 1911* (Imp) (n 7) s 3; *Copyright Act 1968* (Cth) s 33(2), as enacted.

³⁸ *Copyright Act 1968* (Cth) s 33(2), as amended by *US Free Trade Agreement Implementation Act 2004* (Cth) sch 9 item 120. See also *Copyright Act 1968* (Cth) s 33(2), as amended by *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) sch 2 item 4.

³⁹ In 1922 then-Director of the Australian War Museum, John Treloar, recognised that as Official Historian Bean was making history as much as he was writing it, and subsequently requested Bean donate all material, including drafts and related correspondence, to the Australian War Museum. Bean agreed. See Letter from JL Treloar to CEW Bean, 17 October 1922; letter from CEW Bean to JL Treloar, 19 October 1922 (Australian War Memorial, AWM 38, 3DRL 6673/245). See also Michael Piggott, *A Guide to the Personal, Family and Official Papers of CEW Bean* (Australian War Memorial, 1983).

legislation and specific statutory provisions were understood to apply, or in fact misunderstood, in the context of the issues under consideration.⁴⁰

This article proceeds as follows. Part II provides a brief history of the *Official History*, considering the conversation that initiated the creation an official history of the Australian experience in WWI; the development of the series; brief details of the contracts signed by the authors; an overview of issues encountered in the first few years of production; and a list of the published volumes. While the *Official History* itself is comprised of 12 volumes, this article examines the issues relating to the 11 text-based volumes and excludes a consideration of the primarily illustrated volume, Volume XII, the *Photographic Record of the War*.⁴¹

Part III then examines the issue of copyright. Although Bean originally believed he would own the copyright in the *Official History* it was eventually decided that this right would be owned by the Commonwealth of Australia. This Part examines the clauses contained in the author and publisher contracts; the statutory copyright provisions contained in the 1911 and 1968 Acts; how the government viewed the applicable provisions; and whether a case can be made that the Crown copyright-specific provisions applied to the *Official History*. Part III then analyses alternative Commonwealth ownership and the copyright status of the volumes today. It establishes that, despite the claim of the AWM that the series is still in copyright, three of the volumes have entered the public domain. Part IV concludes this article.

II A BRIEF HISTORY OF THE *OFFICIAL HISTORY*

It is worth briefly exploring the concept of an ‘official war history’ before examining the making of the *Official History* in more detail. The AWM provides the following summary of what constitutes an ‘official history’, why such a project may be undertaken and the boundaries of the exercise:

Official histories are ‘official’ in the sense they are commissioned by government as the national record of Australia’s involvement in particular conflicts. The official historians are granted unrestricted access to closed period and security classified government records. The Australian official war histories contain the authors’ own interpretations and judgements and do not follow any official or government line.

⁴⁰ Unless otherwise stated all archival material cited in this article, held by the AWM, National Archives of Australia (‘NAA’) and State Library of New South Wales (‘SLNSW’), has been viewed directly by the author.

⁴¹ This article does not consider the status of the individual ‘maps and photographs contained in the Official Histories’ that the AWM also mentions in the ‘First World War Official Histories Copyright Statement’ (see discussion at n 34). It is the case that copyright could have subsisted separately in these items prior to their inclusion in the *Official Histories*, but consideration of copyright in these items would require a more detailed examination of these individual elements.

The works are the first published official record of Australia's involvement in war.⁴²

To date, official histories of Australia's involvement in WWI, WWII, the Korean War and the South-East Asia conflicts have all been published, with volumes in the series on peacekeeping and post-Cold War operations either in print or being produced. A separate history of Australian involvement in East Timor, Afghanistan and Iraq is currently in development.⁴³

The history of these official war histories, and the *Official History* under consideration here, begins in September 1914, shortly after Bean has been appointed as the Official War Correspondent for the Australian Imperial Force (the 'AIF'). At the commencement of hostilities Bean, a journalist and author, wrote to then-Minister for Defence, Senator Edward Millen, requesting that the Senator permit Bean to document the AIF campaign.⁴⁴ Although the Minister agreed, this plan did not come to fruition. But another opportunity arose when, following the 1914 federal election the Commonwealth Government contacted the Australian Journalists Association requesting assistance with the appointment of an Official War Correspondent.⁴⁵ Bean was appointed through a balloting process and in mid-September 1914 commenced this new role.⁴⁶

As part of a series of initial meetings, Bean spoke with the new Minister for Defence, Senator George Foster Pearce,⁴⁷ and it was during this discussion that Senator Pearce asked whether Bean would consider writing the history of Australia's involvement in the war; Bean agreed.⁴⁸ John Connor sees approaching Bean specifically to act as post-war historian as a calculated decision on the part of Pearce, illustrating that the Senator 'realised that the AIF correspondent could play a role in his long-term desire to develop distinctly Australian national traditions.'⁴⁹ Given the legacy that emerged from the *Official History*, Bean ultimately fulfilled this duty. Indeed, early drafts of Bean's work for the *Official History* likely even exceeded Pearce's patriotic

⁴² 'Official Histories', *Australian War Memorial* (Web Page) <<https://www.awm.gov.au/learn/understanding-military-history/official-histories>>.

⁴³ Ibid.

⁴⁴ Martin Ball, 'The Story of the Story of Anzac' (PhD Thesis, University of Tasmania, 2001) 132.

⁴⁵ Ibid 132–3.

⁴⁶ Ibid 133.

⁴⁷ See B Beddie, 'Pearce, Sir George Foster (1870–1952)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/pearce-sir-george-foster-7996>>.

⁴⁸ See CEW Bean, 'The Writing of the Australian Official History of the Great War: Sources, Methods and Some Conclusions' (1938) 24(2) *Royal Australian Historical Society Journal and Proceedings* 85, 85 ('The Writing of the Australian Official History'); Ball (n 44) 133.

⁴⁹ John Connor, *Anzac and Empire: George Foster Pearce and the Foundations of Australian Defence* (Cambridge University Press, 2011) 47.

hopes and expectations: a note by publisher George Robertson⁵⁰ on an early draft of Bean's first chapter for Volume I notes that Bean included 'Australia [or] Australians 18 times in 36 33 lines!'⁵¹

From the early stages of the war, while working as Official War Correspondent, Bean was already imagining what the planned history would ultimately entail,⁵² contacting the Minister for Defence a number of times during the war with proposals for the history.⁵³ However, it is clear that Bean's goals, plans and suggested remuneration for the work changed as it became increasingly apparent that the history would need to be much more expansive than what was originally envisaged. This is understandable given how initial concepts of the conflict itself changed as the years progressed. Speaking in 1938, Bean noted that 'I thought then [in 1914] of a small one-volume work'.⁵⁴ That one volume became three.⁵⁵ Three became 'six or seven'.⁵⁶ By the time Bean submitted a full proposal for the series to the government, in August 1919, 12 individual volumes were listed.⁵⁷ With George Swinburne, Secretary of the Department of Defence,⁵⁸ Bean had also approached a number of international and Australian-based publishers to facilitate the publication of the multiple manuscripts; it was ultimately felt that, given the significance of the work to Australia, it should be published and printed by Australian companies.⁵⁹

Although the Commonwealth Government took its time in finalising the contracts and details of the series — at a number of points Bean threatened to walk away from the work and sell the 300 notebooks he had filled during the war — by the end of

⁵⁰ See Anthony Barker, 'Robertson, George (1860–1933)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/robertson-george-8233>>.

⁵¹ 'Angus & Robertson Papers Relating to C.E.W. Bean's History of World War I, 1919–1933' Item 1, 'Chapter I. Australia's Entry into the War' (State Library of New South Wales, MLMSS 7309) 2 (correction in original).

⁵² Ball (n 44) 133; see also Letter from CEW Bean to Commander Pethebridge, 16 October 1914 (Australian War Memorial, AWM38, 3DRL 6673/270) 3.

⁵³ Letter from CEW Bean to Senator George Pearce, 24 November 1916 (Australian War Memorial, AWM38, 3DRL 6673/12); Letter from CEW Bean to Senator George Pearce, 14 December 1917, headed 'First Draft' (Australian War Memorial, AWM38, 3DRL 6673/39); Letter from CEW Bean to Senator George Pearce, 14 December 1917, headed 'Final Draft' (Australian War Memorial, AWM38, 3DRL 6673/39); 'Australian Records of the War', 14 August 1919 (Australian War Memorial, AWM38, 3DRL 6673/11).

⁵⁴ Bean, 'The Writing of the Australian Official History' (n 48) 85.

⁵⁵ Letter from CEW Bean to Senator George Pearce, 24 November 1916 (n 53).

⁵⁶ Letter from AH Dakers to CEW Bean, 6 November 1918 (Australian War Memorial, AWM38, D3) 1.

⁵⁷ 'Australian Records of the War' (n 53) 1.

⁵⁸ See Alison Patrick, 'Swinburne, George (1861–1928)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/swinburne-george-8729>>.

⁵⁹ Letter from Cassell & Company Ltd to CEW Bean, 10 December 1918 (Australian War Memorial, AWM38, D3); 'Australian Records of the War' (n 53) 2–4.

1919 official work on the *Official History* was officially underway.⁶⁰ Bean was to be responsible for writing the first six volumes of the series, in addition to collating the photographic volume,⁶¹ with Henry Somer Gullett,⁶² Frederic Morley Cutlack,⁶³ Arthur Wilberforce Jose,⁶⁴ Seaforth Simpson MacKenzie⁶⁵ and Thomas William Heney⁶⁶ to each write one of the five remaining volumes, on issues ranging from the Australian navy to the Australian home front experience. Heney later resigned on account of illness and was replaced by Ernest Scott.⁶⁷

As part of these arrangements, Bean, Gullett, Cutlack, Jose, MacKenzie, Heney and then Scott each entered into contracts with the Commonwealth of Australia, with multiple drafts and copies of these agreements today held by the National Archives of Australia, the State Library of New South Wales and in Bean's files at the AWM.⁶⁸

-
- ⁶⁰ See generally Letter from Charles Bean to the Acting Minister for Defence, 28 September 1919 (Australian War Memorial, AWM38, 3DRL 6673/39); Letter from Charles Bean to the Secretary for Defence, 7 October 1919 (Australian War Memorial, AWM38, 3DRL 6673/39).
- ⁶¹ 'Australian Records of the War' (n 53) 1.
- ⁶² See AJ Hill, 'Gullett, Sir Henry Somer (Harry) (1878–1940)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/gullett-sir-henry-somer-harry-448>>.
- ⁶³ See AJ Sweeting, 'Cutlack, Frederic Morley (1886–1967)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/cutlack-frederic-morley-5859>>.
- ⁶⁴ See Ross Lamont, 'Jose, Arthur Wilberforce (1863–1934)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/jose-arthur-wilberforce-6885>>.
- ⁶⁵ See Ronald McNicoll, 'MacKenzie, Seaforth Simpson (1883–1955)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/mackenzie-seaforth-simpson-7390>>.
- ⁶⁶ See Ken Stewart, 'Heney, Thomas William (1862–1928)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/heney-thomas-william-6635>>.
- ⁶⁷ See Michael McKernan, 'Introduction to University of Queensland Press Edition' in Ernest Scott, *The Official History of Australia in the War of 1914–1918 — Volume XI: Australia During the War*, ed Robert O'Neill (University of Queensland Press, 1989 ed, 1989) xxxi, xxxiii–iv; see also Kathleen Fitzpatrick, 'Scott, Sir Ernest (1867–1939)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/scott-sir-ernest-8367>>.
- ⁶⁸ See generally 'Agreement With Dr CEW Bean Re Compilation of Official History of Australia in War' (National Archives of Australia, A6074, PO8446); 'Agreement with Mr CEW Bean in connection with National Histories' (National Archives of Australia, A3280, P6079); 'Angus & Robertson papers relating to CEW Bean's History of World War I, 1919–1933' (State Library of New South Wales, MLMSS 7309, Item 3); 'Official History, 1914–18 War: Records of Charles EW Bean, Official Historian Papers, 1919–42' (Australian War Memorial, AWM38, 3DRL 6673/11), which contains typescripts on the scheme for three types of official histories and on costs relating to the official history, copies of agreements for the official historians

In each case the relevant agreement detailed the work required by the author, including the number of pages and photographs required. For example, clause 1 of the contract between the Commonwealth and Henry Somer Gullett stated in part that:

T[he] Author shall write for the Commonwealth a volume of History entitled 'The Story of Sinai and Palestine' to form one of the twelve volumes set out in the Schedule hereto jointly to be known as the National Histories. The said volume shall consist of 650 pages each containing about 400 words including 100 pages of photographs.⁶⁹

The agreements also stipulated when work was due;⁷⁰ what the author would be paid and, if in instalments, when;⁷¹ issues of delay;⁷² issues of libel and indemnification;⁷³ and Commonwealth ownership of copyright in the work, discussed in greater detail in Part III below. In the case of Bean's contract, in addition to further information on his role as Official Historian and work as editor,⁷⁴ his agreement also contained the following proviso in clause 9: 'T[he] Commonwealth shall not censor or alter the

other than Bean, and Bean's correspondence with various officials of the Department of Defence; 'Official History, 1914–18 War: Records of Charles EW Bean, Official Historian: Correspondence, 1914–1956' (Australian War Memorial, AWM38, 3DRL 6673/30A), which contains Agreement between the Official Historian and the Commonwealth, and numerous other correspondents) 'Official History, 1914–18 War: Records of Charles EW Bean, Official Historian: Papers, 1919–32) (Australian War Memorial, AWM38, 3DRL 6673/32), which concerns the contract between the government and Angus and Robertson to publish the official history and comprise copies of the 1920 agreement and correspondence with the Department of Defence and Angus & Robertson; 'Official History, 1914–18 War: Records of Charles E W Bean, Official Historian: Agreements, 1919' (Australian War Memorial, AWM38, 3DRL 6673/38), which comprises a minute from the Department of Defence and agreements signed by Bean, F M Cutlack, Sir Henry Gullett, SS Mackenzie, AW Jose and TW Heney to write various parts of the official history).

⁶⁹ See, eg, Draft of Agreement with Henry Somer Gullett (Australian War Memorial, AWM38, 3DRL 6673/11) cl 1.

⁷⁰ Ibid cl 7.

⁷¹ Ibid cl 11; Agreement between Charles Edwin Woodrow Bean and the Commonwealth of Australia, 12 February 1919 (State Library of New South Wales, MLMSS 7309 Item 3), cl 4. Note that, despite the fact that the contract was dated February 1919 it was in fact retrospective, as letters cited in this article illustrate negotiations were still ongoing in late 1919.

⁷² See, eg, Agreement between Charles Edwin Woodrow Bean and the Commonwealth of Australia (n 71) cl 16.

⁷³ See, eg, Draft of Agreement with Frederick [sic] M Cutlack (Australian War Memorial, AWM38, 3DRL 6673/38) cls 9-10. This was particularly important in the case of Jose's volume on the Navy: see generally Stephen Ellis, 'The Censorship of the Official Naval History of Australia in the Great War' (1983) 20(80) *Historical Studies* 367.

⁷⁴ Agreement between Charles Edwin Woodrow Bean and the Commonwealth of Australia (n 71) cls 1–3.

National Histories as written annotated or edited by the Official Historian.⁷⁵ In his initial proposal to the government Bean was insistent that the *Official History* not be subject to external censorship,⁷⁶ with the exception of Volume IX, on the Australian Navy.⁷⁷

These author contracts also placed certain responsibilities on the Commonwealth, including the requirement that it enter into a publishing agreement for the printing and distribution of the series. Bean's contract, for example, included the following clause, arguably the antithesis of plain legal drafting:

T[he] Commonwealth shall enter into a contract or contracts with an Australian publisher or publishers for the publication of the National Histories in Australia and in such other places as the Minister shall determine and shall take all steps which are in the opinion of the Minister reasonable to provide for such publication to be in good style and in respect of each volume of the National Histories as soon as practicable after delivery of the edited manuscript therefor by the Official Historian to the person or at the place directed by the Minister.⁷⁸

As noted above, the Commonwealth entered into an agreement with noted local publisher Angus & Robertson for the production of the series.⁷⁹

While Bean's first volume was published in 1921,⁸⁰ just as it had become evident to Bean that one, three, six or seven volumes would not be enough for capturing Australia's involvement in WWI, it quickly became apparent that the five years provided by his contract would not be enough time to complete the series. As Bean commented in 1938, while the series was still underway, '[e]ach volume has taken, on an average, slightly over three years to write'⁸¹ with a general word length of 300 000 per title.⁸²

⁷⁵ Ibid cl 9 (emphasis in original).

⁷⁶ 'Australian Records of the War' (n 53) 2.

⁷⁷ See Bean, 'The Writing of the Australian Official History' (n 48) 86; Ellis (n 73); Ross Lamont, 'Introduction to University of Queensland Press Edition' in Arthur W Jose, *The Official History of Australia in the War of 1914–1918: Volume IX: The Royal Australian Navy 1914–1918*, ed Robert O'Neill (University of Queensland Press, 1987 reprint of 1929 edition) xxiii.

⁷⁸ Agreement between Charles Edwin Woodrow Bean and the Commonwealth of Australia (n 71) cl 7; see also Draft of Agreement with Henry Somer Gullett (n 69) cl 2.

⁷⁹ See generally 'Copy of an Agreement Dated 5th February 1920, Between The Commonwealth of Australia and Angus and Robertson Limited For the Printing, Binding, Publication, and Sale of Literary Work dealing with Australia's Part in the War of 1914–1918' (Australian War Memorial, AWM38, 3DRL 6673/32).

⁸⁰ CEW Bean, *The Official History of Australia in the War of 1914–1918 – Volume I: The Story of ANZAC from the Outbreak of War to the End of the First Phase of the Gallipoli Campaign, May 4, 1915* (Angus & Robertson, 1921).

⁸¹ Bean, 'The Writing of the Australian Official History' (n 48) 89.

⁸² Ibid 93.

In 1924 Bean applied to the Minister for Defence for the first time for an extension of his contract; his tenure as Official Historian was extended for another five years without issue.⁸³ Both Bean and then-Minister for Defence Eric Bowden were philosophical about the delay, with the Minister noting the value that the copyright being generated would have for the government.⁸⁴

A similar extension was also approved without controversy by the Department of Defence in 1929,⁸⁵ but a few years' later the *Official History* attracted the ire of the Auditor-General, who was critical of the delay and cost, and even argued that there was a lack of public interest in the series.⁸⁶ Still, the work continued and the final text volume, *The Australian Imperial Force in France During the Allied Offensive* (Volume VI), was published in 1942, more than two decades after the events documented took place.

Despite the time elapsed and the issues that emerged during the course of writing, all 12 volumes as proposed in Bean's original submission to the Commonwealth Government were ultimately completed. Table 1 provides the basic details for each of the 11 textual volumes; as noted above Volume XII, the photographic volume, is not considered here.

Table 1: Details of the text-based volumes of the *Official History*

Volume	Title of Volume	Author	Year of First Publication
I	<i>The Story of ANZAC from the Outbreak of War to the End of the First Phase of the Gallipoli Campaign, May 4, 1915</i>	Charles Bean	1921
II	<i>The Story of ANZAC from 4 May, 1915 to the Evacuation of the Gallipoli Peninsula</i>	Charles Bean	1924
III	<i>The Australian Imperial Force in France: 1916</i>	Charles Bean	1929
IV	<i>The Australian Imperial Force in France: 1917</i>	Charles Bean	1933
V	<i>The Australian Imperial Force in France during the Main German Offensive, 1918</i>	Charles Bean	1937

⁸³ See Letter from WA Newman to CEW Bean, 5 June 1924 (Australian War Memorial, AWM38, 3DRL 6673/11); Letter from the Acting Secretary, Department of Defence to the Commonwealth Crown Solicitor, 17 June 1924 (National Archives of Australia, A3280, P6079); Letter from the Commonwealth Crown Solicitor to the Department of Defence, 23 June 1924 (National Archives of Australia, A3280, P6079).

⁸⁴ EK Bowden 'Australia War Histories. Renewal of Engagement of Official Historian (Mr CEW Bean)', 4 June 1924 (Australian War Memorial, AWM 38, 3DRL 6673/11), 1; cf CEW Bean to the Minister for Defence, 'Position Concerning War Histories' (Australian War Memorial, AWM 38, 3DRL 6673/11) 2.

⁸⁵ Letter from Malcolm Shepherd, Secretary of the Department of Defence, to CEW Bean, July 1929 (Australian War Memorial, AWM 38, 3DRL 6673/11).

⁸⁶ 'Extract from Annual Report of Commonwealth Auditor-General for the Year Ended 30 June 1931' (Australian War Memorial, AWM 38, 3DRL 6673/11) 1–3.

Volume	Title of Volume	Author	Year of First Publication
VI	<i>The Australian Imperial Force in France during the Allied Offensive</i>	Charles Bean	1942
VII	<i>The Australian Imperial Force in Sinai and Palestine: 1914 – 1918</i>	Henry Gullett	1923
VIII	<i>The Australian Flying Corps in the Western and Eastern Theatres of War 1914 – 1918</i>	Frederic Cutlack	1923
IX	<i>The Royal Australian Navy: 1914 – 1918</i>	Arthur Jose	1928
X	<i>The Australians at Rabaul: The Capture and Administration of the German Possessions in the Southern Pacific</i>	Seaforth Simpson MacKenzie	1927
XI	<i>Australia During the War</i>	Ernest Scott	1936

How copyright applied and continues to apply to the *Official History* and its volumes, and the complicated relationship that this highlights in relation to the general and Crown ownership provisions of Australia’s copyright statutes, is now examined in more detail.

III CROWN OWNERSHIP OF COPYRIGHT AND THE *OFFICIAL HISTORY*

A Copyright and Contracts

Bean began to consider the issue of copyright almost immediately after his September 1914 meeting with the Minister for Defence. In a letter to Commander Samuel Pethebridge dated 16 October 1914, it is clear that Bean had a good understanding of copyright, its value and the royalties it could generate.⁸⁷ He commented that ‘[m]y payment for this [history] would be the usual royalty on the book if published by the Commonwealth in Australia, and the rights for the publication of the book in other countries’.⁸⁸ Bean appeared so certain that this arrangement would proceed that in late 1918, as WWI was finally drawing to a close, he exchanged multiple letters with his international agent, Curtis Brown Ltd, and publisher Cassell & Company,⁸⁹ with a view to finalising publication of the work.⁹⁰ A contract between Bean and Cassell & Company was even drawn up by Curtis Brown Ltd, for a six-volume version

⁸⁷ See Granville Allen Mawer, ‘Pethebridge, Sir Samuel Augustus (1862–1918)’, *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/pethebridge-sir-samuel-augustus-8029>>.

⁸⁸ Letter from CEW Bean to Commander Pethebridge (n 52) 3.

⁸⁹ Cassell & Company had published a number of books by Bean, including CEW Bean (ed), *The Anzac Book* (Cassell & Company, 1916) and CEW Bean, *In Your Hands, Australians* (Cassell & Company, 1918).

⁹⁰ Letter from AH Dakers, Curtis Brown Ltd to CEW Bean, 6 November 1918 (Australian War Memorial, AWM38, D3) 1.

of the proposed history;⁹¹ however, both Cassell's hesitancy at publishing such an expansive, expensive work and the decision to publish using an Australian company quelled this arrangement.⁹²

As noted above, when details for the proposed history were being finalised by the Commonwealth Government all contracts included a provision that the Commonwealth would own copyright in the work generated. It is not clear when this was decided, but it is understandable that the Commonwealth, rather than Bean, would own copyright given the inclusion of additional authors in the series.⁹³ Still, from his correspondence with the Minister for Defence it is apparent that Bean saw the forfeiture of his legal rights in the work as one justification for asking for a higher salary than had been initially proposed. In a letter to the Minister for Defence dated 16 August 1919, Bean opined:

That the Government obtains the great work of my lifetime, I retaining no further share in the possession of it, and the Government obtaining all future rights. I may explain this by saying that the work involves the final use, by the writer, of a vast private record of the war — 300 volumes of private notes and diary — written daily and nightly entirely apart from his office of war correspondent ... This is a purely personal record having no connection with the Official war records, but at least three quarters of the main history will be based on it. These records have been bequeathed by me to the Commonwealth and on my death will go the nation ...⁹⁴

Bean attained that higher salary and his contract contained the following clause:

8. T[he] Copyright of the said History shall belong to the Commonwealth.⁹⁵

The agreements with authors Gullett, Cutlack, Jose, MacKenzie, Heney and Scott contained a similar provision:

⁹¹ Draft Agreement between CEW Bean and Cassell & Company Limited, 1919 (Australian War Memorial, AWM38, D3).

⁹² Letter from Cassell & Company Ltd to CEW Bean, 10 December 1918 (Australian War Memorial, AWM38, D3); Letter from CEW Bean to CE Gardiner, Cassell & Company, 25 October 1919 (Australian War Memorial, AWM38, D3); Letter from CEW Bean to AH Dakers, Curtis Brown Ltd, 31 October 1919 (Australian War Memorial, AWM38, D3).

⁹³ The August 1919 proposal states the following recommendation to the Commonwealth Government, made by George Swinburne: 'That the Government should retain the copyright of all the books written and issued under its auspices.' See 'Australian Records of the War' (n 53) 6.

⁹⁴ Letter from CEW Bean to the Minister for Defence, 16 August 1919 (Australian War Memorial, AWM38, 3DRL 6673/39) 1. Bean's final comment was not simply rhetoric; those records are today physically held by the Australian War Memorial.

⁹⁵ Agreement between Charles Edwin Woodrow Bean and the Commonwealth of Australia, 12 February 1919 (State Library of New South Wales, MLMSS 7309, Item 3) cl 8.

3. T[he] Copyright of the said volume shall belong to the Commonwealth.⁹⁶

The government contract with *Official History* publisher Angus & Robertson also featured a clause relating to copyright:

27. S[ubject] to the provisions of this Agreement the whole right title and interest in the manuscript and the copyright in the work shall remain in the Commonwealth.⁹⁷

Given the existence of these clauses, Commonwealth ownership of copyright in the *Official History* seems uncontroversial. The question that remains is *which* provisions of the relevant copyright statute, the *Copyright Act 1911* (Imp) (in force in Australia pursuant to the *Copyright Act 1912* (Cth)), applied to the *Official History* when the works were written and published between 1921 to 1942 and, by virtue of those provisions, the applicable term of copyright. When the 1912 statute was repealed and replaced in the Commonwealth by the *Copyright Act 1968* (Cth),⁹⁸ the copyright subsisting in the *Official History* would have continued pursuant to the relevant provisions of that new legislation.

As noted above, the specific Crown copyright section of the 1911 statute, s 18, granted a 50-year period of protection from first publication, with that duration maintained in the 1968 Act. If that term applied, all volumes of the *Official History* should now be in the public domain, the last (Volume VI) since 1 January 1993. However, if s 18 had no effect, then the general provisions would have applied and life of the author plus 50 years, now extended to life of the author plus 70 years, would be the applicable term of copyright. Information on the AWM website indicates a belief that copyright continues to subsist in all volumes of the *Official History*; as the analysis below indicates, it is difficult to take such an unequivocal position.

B Subsistence and Ownership of Copyright for Crown-related works and the Official History

It is first useful to examine the relevant provisions of the *Copyright Act 1911* (Imp) in force at the time of the writing of the series. Only one section, s 1(1), provided

⁹⁶ Draft of Agreement with Frederic Morley Cutlack (Australian War Memorial, AWM 38, 3DRL 6673/11) cl 3; Draft of Agreement with Henry Somer Gullett (Australian War Memorial, AWM 38, 3DRL 6673/11) cl 3; Draft of Agreement with Seaforth Simpson MacKenzie (Australian War Memorial, AWM 38, 3DRL 6673/11) cl 3; Draft of Agreement with Ernest Scott (Australian War Memorial, AWM 38, 3DRL 6673/11) cl 3; Agreement with Arthur Wilberforce Jose (Australian War Memorial, AWM 38, 3DRL 6673/38) cl 3) (the Agreement uses the incorrect name ‘Arthur William Jose’); Agreement with Thomas W Heney (cl 3) .

⁹⁷ ‘Copy of an Agreement Dated 5th February, 1920, Between The Commonwealth of Australia and Angus and Robertson Limited For the Printing, Binding, Publication, and Sale of Literary Work dealing with Australia’s Part in the War of 1914-1918’ (Australian War Memorial, AWM 38, 3 DRL 6673/32) cl 27.

⁹⁸ *Copyright Act 1968* (Cth) ss 5–6.

for the subsistence of copyright. The creation of all works had to meet the following requirements, regardless of whether copyright would be owned by the author, an employer, or even the Crown:⁹⁹

Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary dramatic musical and artistic work, if—

- (a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and
- (b) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid;

but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries.¹⁰⁰

While the Act provided that the author would be the first owner of copyright in his or her work,¹⁰¹ it also contained alternative ownership arrangements in instances of, for example, employment or assignment.¹⁰² In the latter case, s 5(2) provided

[t]he owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations to the United Kingdom or any self-governing dominion or other part of His Majesty's dominions to which this Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorized agent ...¹⁰³

Unless another provision applied — as will be discussed below — the applicable term of protection for all works was contained in s 3. Regardless of whether copyright was owned by the author, or if ownership of the copyright was vested in an employer, or was assigned to another party, copyright would subsist for 'the life of the author and a period of fifty years after his death'.¹⁰⁴ In the case of collective

⁹⁹ *A-G (NSW) v Butterworth & Co (Australia) Ltd* (1938) 38 SR (NSW) 195, 258–9. This is also in contrast to the position today, where under the *Copyright Act 1968* (Cth) copyright can subsist in a work pursuant to either s 32 or s 176(1).

¹⁰⁰ *Copyright Act 1911* (Imp) (n 7) s 1(1).

¹⁰¹ *Ibid* s 5(1).

¹⁰² *Ibid* ss 5(1)(b), 5(2).

¹⁰³ *Ibid* s 5(2).

¹⁰⁴ *Ibid* s 3.

works, the owner would hold copyright in each contribution for life of the author plus 50 years;¹⁰⁵ special provision was made for the duration of copyright in works of joint authorship.¹⁰⁶

One of the alternative terms of protection provided by the 1911 Act concerned works created in circumstances where the specific Crown copyright provision, s 18, would apply. If the criteria in s 18 were met, then not only would the Crown own copyright in the relevant work, but copyright would subsist for a different period to that identified in s 3. Section 18 stated that:

Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.¹⁰⁷

For s 18 to apply, however, the work in question needed to be ‘prepared or published by or under the direction or control of His Majesty or any Government department’.

Copyright would have thus subsisted in each volume of the *Official History* pursuant to s 1(1), but if one or more of the elements of s 18 was satisfied — that the work was ‘prepared or published by or under the direction or control of His Majesty or any Government department’ — copyright would immediately have vested in the Crown. The applicable period in this instance would be 50 years from first publication. If s 18 did not apply, then, as before, copyright would subsist in each volume pursuant to s 1(1) but the author agreements would have acted as a valid assignment of copyright from the author to the Commonwealth, as permitted by s 5(2). The volume would be protected for the life of the author plus 50 (now 70) years.

In determining the likely position, it is first useful to examine how the Commonwealth Government viewed copyright as it applied to the *Official History*, at the time of the writing of the series. Correspondence between Bean and a number of government departments, penned eight years after the first publication of Volume I, is helpful in this regard.

In mid-1929 Bean wrote to the Secretary of the Department of Defence, and then to the Crown Solicitor’s Office, expressing concerns regarding the copyright status of the *Official History*.¹⁰⁸ These concerns were unfounded, but the Deputy Crown

¹⁰⁵ See LCF Oldfield, *The Law of Copyright* (Butterworth & Co, 1912) 20. The term ‘collective work’ was defined in the interpretation section of the 1911 Act: see *Copyright Act 1911* (Imp) s 35(1). It will be discussed in more detail below.

¹⁰⁶ *Copyright Act 1911* (Imp) (n 7) s 16(1); see also Oldfield (n 105) 64–6.

¹⁰⁷ *Copyright Act 1911* (Imp) (n 7) s 18.

¹⁰⁸ Letter from CEW Bean to the Secretary, Department of Defence, 3 May 1929 (National Archives of Australia, A1952, 580/2/4414).

Solicitor prepared a comprehensive memorandum in response, highlighting the practice of the Commonwealth Government in relation to Crown copyright.¹⁰⁹ This policy dated back to early 1914, following receipt of a 1912 Treasury Minute from the British Government that built on an earlier document of this type created in 1887.¹¹⁰ That document noted the various types of materials produced by government and the ‘considerable cost’ expended in the creation of some of these publications, including ‘Official books’, ‘Literary or quasi-literary works’ and ‘Charts and Ordnance Maps’.¹¹¹ In Australia, the 1912 Minute was subsequently distributed to major Commonwealth departments by Solicitor General Robert Garran, with additional advice regarding registration of copyright in these creations.¹¹² Incidentally, while the Commonwealth Government had sought to register copyright in Bean’s dispatches as Official War Correspondent,¹¹³ as per this earlier advice, by failing to register the copyright in the *Official History* it had not followed its own stated procedure.¹¹⁴

The memo of the Deputy Crown Solicitor is of additional significance here as it provides further insight as to how the Crown Solicitor’s Office, responsible for the drafting of the author contracts, viewed copyright in the *Official History*. In the first few paragraphs of the memo it was simply stated that:

The copyright in the Official History of the War apparently belongs to the Commonwealth by virtue of the application in Australia by Sec. 8 of the Copyright Act 1912 of Section 18 of the Copyright Act 1911 (1 & 2 Geo. V, Ch. 46).¹¹⁵

On that basis, in the view of the Commonwealth Government, s 18 and thus the 50 year period of protection applied to the *Official History*. However, as noted above, in order for Commonwealth ownership of copyright in the *Official History* to be founded in section 18, the series needed to be ‘prepared or published by or under the direction or control of His Majesty or any Government department’. There were

¹⁰⁹ See generally ‘Re Copyright in Australian Official History of the War’, 22 May 1929 (National Archives of Australia, A432, 1929/1720).

¹¹⁰ ‘Treasury Minute Dated 28th. June, 1912’ (National Archives of Australia, A2, 1914/3164) 1; see also Oldfield (n 105) 111–13; *A-G (NSW) v Butterworth & Co (Australia) Ltd* (n 99), 227; *Copyright Agency Ltd v New South Wales* (2007) 159 FCR 213, 247 [177] (Finkelstein J).

¹¹¹ ‘Treasury Minute Dated 28th. June, 1912’ (National Archives of Australia, A2, 1914/3164) 1.

¹¹² Letter from RR Garran to the Secretary, Prime Minister’s Department, 19 January 1914 (National Archives of Australia, A2, 1914/3164).

¹¹³ See letter from the Assistant Secretary, Department of Defence to the Registrar of Copyrights, 6 January 1915 (National Archives of Australia, A1336, 3986).

¹¹⁴ As the Solicitor General pointed out to Bean, however, this would not preclude any future action for infringement: see letter from RR Garran to CEW Bean, 5 June 1929 (National Archives of Australia, A432, 1929/1720) 1. See also *Copyright Act 1912* (Cth) s 26.

¹¹⁵ Letter from the Deputy Crown Solicitor to the Crown Solicitor, 22 May 1929 (National Archives of Australia, A432, 1929/1720) 1.

multiple avenues for Crown ownership under that provision: section 18 would apply where a work was prepared by the Crown;¹¹⁶ where a work was prepared under the direction or control of the Crown; where a work was published by the Crown; or where the work was published under the direction or control of the Crown.¹¹⁷ To understand whether any of those options applied in the case of the *Official History*, a closer analysis of the terms ‘prepared or published by or under the direction or control’ of government is needed.

In its 2007 decision in *Copyright Agency Ltd v New South Wales* (2007) 159 FCR 213, the Full Court of the Federal Court considered copyright ownership in a series of survey plans. The case was referred to the Federal Court from the Copyright Tribunal, which normally would have simply sought to determine an applicable licence fee under s 183 of the *Copyright Act 1968*, for use of the survey plans by the New South Wales Government.¹¹⁸ The State of New South Wales argued it was not liable for such fees, however, first on the basis that it was the owner of the copyright in the survey plans pursuant to either s 176(2) or s 177 of the 1968 legislation.¹¹⁹ In the alternative it argued that a licence other than that stated in section 183 applied, and as a result it did not need to pay any fees for its reproduction of the survey plans.¹²⁰ In the Full Federal Court the State of New South Wales was successful on the latter point;¹²¹ this was overturned on appeal in a unanimous judgment of the High Court.¹²²

Justice Emmett, with whom Lindgren J concurred and Finkelstein J concurred in general, made the following comments in the course of his judgment on the application of the terms ‘by’, ‘direction’ and ‘control’:

‘By’ is concerned with those circumstances where a servant or agent of the Crown brings the work into existence for and on behalf of the Crown. ‘Direction’ and ‘control’ are not concerned with the situation where the work is made *by* the Crown but with situations where the person making the work is subject to either the direction or control of the Crown as to how the work is to be made. In the copyright context, that may mean how the work is to be expressed in a material form.

¹¹⁶ Speaking of the similar provision contained in the 1968 statute, section 176, Finkelstein J noted in *Copyright Agency Ltd v New South Wales* (2007) 159 FCR 213 that ‘[a]s regards a work made by the Crown, we are necessarily dealing with a fiction. Generally for copyright purposes a work is made by its author. What s 176 contemplates is that, in certain circumstances, the act of the author in making a work is to be attributed to the Crown.’: at 248 [183].

¹¹⁷ In *Copyright Agency Ltd v New South Wales* (2007) 159 FCR 213 Finkelstein J created a similar list in relation to ss 176 and 177 of the *Copyright Act 1968*: at 248 [182].

¹¹⁸ *Ibid* 215–16.

¹¹⁹ *Ibid* 216–17.

¹²⁰ *Ibid* 217.

¹²¹ *Ibid* 243–4.

¹²² *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279. See also *Copyright Agency Ltd v New South Wales* (2013) 102 IPR 85.

Direction might mean order or command, or management or control (Macquarie Dictionary Online). *Direction* might also mean instructing how to proceed or act, authoritative guidance or instruction, or keeping in right order management or administration (Oxford English Dictionary Online).

Control might mean the act or power of controlling, regulation, domination or command (Macquarie Dictionary Online). *Control* might also mean the fact of controlling or of checking and directing action, the function or power of directing and regulating, domination, command, sway: *Shorter Oxford English Dictionary* (5th ed, Oxford University, 2002).

...

The question is whether the Crown is in a position to determine whether or not a work will be made, rather than simply determining that, *if it is to be made at all*, it will be made in a particular way or in accordance with particular specifications.¹²³

On the last point and in a similar vein, Finkelstein J made the following comment after considering the application of section 18 of the 1911 statute in the 1926 decision *British Broadcasting Co v Wireless League Gazette Publishing Co*:¹²⁴

[M]erely to specify the form that a work should take does not constitute a direction to prepare the work or amount to control over its preparation. What is lacking is authority to give the direction to prepare the work or to control the manner in which the work was prepared.¹²⁵

C *Ownership and the Copyright Status of the Official History*

A number of points from this discussion can be used to inform an analysis of Crown ownership, and thus the relevant duration of protection, in the specific case of the *Official History*. As to the first element of s 18, the precursor to the provisions discussed by Emmett J,¹²⁶ whether a work was prepared by, or under the direction or control of the government, the role of the Crown in initiating the creation of the work is an important factor. In the case of the *Official History*, from the discussion at the start of Part II it is apparent that the Minister for Defence, Senator George Pearce, was responsible for the *concept* of the *Official History*. On that basis, it is

¹²³ *Copyright Agency Ltd v New South Wales* (2007) 159 FCR 213, 238 (emphasis in original). These comments were in part cited by Besanko J in *Insight SRC IP Holdings Pty Ltd v Australian Council for Educational Research Ltd* (n 5) 573 [43].

¹²⁴ [1926] 1 Ch 433.

¹²⁵ *Copyright Agency Ltd v New South Wales* (2007) 159 FCR 213, 250 [129].

¹²⁶ There are some differences: for example, *Copyright Act 1911* (Imp) (n 7) s 18 used the term ‘prepared’ while *Copyright Act 1968* (Cth) ss 176(1) and (2) adopt the term ‘made by’. *Copyright Act 1911* (Imp) (n 7) s 18 also used the term ‘published’, whereas *Copyright Act 1968* (Cth) s 177 adopts the phrase ‘first published’. These aspects are not relevant for the purpose of the present discussion.

arguable that the *Official History* was ultimately made pursuant to the ‘direction’ of the government, with the Minister for Defence giving the ‘order or command’ for creation of the work.

That, however, seems to place significant emphasis on what appears to have been a simple conversation, and the importance of the conversation is potentially overstated when viewed as a *direction* to create the *Official History*. As Part II illustrated, Bean was responsible for many of the logistical decisions behind the creation of the *Official History*, determining, for example, the number of volumes in the series and the topics of each volume.¹²⁷ It may be that the contractual stipulations as to page lengths, words and photograph numbers could also be considered a ‘direction’ or assertion of ‘control’; as a result of the factual circumstances of the case Emmett and Finkelstein JJ placed less emphasis on directions of the making of the work, focusing on direction as to whether the work would be made at all. Given that, despite the form requirements of the contracts, Bean and the authors were also generally free to determine the substance of their volumes — an important facet of official war histories in Australia, reflected in the quotation at the start of Part II¹²⁸ — this argument is also difficult to establish.

This analysis, though, should not be limited to a consideration of the role of the Commonwealth in the *preparation* of the *Official History*, but also its role in the *publication* of the series. Under s 18 the Crown would also own copyright where a work was ‘published by or under the direction or control of His Majesty or any Government department’; section 1(3) defined the term ‘publication’ as ‘the issue of copies of the work to the public’.¹²⁹ While the Commonwealth may not have physically published the *Official History* — that action was undertaken in agreement with Angus & Robertson — there existed a clause in the author contracts expressly requiring the Commonwealth to organise and facilitate publication. If ‘direction’ is defined as ‘order or command, or management or control’, with ‘control’ defined as ‘the fact of controlling or of checking and directing action, the function or power of directing and regulating’, as Emmett J discussed, then the actions of the Commonwealth arguably satisfied these elements of s 18.

If this was the case, then copyright would have been owned by the Commonwealth under s 18 of the 1911 statute, by virtue of the act of publication, regardless of the existence of the author contracts. When the 1912 Act was repealed, s 177 of the 1968 *Copyright Act*, which provided and continues to provide for copyright ownership of works ‘first published by, or under the direction or control of, the Commonwealth or the State’, would have maintained this ownership. Copyright should have subsisted in each of the volumes for 50 years from first publication.

¹²⁷ See generally ‘Australian Records of the War’ (n 53).

¹²⁸ ‘Official Histories’ (n 42).

¹²⁹ *Copyright Act 1911* (Imp) (n 7) s 1(3). See also Oldfield (n 105) 38–40.

Table 2: Expiration of copyright in the volumes of *The Official History* under a 50-year term

Volume	Year of First Publication	Date of entry into the public domain
I	1921	1 January 1972
II	1924	1 January 1975
III	1929	1 January 1980
IV	1933	1 January 1984
V	1937	1 January 1989
VI	1942	1 January 1993
VII	1923	1 January 1974
VIII	1923	1 January 1974
IX	1928	1 January 1979
X	1927	1 January 1978
XI	1936	1 January 1987

In the alternative, if it could be established that s 18 did not apply, then copyright would have subsisted in the volumes of the *Official History* pursuant to s 1(1), as before, but each of the volume authors would have been the first owner of the copyright by virtue of s 5(1). However, the contractual clauses would have amounted to a valid assignment of that copyright to the Commonwealth under s 5(2). The Commonwealth would be the subsequent owner of the copyright, with s 3 of the 1911 statute providing the applicable term of copyright: life of the author plus 50 years, subsequently extended to life of the author plus 70 years from 1 January 2005. Even if the *Official History* was considered a collective work,¹³⁰ copyright in each volume would still be determined on the basis of the life of the author, plus the applicable posthumous period of protection.¹³¹ It appears that this is the approach taken by the AWM.

Table 3 therefore summarises the copyright status of each of the volumes of the *Official History* on the basis of this purported longer term of protection. It includes the volume details; author; author's year of death; the applicable term of copyright; and the suggested copyright status of the volume.

¹³⁰ *Copyright Act 1911* (Imp) (n 7) s 35(1). The term 'collective work' was defined in part to mean 'an encyclopædia, dictionary, year-book, or similar work' or 'any work written in distinct parts by different authors'. It is likely the *Official History* would satisfy that criteria.

¹³¹ See Oldfield (n 105) 19: 'The term of protection of the contribution in the collective work will be the life of the author ... and for fifty years after his death.'

Table 3: Copyright status of the volumes of the *Official History* under the general provisions

Volume	Author	Year of Author's Death	Applicable duration of copyright	Suggested copyright status of volume
I-VI	Charles Bean	1968	Life of the author plus 70 years	In copyright; volume will enter the public domain on 1 January 2039
VII	Henry Gullett	1940	Life of the author plus 50 years	Copyright has expired; volume entered the public domain on 1 January 1991
VIII	Frederic Cutlack	1967	Life of the author plus 70 years	In copyright; volume will enter the public domain on 1 January 2038
IX	Arthur Jose	1934	Life of the author plus 50 years	Copyright has expired; volume entered the public domain on 1 January 1985
X	Seaforth Simpson MacKenzie	1955	Life of the author plus 70 years	In copyright; volume will enter the public domain on 1 January 2026
XI	Ernest Scott	1939	Life of the author plus 50 years	Copyright has expired; volume entered the public domain on 1 January 1990

A number of points are immediately apparent from this table.

While, as noted in Part I, the AWM claims that it ‘holds copyright for the text, maps and photographs contained in the Official Histories’, even on a broad interpretation of the applicable duration of protection for the series, three volumes — those penned by Jose (Volume IX), Gullett (Volume VII) and Scott (Volume XI) — have arguably entered the Australian public domain. That copyright also expired well before the term extension, with Volume IX entering in the public domain in 1985, Volume XI in 1990 and Volume VII in 1991. Coincidentally, Volume X of the series was one of the immediate beneficiaries of the 2004 term extension: instead of entering the public domain on 1 January 2006, copyright in MacKenzie’s volume will now expire at the end of 2026. Further, under these calculations, copyright will subsist the longest in the volumes penned by Bean (Volumes I to VI), expiring at the end of 2038, and Cutlack’s contribution (Volume VIII) will enter the public domain only very shortly beforehand, on 1 January 2038. Thus, while the majority of volumes of the *Official History* are still in copyright, it is not the case that the AWM can claim ownership in those that have already entered the public domain.

Three additional points, however, are worth noting. First, the calculations in Table 3 apply to the first published versions of the volumes, but multiple editions of the majority of the books of the *Official History* were published by Angus & Robertson. The last two editions were published in 1944. However, a ‘fresh’ copyright would not subsist with every subsequent edition, and it is not clear that the modifications made would have reached the level required under the law. Easton commented the following in 1915:

The general rule is, that each successive edition, which is substantially different from the preceding ones, or which contains new matter of substantial amount or value, becomes entitled to copyright as a new work, and it is immaterial whether the new edition is produced by condensing, expanding, correcting, re-writing, or otherwise altering the original work; or by introducing notes, citations, or other additions. Nor is it essential that the new edition should be an improvement on the old, the sole question is whether it is substantially different.¹³²

Thus, a new copyright *may* have subsisted in one of the later editions, but a substantial comparative analysis of the text of the multiple volumes is beyond the boundaries of this article.

Second, in the 1980s the University of Queensland Press republished each of the volumes of the *Official History*, edited by Robert O'Neill. Each individual edition featured an introductory essay penned by noted historians including Ken Inglis, Ross Lamont and Bill Gammage. While copyright in each introduction would be owned by the author — a fact noted on the AWM website¹³³ — the inclusion of that new part would, as discussed above, not create a 'fresh' copyright in that edition of the relevant volume.

Third, it is also worth considering whether Official Historian and editor Charles Bean could be considered a joint author of each volume, and therefore copyright would subsist until 1 January 2039.¹³⁴ Under the *Copyright Act 1911* (Imp), 'a work of joint authorship' was defined as 'a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors'.¹³⁵ A similar, though not identical, statement appears in the 1968 Act today.¹³⁶ However, from the historical record, it is apparent that, while Bean was fastidious in his role as Official Historian and editor of the series, and contributed occasional chapters to some of the volumes,¹³⁷ given his contributions would not have been truly 'in collaboration' with a volume's author, it is

¹³² JM Easton, *The Law of Copyright in Works of Literature, Art, Architecture, Photography, Music and the Drama: Including Chapters on Mechanical Contrivances and Cinematographs; Together with International and Foreign Copyright, With the Statutes Relating Thereto* (Stevens and Haynes, 5th ed, 1915) 61.

¹³³ See 'First World War Official Histories Copyright Statement' (n 34).

¹³⁴ The duration of copyright under the 1911 statute for works created by joint authorship was particularly complicated: see *Copyright Act 1911* (Imp) (n 7) s 16(1), (2); Oldfield (n 105) 80–3, 107–8. See also *Copyright Act 1968* (Cth) s 80 as amended by the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) sch 2 item 5.

¹³⁵ *Copyright Act 1911* (Imp) (n 7) s 16(3).

¹³⁶ *Copyright Act 1968* (Cth) s 10(1) (definition of 'work of joint authorship').

¹³⁷ As Scott notes in the Preface to Volume XI, Bean wrote Chapter XIV of that volume, 'Australian Trade During the War'. See Ernest Scott, *The Official History of Australia in the War of 1914–1918 — Volume XI: Australia During the War* (Angus & Robertson, 1936) xiii.

unlikely he would have met the requirements of the statutory test for joint authorship.¹³⁸ As a result, if the 50-year period of protection does not apply, then the life of each of the individual volume authors, plus 50 or 70 years, would be the appropriate duration of protection.

As this Part has illustrated, Crown ownership of copyright has involved and continues to involve myriad provisions that are soon complicated in situations that do not automatically or holistically meet the requirements of the specific Crown copyright, or indeed general ownership, provisions. In other instances, the circumstances may meet all these requirements, raising questions as to which sections of Australian copyright law trump others. Part IV concludes this article with a reflection on the broader policy implications of government ownership today.

IV CONCLUSION

WWI ended on 11 November 1918. The first textual volume of the *Official History* was published in 1921; subsequent volumes were then released in 1923, 1924, 1927, 1928, 1929, 1933, 1936, 1937 and 1942. By the time the last volume was published, Australia had been involved in its second international conflict, WWII, for around three years.

Today, copyright has expired in three of the 11 textual volumes of the series. The next volume will enter the public domain in 2026 and copyright in the final seven volumes will expire at the end of 2037 and 2038 respectively. In the case of Bean's six volumes, copyright will have subsisted in these works between 96 years (Volume VI) and 117 years (Volume I). When these volumes enter the public domain, Australia will also commemorate the 120th anniversary of the cessation of WWI.

The lengthy durations of copyright in the *Official History* are not the result of any specific Crown copyright provisions contained in the 1911 or 1968 statute. Indeed, if Bean and the various authors, or Angus & Robertson, had been the owner of the copyright, rather than the Commonwealth, then protection for life of the author plus 50 or 70 years would still have applied. Still, it is troubling that books paid for by Australian public funds — where the content is in many parts about a conflict involving a substantial loss of Australian lives — will not all be available for public reproduction and consumption until 120 years after the end of those hostilities. While the AWM makes these works freely available on its website, and notes permission is only required in a commercial context,¹³⁹ if the AWM disagreed with the way in which a publisher sought to use the series, then copyright could still be invoked, at least in the case of eight of the volumes. As long as copyright continues, so does this risk.

¹³⁸ See also Oldfield (n 105) 108; Easton (n 132) pt III ch II.

¹³⁹ See 'First World War Official Histories Copyright Statement' (n 34).

In recent years the Australian Parliament has indicated its willingness to make amendments to the duration of copyright, as evidenced by changes in the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth).¹⁴⁰ This included capping the duration of Crown copyright under s 180 to ‘50 years after the calendar year in which the material is made’,¹⁴¹ as opposed to the previous position where a fixed term of copyright was only triggered upon publication.¹⁴² Parliament could rectify the circumstances identified in this article with a simple change to the *Copyright Act 1968* (Cth), through an amendment or new section providing that, regardless of how copyright came to subsist in a work, or how the Crown gained ownership of that material, where the Commonwealth, or a State or Territory government, is the ultimate owner, the relevant duration of protection is ‘50 years after the calendar year in which the material is made’.¹⁴³ While there may be some logistical issues with such a change, given the complexity that arises in even simple situations involving Crown ownership of copyright, the clarity and public good resulting from such an amendment outweigh any challenges.

¹⁴⁰ See *Copyright Amendment (Disability Access and Other Measures) Act 2017* sch 2.

¹⁴¹ See discussion above (n 1).

¹⁴² See *Copyright Act 1968* (Cth) s 180(1) as first enacted.

¹⁴³ See also Recommendations 2 and 3 in CLRC (n 1) xxii–xxiv, though these recommendations must be read in the context of the suggested repeal of ss 176–9: at xxii, Recommendation 1. The proposal here also raises issues for the prerogative right of the Crown in the nature of copyright, which could be rectified through the abolition of that right, as also recommended by the CLRC: at xxviii, Recommendation 7.