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Dear Sir,

First let me emphasise that I am writing in my capacity as a private individual, though I do think that I can claim to speak in principle for the vast majority of Members of the Inventors' Association of Australia (SA) Inc., of whose Executive Committee I am an active and long-serving member. I have not directly discussed your Discussion Paper with them, nor have I expertise in the writing of such submissions; still I will try to put in clear terms what I think to be the core considerations with regard to Crown Use Provisions in Patents and Designs Legislation, based on principles of natural justice.

The reason I feel certain that our membership would overwhelmingly support my views on the matter are based on the fact that a man presented our Association with an *actual case in point* some few years ago; we considered it at the time, and the response from our members was unanimous in its attitude. The case is worth the telling, for it will help to bring a clear focus on some of the issues involved.

*Tom Schwerdt had been a fireman, and had on several occasions been impeded in fighting fires because the steel covers over mains water points in roads had been so hard to remove. The covers are shaped like sink plugs - truncated cones with very steep angles - and have always been removed by inserting through the double-ended-keyhole-shaped hole in the centre of the cover a T-shaped device with a keyed tip, rotating it through 90 degrees, and lifting hard. The plug is often jammed, stuck hard in its seat, and sledge hammers are often needed to loosen it; even then there can be major difficulties and delays, exactly as are not needed in the case of a house fire. So Tom developed, on his own time, an impact-hammer device which makes the lifting-clear a few seconds' work at most. He had made working prototypes, and taken initial steps to patenting the device.*

*After a short time he noticed that a Government agency which had had access to his first units had started making and using versions of exactly the same device, without having sought his permission nor even informed him that they were about to begin such manufacture. Tom was understandably very miffed, and told those responsible so. They did not deny copying his device, but simply cited the Crown Use Provisions as their justification and shield. They simply defied him to try to do anything about it.*

Upon Tom's telling this story at an IAA meeting, all members there present supported his case, and our unanimity of opinion sustained him to some degree in his fight for recognition and compensation. His protestations eventually bore fruit through the efforts of two MPs, one State and one Federal, such that the government agency was obliged to cease and desist. Nevertheless, the whole adventure has cost him much, in terms of time, money and angst. Still, whilst his invention has not paid for itself in money terms, Tom has had the signal satisfaction of having been awarded the Australian Safety Community Award, and a photo of him was published recently receiving this award from the SA Minister for Energy, Pat Conlon. That's something, at least.

It is obvious that in cases of direst need, such as wartime in London during the Blitz, such an invention as Tom's would be highly desirable for fighting fires on a frequent basis, and there might then indeed be a case for the Government's requisitioning the rights to the item and for replicating multiples of it. Even so, the inventor and/or holder of the rights would justifiably expect to be properly compensated, and if the right to replication and use of the invention were compulsorily acquired, there would be a strong case for the financial compensation to be *at the higher end* of the assessed potential value of the rights. How such value would be assessed remains moot, but it is obvious that the more dire the need, the more valuable the device would be in dealing with the problem, and so the higher the figure for compensation should be. *That principle should be admitted as a given, for without such admission any discussion predicated on notions of fairness would be a nonsense.*

Therein lies one major rub: for plainly Government fighting-funds tend to be bottomless, whereas mean old Necessity never leaves inventors any money for fighting legal cases. In considering prosecution of any case of abuse of their rights where the alleged abuser is a government agency or other bodies purporting in some way to be amongst its minions, inventors and graphic artists must be very hesitant indeed, especially when, as I know from personal observation and experience, the onus in copyright matters is on the originator to prove that actual copying took place – an almost *impossible* ask. In a word, the present system is unavoidably loaded against the plaintiff in these matters, and every effort should be made to redress the imbalance.

No wartime-type emergency existed anyway in the case with Tom; even though for any given house-fire the emergency is obviously very acute, the overall need for the device is very long-term, and there seemed no case at all for the Government agency to commandeer the rights; indeed the outcome (with Tom "winning") was itself testimony to the essential unsupportability of the Government agency's case. Decent behaviour would have been for the interested parties to have entered negotiations with Tom himself, a course which seemed foreign to their thinking. These days Tom is receiving enough orders from Councils and other community organizations to keep him in production, though not enough to make money. Still the rights remain his alone, and he does not have to nurture a sense of theft and grief, as some other inventors I have known still do.

Plainly not all breaches of proper behaviour on Government agencies' part would be so easily dealt with as in Tom's case, and it does behove Government to be seen to be *bending over backwards* to be fair, and to treat really seriously proven breaches of fair dealing by its own minions. Theft of intellectual property is very hurtful to, and deeply resented by, its originators. (*Plagiarius* is Latin for *kidnappee* or *stolen person*; thus *plagiarism*, i.e. theft of one's *brain-children*, is acknowledged by English itself to be a very bitter matter indeed.)

The actual powers of Government under Crown Use Provisions are very broad, and it is difficult to envision cases in any but dire emergencies where they might justifiably be exercised. Even then the need to use them would be exceptional, since they would only need to be invoked when ordinary avenues of negotiation had failed. Indeed the entire

Discussion Paper gives no examples, and in fact had it not been for the Schwerdt case I should have been at a loss as to how they might ever be brought into play at all. Even in that case, plainly, the use of the powers was inappropriate and unjustifiable, and therefore reprehensible, to say the least; moreover, the cavalier attitude which we understand that the semi-government agency evinced at the time added insult to injury, and suggests that the agency involved was ill-informed from the outset and clutching at straws in an attempt to stave off Mr Schwerdt's complaint against it. That I still know of no example where the powers have been used 'properly' suggests to me that the legislation is close to being archaic, and should be treated with great circumspection. The principle however is still crystal-clear, and that is that the powers should only be invoked as a last resort, in the most extreme emergency. Any decision to invoke them should therefore be taken at the highest level, that is, with the direct intercession of the responsible Minister, who must stand ready to defend his decision, and if necessary to make amends, or ultimately to resign, should his decision be overruled in subsequent court action. It is quite conceivable that no instance will ever again surface where the Crown Use Provisions are invoked, and I would suggest that that is the desirable situation; nevertheless I concede that the provisions might need to be retained as a reserve power, (and in any case I do not get the feeling that Government is about to relinquish them.) The unanimous feeling of the IAA in the Schwerdt case was that the inventor/originator's rights should be the paramount consideration except in cases of direst social need.

There are many concerns brought forward in your Discussion Paper; one is a question as to exactly which bodies can claim these Crown Use Provisions should they ever be used. *It would obviously be a very serious matter indeed for them to be invoked if at all, which is why direct Ministerial intervention should be an absolute demand.* Plainly if the reason for invoking them is considered to be so serious as even to permit of, let alone justify, the abrogation of all normal rights of property, (as appears to be the only case even arguably with merit), then the abrogation of those rights is a matter of such gravity that the responsible Minister must be personally accountable. For local councils and even State governments to claim such a right is laughable, *except* for the fact that it was the now-defunct Adelaide *E&WS* that attempted to use the Crown Use Provisions against Tom!

Where a case of use of the Provisions might ever arise, it is *prima facie* such an odious procedure that I contend that appeal procedures should be automatic, and that they should be funded by the Crown Law Department, rather than by the dispossessed holder of the rights. Negotiations as to reimbursement need to be weighted in favour of, rather than against the originator, since in effect all the commandeering of his rights amounts to, from his point of view at least, is simple theft, but at the hands of 'the Authorities' whoever they might turn out to be.

I do know of one other relatable case, though Crown Use Provisions were not invoked. It concerns the case of *Oehlschlager v LandCare*. Jurgen Oehlschlager claimed that his 1982 Registered Design *All Hands Shape Australia* was the genesis for the 1990-published LandCare Logo. Despite overwhelming evidence to support him, and despite the fact that the defendant could show no developmental evidence of his own to show how he had come up with and refined the graphic, Jurgen lost his case in the Adelaide

Supreme Court. As an onlooker I was dismayed at the disparity between the 2 legal counsel for Mr Oehlschlager (one barrister, one QC), and the *dozen-plus* for LandCare, including several QCs. It was plain that LandCare had spared no expense to win the case, and I must say that the judgment itself is very questionable, relying as it does solely on the defendant's previous good reputation for honesty. I do invite you to read the judges's words in the Oehlschlager case, and decide for yourself the rights and wrongs. The case was enough to make me doubt forever the capacity of an ordinary citizen to secure a decision in his favour, almost regardless of the rights and wrongs of the case, should City Hall with all its financial clout and influence choose to fight him. If the Minister is necessarily involved and accountable, and if he knows that he will have to defend an automatic legal challenge to the invoking of the Crown Law Provisions, then that should dissuade such actions except in that sole arguable area, namely extreme need. Onus of proof that such an action was the sole last resort and the need extreme should be on the Government.

In conclusion let me say that whilst I would view the possible use of Crown Law Provisions as more serious than the common theft of valuables involving, as more serious than the theft of a beloved dog, and indeed as the word plagiarism suggests, next of kin to kidnapping, I do acknowledge the Government's rights to retain the Provisions, in the hope that there will never prove to be a situation so grim as to necessitate their use. If the suggestions I have made are built in to the preconditions for their implementation, I believe that there will other ways be found to achieve the desired outcome.

Yours faithfully,  
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