## Submission Responding to the March 2018 Copyright Modernisation Consultation Paper

I thank the Department for the opportunity to participate in these law reform consultations. I will confine my submission to Question 1 (on which I will deal with: Incidental or Technical Use; Text and Data Mining; Quotation – Criticism or Review; Quotation – Appropriation Art) and Questions 5-7 (Orphan Works).

**Question 1 – Fair dealing for incidental or technical use: US-Australia FTA compliance**

Consideration is being given to amending the Copyright Act to introduce a new fair dealing exception for incidental or technical use (and make related consequential reforms) consistent with ALRC recommendation 11-1. At a 1 May 2018 consultation meeting it was explained by the Department that the scope of the new purpose was intended to include the following four activities: (i) caching/indexing; (ii) web scraping; (iii) web crawling, and (iv) cloud computing.

An immediate issue created by any such new fair dealing purpose is its compliance with an aspect of Australia's intellectual property enforcement obligations under US-Australia Free Trade Agreement ('FTA'), article 17.11(29); the so-called safe harbour regime. That FTA article recites that the safe harbour regime exists 'for the purposes of providing enforcement procedures that permit effective action against any act of copyright infringement' and 'legal incentives for service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyrighted materials'. The remedial limitations offered to service providers by the safe harbour are only available for the designated A-D functions on condition that service providers assist copyright owners in enforcing their rights on networks over which the service provider has control.

The four activities (i)-(iv) set out at the 1 May 2018 consultation meeting, and there explained by the Department to be intended to be included within this new fair dealing purpose, appear to overlap substantially with the A-D safe-harbour functions. In particular:

(i) Caching/indexing appears to overlap substantially with safe-harbour functions B and D;
(ii) Web scraping appears to overlap substantially with safe-harbour functions B and D;
(iii) Web crawling appears to overlap substantially with safe-harbour function D
(iv) Cloud computing appears to overlap substantially with safe-harbour function C.

Unlike the safe-harbour regime, the proposed unremunerated exception would not be conditioned upon requirements to assist in enforcing copyright. The new fair dealing purpose would remove copyright liability, however the logic of the safe-harbour regime relies on that very liability to provide incentives for enforcement cooperation.

Whether enacting this fair dealing purpose can be reconciled with the FTA article 17.11(29) enforcement obligation is an open question. This is because it is unclear, if the new fair dealing was introduced, what liability would remain for there to be sufficient legal incentives for service providers to cooperate with rightsholders to comply with the safe-harbour conditions with respect of those (i)-(iv) activities. The ALRC report states (at para 11.56) that if such a fair dealing purpose were to be introduced: 'internet intermediaries and others may still need to rely on a safe harbour scheme in other circumstances' (emphasis added). No further explanation of what those other circumstances might be was offered by the ALRC. Within the four activities (i)-(iv) identified by the Department, what those other circumstances

might be are difficult to ascertain and that should give pause for thought about the scope of the proposed fair dealing purpose and its FTA compliance.

**Question 1 – Fair dealing for text and data mining: current inclusion within research or study**

At the 1 May 2018 consultation meeting and in subsequent correspondence it was made clear that text and data mining for non-commercial purposes are also intended to be covered by a fair dealing exception for incidental or technical use. However, this appears to be quite a separate fair dealing purpose.

Many of the settings put forward by advocates of a fair dealing exception for data and text mining relate to its need for uses tied to research or study. Thus, at the recent CMCL Conference session on 6 April 2018 the text-mining of an academic conducting research was explained to highlight the need for a new targeted fair dealing exception. However, the current research or study fair dealing exception can apply to such uses – contrary to the impression created by the ALRC report. That report included (at para 11.65) the following passage:

> One issue is whether data and text mining, if done for the purposes of 'research or study', would be covered by the fair dealing exception. The reach of the fair dealing exceptions may not extend to text mining if the whole dataset needs to be copied and converted into a suitable format. Such copying would be more than a 'reasonable portion' of the work concerned.

The final sentence of this passage references section 40(5) of the Copyright Act. A difficulty with the ALRC's assertion in that sentence is that it might mislead its reader into believing that section 40(5) somehow limits the scope of the research or study fair dealing exception to defined portions, thereby making it inapplicable to reproductions of whole works such as compilations of data. Any such a belief is wrong.

Section 40(5) deems reproductions of works for research or study purposes that do not exceed prescribed quantity amounts to be fair dealings, and thereby overriding the fairness factors set out in section 40(2). When reproduction for a research or study use exceeds the prescribed quantity amounts, whether that reproduction is a fair dealing is determined by the fairness factors set out in section 40(2). Those factors explicitly contemplate the possibility that a work might be reproduced in its entirety and comprise a fair dealing: 40(2)(e). The reproduction of the whole of a compilation literary work (such as a data base) for the purposes of research or study may fall within the section 40 fair dealing exception if the relevant fairness factors of section 40(2) are satisfied.

**Question 1 – Fair dealing for quotation: current inclusion within criticism or review**

Consideration is being given to amending the Copyright Act to add a quotation fair dealing exception, consistent with ALRC recommendation 9-1 and Berne article 10(1). However, many mainstream quotation uses are currently within criticism or review fair dealing and the breadth of that existing exception appears to be not well understood. Indeed, the first four examples offered in the ALRC report at para 9.14 that are suggested to be quotation uses that are essentially outside of existing fair dealing exceptions, are within the potential scope of the criticism or review fair dealing purpose under current law. That purpose from the UK jurisprudence can extend to the criticism or review of: the doctrine or philosophy explaining a work (*Hubbard v Vosper*, 1971); the motivation underlying the writing of a work (*Beloff v Pressdram*, 1972); the decision to withdraw a work from the public (*Time Warner v Channel 4*,

1993); and the social or moral implications related to a work (*Pro Sieben v Carlton TV*, 1998). This UK jurisprudence has been accepted in Australia in *TCN Channel 9 v Network 10* where a 2002 Full Federal Court of Australia (and indeed both parties before it) accepted its obvious effect: 'criticism and review are words of wide and indefinite scope which should be interpreted liberally'.

Thus, the criticism or review defence encompasses dealings with a work – including quotations (i.e. extracts) across various media forms – made for contextual criticism or review. This includes, as in *Pro Sieben,* a film-documentary type of use to provide an example for the critique or review of a matter of social or moral concern: cheque-book journalism. Moreover, in *Pro Sieben* the trial judge's narrow interpretation of the exception that denied such a broad reach of the criticism or review purpose ('The Act does not provide a general defence to the effect that it is permissible to fairly deal in any copyright work for the purpose of criticising or reviewing that work or *anything* else. The defence is limited to criticising or reviewing that or another work ... It must be taken to be deliberately so limited.') was emphatically rejected by the UK Court of Appeal. The Court of Appeal instead put forward a liberal interpretation, an interpretation that was said to be consistent with the earlier UK cases, that has been wholly adopted in Australia by *TCN Channel 9 v Network 10*. In *Pro Sieben* the Court of Appeal treated the words 'For the purpose of criticism or review' as a composite phrase similar to 'for the purpose of argument'. The statutory words 'whether of that work or another work' (which had been introduced on the recommendation of the 1951 UK Gregory Committee with the intention to loosen rather than restrict: Gregory Committee Report pp 15-16) were not regarded by the Court of Appeal as any limitation on the scope of the defence.

Each of the first four examples given by the ALRC at para 9.14 of things that 'at least in some circumstances [are] not covered by existing fair dealing exceptions' do fall within the potential scope of the criticism or review fair dealing exception under the liberal approach in *Pro Sieben* that has been adopted in Australia. Therefore, given the level of misunderstanding about the scope of the current law it might be worthwhile to consider removing: from section 41 the words 'whether of that work or another work'; from section 103A 'whether of that audio-visual item, another audio-visual item or a work'; and, from the section 248A definition of *exempt recording* para (fa) 'whether of that performance or another performance'. These removals will better codify the operative scope of the criticism or review fair dealing exception in current law.

Finally, in view of this jurisprudence, it is difficult to conceive of how current Australian law does not meet any obligation under Berne article 10(1). Indeed, the current law exceeds that obligation by potentially applying to quotation from unpublished matter – such as the work at issue in *Beloff v Pressdram*.

**Question 1 – Fair dealing for quotation: the inclusion of appropriation art as 'quotation'**

The ALRC also included at para 9.14 as quotations essentially 'not covered by existing fair dealing exceptions' a range of literary or artistic practices such as the use of epigrams, sampling, mashups and remixes. Related to this was a discussion (at paras 9.17-9.20) about the infringement of the musical work at issue in the *EMI v Larrikin* litigation. The ALRC concluded that discussion by indicating (at para 9.21) that the infringement in *EMI v Larrikin* ideally should be regarded as quotation to assess the use under the ALRC's proposed fairness factors. The types of uses listed by the ALRC – including that in *EMI v Larrikin* – might be more accurately regarded as appropriation art. Consistent with the ALRC's broad characterisation, Adeney's proposed definition includes quotation as a reproduction from the quoted

work to support an artistic idea contained in the quoting work: (2013) 23 AIPJ 142, 156. Although what it might mean to exploit copyright to support an artistic idea is perhaps somewhat cryptic, it seems that this aspect of the Adeney definition identifies the area that a new quotation exception would potentially cover which the *Pro Sieben* approach to fair dealing for criticism or review currently does not: appropriation art – including music sampling, epigrams and the type of visual art use controversially considered to fall within the US fair use purpose in *Cariou v Prince*, 714 F 3d 694 (2d Cir 2013).

If, in substance, the practical law reform issue resolves to whether Australia should introduce a new fair dealing exception for appropriation art, the issue should be directly put. That way the full ramifications of this new exception can be debated – including its relationship with the obligation in Berne article 12 which confers exclusive rights over 'adaptations, arrangements and other alterations'. Indeed, it is confusing and obscure to attempt to introduce an appropriation art fair dealing exception in the guise of a quotation fair dealing exception.

**Questions 5-7 – Orphan Works and Mass Digitization Projects: statutory licensing**

Michael Fraser and I proposed in 2011 a hybrid orphan works regime which included a compulsory licence to deal with belated assertions of rights by missing owners: (2012) 23 AIPJ 4, 9-17. In that proposal we also suggested a free exception for non-commercial uses by natural persons of lawfully obtained unpublished orphaned material, and that mass digitization projects should receive separate treatment.

The ALRC report rejected compulsory licensing (at paras 13.41-13.54) in favour of a remedial limitation model. An earlier Attorney-General's Department 2012 Review ("Works of Untraceable Copyright Ownership") provided a detailed exposition of the issues and trade-offs involved in the various policy alternatives. That Review was more open to exploring compulsory licensing within the available range of measures.

If an orphan works exception to copyright was to be reconsidered now, the hybrid regime we have proposed remains as a model that could deliver a practical solution to meet the requirements of a wide variety of stakeholders.

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