HIGH COURT OF AUSTRALIA

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COPYRIGHT AGENCY LIMITED v STATE OF NEW SOUTH WALES

The State of New South Wales was not entitled to use surveyors' plans without fairly remunerating copyright owners, the High Court of Australia held today.

Members of the Copyright Agency Limited (CAL) include consulting surveyors. They own the copyright in their survey plans, which are "artistic works" protected by the Commonwealth *Copyright Act*. CAL is the relevant collecting society distributing remuneration to copyright owners. It applied to the Copyright Tribunal to determine the terms upon which the State could copy the survey plans and provide them to the public. Part VII, Division 2 of the Act provides for the use of copyright material by the Crown where "the Crown" includes the government of a State, and provides for an exception to infringement provisions which would otherwise apply. Because section 183(1) exempts the copying and distribution of plans from infringement if done for the services of a State, CAL did not contend that NSW was infringing the copyright in survey plans. The Act provides that a State, doing any acts within the copyright, must inform the copyright owner. Section 183A(2) provides that the government must pay the collecting society fair remuneration for the making of government copies using a method agreed on by the collecting society and the government or, if there were no agreement, determined by the Tribunal.

The Copyright Tribunal referred 11 questions of law to a Full Court of the Federal Court of Australia. The appeal to the High Court related to questions 5 and 6. Question 5 asked whether the State, other than by operation of section 183 of the Act, was entitled to a licence to reproduce survey plans and to communicate them to the public. Question 6 asked if the answer to question 5 is "yes", what were the terms of the licence. The Full Court answered "yes" to question 5 and answered question 6 by saying that the licence which they found was for the State to do everything it was obliged to do under the statutory and regulatory framework that governed registered plans. CAL appealed to the High Court on the issue of whether the Full Court erred in finding that the State had a licence to reproduce the plans and to communicate them to the public, independently of section 183 of the Act. CAL contended that section 183 was a statutory licence scheme leaving no room for the implication of a licence to copy the plans to communicate them to the public. The State relied upon a licence said to be implied by the conduct of a surveyor permitting survey plans to be registered in the knowledge of the uses to which they would be put.

The High Court unanimously allowed the appeal. It answered "no" to question 5, making it unnecessary to answer question 6. The Court held that Part VII, Division 2 of the *Copyright Act* contained a comprehensive licence scheme for government use of copyright material. Copyright owners such as surveyors had a statutory right to seek terms upon which the State did any act within copyright and to receive remuneration for any government copying. The Court held that various factors militate against implying a licence in favour of the State in respect of its dealings with survey plans. First, nothing in the conduct of a surveyor in preparing plans for registration involved abandoning exclusive rights bestowed by the Act, particularly since the statutory licence scheme qualified those rights on condition that remuneration be paid for permitted uses. Secondly, surveyors could not practise their profession without consenting to the provision of survey plans for registration, knowing the subsequent uses to which plans would be put. Thirdly, an application by a surveyor for fair remuneration for government uses of survey plans involving copying and communication of the plans to the public after registration did not undermine clients' use of the survey plans for lodgement for registration and issue of title. Fourthly, neither a surveyor nor their client could factor into fees under the contract between them, copying for public uses done by the State. Fifthly, the State charged for copies issued to the public. Sixthly, nothing in the express terms of section 183(1) could justify reading down the expression "for the services of the ... State" to exclude copying and communication of plans to the public.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

Address: PO Box 6309, Kingston ACT 2604 Telephone: (02) 6270 6998 Fax: (02) 6270 6909
Email: fhamilton@hcourt.gov.au