EXPLOITING COMPUTER SOFTWARE*

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Introduction

This paper will outline a number of commercial considerations involved in the exploitation of computer software, concentrating in particular upon the implications of the *Copyright Act* 1968 (Cth) and the Trade Practices Act 1974 (Cth).

Importation of software

In recent times, the parallel importation provisions in the *Copyright Act* 1968 (Cth) have attracted considerable comment. As the operation of these provisions is in turn dependent upon the extent of copyright protection for software in Australia, it is appropriate to briefly outline the existing state of copyright law in Australia.

The *Copyright Act* was amended in 1984, consistent with the world-wide realisation that traditional copyright legislation was probably inadequate to extend protection to computer programs, at least in object code. The Act was amended to include within the definition of "literary work":

> (a) a table or compilation, expressed in words, figures or symbols (whether or not in a visible form); and
>
> (b) a computer program or compilation of computer programs.

Computer program was for the first time defined, being:

* Based on a paper presented at a conference entitled Exploiting Intellectual Property Rights, presented by the Centre for Intellectual Property Studies, Bond University, 28 August 1993, and drawing in part upon the text of Hughes and Sharpe, *Computer Contracts: Principles and Precedents*, a text co-authored by Dr Hughes and published in looseleaf form by the Law Book Co.

> an expression, in any language code or notation, of a set of instructions (whether with or without related information) intended, either directly or after either or both of the following:
>
> (a) conversion to another language, code or notations;
>
> (b) reproduction in a different material form, to cause a device having digital information processing capabilities to perform a particular function.

Given that an infringement only arises where a reproduction of a protected work is made in a "material form", the new definition of "material form" was of significance as it included, in relation to a work or an adaptation of a work:

> any form (whether visible or not) of storage from which the work or adaptation or a substantial part of the work or adaptation can be reproduced.

Despite some initial academic misgivings, the amendments appear to have been successful in extending protection to software in both source and object code.

Against this background, the parallel importing (or "grey marketing") provisions of the *Copyright Act* can be considered. The practice of parallel importing is prohibited by section 37 which provides, inter alia, that "the copyright in a literary ... work is infringed by a person who, without the licence of the owner of the copyright, imports an article into Australia for the purpose of ... selling ... distributing ... or ... exhibiting ... where to his knowledge, the making of the article would, if the article had been made in Australia by the importer, have constituted an infringement of copyright".

Section 38 is expressed in similar terms and addresses the liability of the person who, in Australia, actually sells or exhibits the product in question. These provisions have been the subject of consideration in a number of reported cases: see, eg, *Barson Computers Australasia Ltd v Southern Technology Pty Ltd*,[1] *Lotus Development Corporation v Vacolan Pty Ltd*,[2] *Star Micronics Pty Ltd v Five Star Computers Pty Ltd*,[3] *Avel Pty Ltd v Multicoin Amusements Pty Ltd*,[4] *Broderbund Software Inc v Computermate Products (Australia) Pty Ltd*.[5]

The parallel importation provisions of the *Copyright Act* were the subject of an inquiry by the Prices Surveillance Authority (PSA) in 1993

1 (1987) 10 IPR 597.
2 (1989) 16 IPR 143.
3 (1990) 18 IPR 225.
4 (1990) 171 CLR 88.
5 (1992) 22 IPR 215.

which examined of the cost of computer software in Australia. The study ascertained that prices for software in Australia were considerably higher than in the United States of America and it concluded that the principal fault lay with local Australian distribution channels. It recommended the repeal of the parallel importing provisions of the *Copyright Act* as they apply to computer software and accompanying manuals.

Specifically, the PSA considered that sections 37 and 38, coupled with the reluctance of many domestic subsidiaries of international developers to engage in distribution themselves, limited the source of supply of local retailers to certain high cost Australian distributors. The parallel importation provisions of the *Copyright Act* prevented retailers from directly importing software and thus by-passing the "high cost local distribution network" and from "undercutting price discrimination exercised by some USA suppliers". The effect of appointing an exclusive distributor was to enable monopoly prices to be charged to domestic dealers if there were no other close substitute packages.

Parallel importation of software was subsequently considered by the Copyright Law Review Committee (CLRC).

In its draft report on Computer Software Protection published in June 1993, the CLRC was divided on the issue of parallel importation. A bare majority agreed with the PSA recommendations. In reaching this conclusion, the CLRC acknowledged it was conscious of the need to balance the rights of the copyright owners to exploit their works against the interests of consumers, and society as a whole, to have ready access to those works.

The CLRC subsequently reversed its position in its final report, published in 1995. Its revised position was that the existing restrictions on parallel importation of computer programs should remain unchanged and that the position be reviewed after three years. In reaching this conclusion, the CLRC was swayed by the view that, whilst parallel importation provisions may be exercised in an anti-competitive manner, there were hidden economic benefits that were impossible to measure. Furthermore, any repeal of the provisions might have detrimental effects on the computer software industry (eg piracy) and the wider community (eg employment).

There are other aspects of the Australian copyright legislation which should be considered in the present context. As a corollary of the parallel importing provisions, for example, the *Copyright Act* creates the offence of importing an infringing copy of a work into Australia for the purpose of distributing the article for trade or for any other purpose to an extent that will prejudice the owner of the copyright in the work.

Section 132(2A), introduced in 1984, provides, inter alia, that a person shall not knowingly be in possession of an infringing copy for the purpose of trade. This new subsection has been applied in the Federal Court in two reported cases involving software enthusiasts who attempted to sell pirated software: *Irvine v Carson*[6] and *Irvine v Hanna-Rivero*.[7]

Section 133A relates to advertisements for the supply of infringing copies of computer programs. Introduced in 1986, the section provides that where a person publishes an advertisement which that person knew, or should reasonably have known, related to an infringing copy of software, that person will be guilty of an offence. The section was applied for the first time in *DPP v Olsen*.[8]

Section 135 provides for the seizure at the border of illegal works, defined more precisely in subsection (4) as "any printed copy of the work made outside Australia ... the making of which would, if it had been made in Australia by the person who imported it into Australia, have constituted an infringement of the copyright in the work". By applying only to printed works, the provision does not at present affect the importation of computer software. This is a deficiency highlighted by the PSA, which recommended an amendment of the section to cover pirated and counterfeit computer software contained on disk or magnetic tape in circumstances where the copyright owner has given notice to the Australian Customs Service regarding the expected time and place of importation.

Ownership of Developed Software

An integral aspect of the commercial exploitation of software is the development of new applications or the modification of existing programs for local or specific use. In a contract for the development of computer software, practitioners should not overlook the importance of a clause designating ownership rights of copyright in the finished product. This is particularly the case in circumstances where it is intended that ownership of the copyright will ultimately reside in the party which has commissioned the work. A common misconception held by clients is that the person who commissions the development of new software becomes the owner of the software upon payment. Of course, as a general working principle, this will not be the case - ownership vests with the author unless there is an assignment in writing by the author to the commissioner: see *Copyright Act* 1968 (Cth) ss 35(2) and 196(4). In *Cope Allman (Marrickville) Pty Ltd v Farrow*[9] and *Avtex Airservices Pty Ltd v Bartsch*[10], the court dealt with applicants who had apparently misconstrued their rights in this regard.

6 (1991) 22 IPR 107.
7 (1992) 23 IPR 295.
8 Unreported, St James Local Court, Sydney, 10 January, 1991.
9 (1984) 3 IPR 567.
10 (1992) 23 IPR 469.

It should be emphasised that the vesting of ownership of copyright in an employer, in circumstances where the software has been developed by an employee pursuant to a contract of service, may be excluded or modified by agreement: *Copyright Act* 1968 (Cth) s 35(3). Agreement to this effect may be implied: *Massine v de Basil*.[11]

In its draft report on Computer Software Protection published in June 1993, the CLRC recommended that the *Copyright Act* s 35 be amended to provide that ownership of a computer program vest in the commissioner, not the author. The CLRC considered there was no basis for the distinction between employees and contractors in this regard and, bearing in mind that the parties would remain free to contract expressly with respect to ownership, believed it would be "more sensible and more equitable" if the present law were changed.

This recommendation was reversed in the CLRC's final report, published in 1995. The underlying rationale for the change was that the CLRC considered that the task of identifying the author of a computer program was not so much more difficult (if indeed more difficult at all) than in the case of some other types of copyright works as to justify a different allocation of copyright ownership from that applying to other works. There was no justification for placing computer programmers in a unique position.

Different considerations exist in the case of original works commissioned by the Crown. In particular s 176(2) of the *Copyright Act* provides, inter alia, that "the Commonwealth or a State is ... the owner of a copyright in an original literary ... work made by, or under the direction or control of, the Commonwealth or the State, as the case may be". It does not follow, however, that ownership of software commissioned by the Crown will be free from doubt in all instances. The term "under the direction or control of" is somewhat vague and might not necessarily embrace development work designed to achieve a specified result in circumstances where the means of achieving that result is not so specified.

Uncertainty regarding ownership of government-commissioned works has led to a specific provision being included in the Government Information Technology Conditions (GITC), discussed below. Clause 56 of the GITC provides that intellectual property rights in works created at the request of the government are assigned to the government upon completion unless otherwise agreed in writing between the parties.

Difficulties also commonly arise in relation to the ownership of copyright in software which has been developed by more than one party. This requires a consideration of the provisions in the *Copyright Act* 1968 (Cth) regarding joint ownership of copyright and a consideration of various

11 [1936-45] Mac CC 223.

contractual arrangements which may be entered into in order to avoid subsequent uncertainty and dispute.

The *Copyright Act* 1968 (Cth) s 10(1) defines a "work of joint authorship" as "a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors". For a person to be regarded as the joint owner of copyright in software, therefore, it would have to be demonstrated that that person had contributed to the act of authorship (that is, the act of reducing the work in some degree to a material form) and that the role of that person was not simply to provide ideas which formed the basis for the writing of the program by the other party: see, for example, *Donoghue v Allied Newspapers*;[12] *Whelan Associates Inc v Jaslow Dental Laboratories Inc*.[13] Joint authors hold as tenants in common in equal shares, again unless there is agreement to the contrary: *Acorn Computers Ltd v MCS Microcomputer Systems Pty Ltd.*[14] It follows that in circumstances where more than one party might be interested in acquiring ownership rights (whether as a collaborator or as a commissioner), it is important that the issue be addressed by contract.

Gordon[15] identifies five possible structural approaches which may be used in joint or derived work developments. The parties may opt for total ownership by one party (with the other party retaining no ownership or licence rights whatsoever); ownership by one party with a limited licence to the other (whereby the other party acquires licence rights to use the product internally for its own purposes); ownership by one party with a non-exclusive, unrestricted licence grant-back to the other (whereby the other party has no restrictions on the use or commercial exploitation of the software); joint ownership (whereby both parties acquire full ownership and rights in the product); or an alternative form of joint ownership (whereby each party owns its separate input, assuming such input is capable of precise identification).

These issues clearly need to be anticipated and addressed in any agreement involving the exploitation of software in circumstances where there is a prospect that more than one entity may be involved in writing new code.

Originality of Developed Software

12 [1938] 1 Ch. 106.

13 609 F Supp 1307.

14 (1984) 4 IPR 214, 221.

15 Gordon, ML, 'Key Issues in Contracting for the Development of Joint and Derived Products' (1991) Computer/Law Journal 1, 20-27.

Not infrequently, questions arise as to the originality of software products distributed in Australia. Perhaps the most common allegation is that the software developer has plagiarised the work of another. Allegations of plagiarism are not unique to computer software but there are two aspects which, in a technical sense, are unique: reverse engineering and "look and feel".

Reverse engineering in this context is the process whereby the object code of a computer program is disassembled or decompiled by a third party and then analysed in order to assist the third party in developing a new program which performs the same function. Issues associated with the reverse engineering of a computer program to some extent raise no unusual copyright problems, the ultimate question being whether a substantial portion of the original program has been integrated or copied into the new program: see, eg, *Barson Computers Australasia Limited v Southern Technology Pty Ltd.*[16]

A case which achieved some significance in the context of reverse engineering, however, was *Autodesk v Dyason*.[17] The respondent developed a device to circumvent the applicant's hardware lock. In doing so, the respondent did not dismantle the applicant's lock but used an oscilloscope to observe the lock's workings. The respondent then created a conceptually different device which was able to adequately interact with the applicant's program. The High Court held that the respondent's device, in the form of an EPROM, reproduced a substantial part of the applicant's program, notwithstanding that there had been no direct copying. The decision has been regarded by many as granting protection to computer output, or "function", and hence potentially restricting legitimate reverse engineering in Australia.

The CLRC subsequently recommended that the *Copyright Act* be amended to permit the decompilation of computer programs to the extent necessary to achieve interoperability with an independently created computer program or for the purpose of error correction, provided the decompilation was performed by the authorised user of a lawfully acquired copy of the program.

The "look and feel" issue involves circumstances where screen formats, sequential operations and the general "user interface" of the program are replicated without the programmer analysing the code of the original program at all. Whether copying of this nature should be regarded as an infringement of copyright has been the subject of conflicting decisions in the United States: see, eg, *Whelan Associates Inc v Jaslow Dental Laboratories Inc*,[18] *Plains Cotton Co-Operative Association of Lubbock,*

16 (1987) 10 IPR 597.
17 (1992) 173 CLR 330.
18 F Supp 1307.

Texas v Goodpasture Computer Service Inc,[19] *Broderbund Software Inc v Unison World Inc*,[20] *Lotus Development Corp v Paperback Software International Inc*.[21]

The most broadly accepted United States authority is *Computer Associates International Inc v Altai Inc*[22] in which the court recommended a three step procedure to determine whether non-literal elements of two or more computer programs are substantially similar - the abstraction step (whereby the infringed program is broken down into its contingent conceptual parts), the filtration step (whereby such aspects as incorporated ideas, expression necessarily incidental to those ideas and elements taken from the public domain are to be disregarded as unprotectable) and the comparison step (whereby the remaining core of the infringed work is compared with the defendant's work in order to determine the existence of a substantial similarity).

"Look and feel" has not been the subject of specific judicial pronouncement in Australia and there is every prospect that Australian courts would follow *Altai*. Nevertheless, *Data Access Corporation v Powerflex Services Pty Ltd* touched upon the issues.[23] The respondent had created a program compatible with the applicant's program. The respondent did not have access to the applicant's source code but endeavoured to independently create a program which closely emulated the applicant's product. The court found that the applicant's copyright had been infringed by certain features of the respondent's program. Although these features had been independently derived, the court considered there had been an adaptation on the basis of the strong objective similarity of the two versions of the source code. In relation to other aspects of the respondent's program, however, the court found against an infringement on the basis that there was no realistic alternative means of expressing the same idea. In respect of these features, Jenkinson J stated that "the expression of the idea is inseparable from its function and is not copyrightable".

It would be reasonable to conclude that in relation to both "reverse engineering" and "look and feel" issues, there is yet to be a definitive judicial pronouncement in Australia. Commercial exploitation of software involving either of these approaches is therefore be set with some level of uncertainty.

Impact of the Internet

19 807 F 2d 1256.
20 648 F Supp 1227.
21 740 F Supp 37.
22 (1992) 23 IPR 385.
23 (1996) 33 IPR 194.

The Internet is being used increasingly as a means of distributing computer software in Australia. In particular, software is commonly distributed as "shareware" over the Internet. "Shareware" is software which is made available to users to reproduce and trial for a free period, with the expectation of payment of a licence fee at the end of that trial period.

It was established in *Trumpet Software Pty Ltd v OzEmail Pty Ltd*[24] that shareware does not lose the benefit of copyright protection, per se, by virtue of its distribution in this manner.

It follows that in relation to shareware and other software made available over the Internet, one must consider the existence of an implied licensed to copy the program. The *Copyright Act* s 36 provides that copyright in a literary work (i.e. software) is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia or authorises the doing in Australia of any act comprised in the copyright. Whilst the *Copyright Act* s 10(1) requires exclusive licences to be in writing, non-exclusive licences need not be in writing and may be given orally or may be implied.

The existence of an implied non-exclusive licence to copy software made available over the Internet will be a question of fact in each case. One principle emerging from *Trumpet* is that in the event the court finds an implied licence to utilise protected material accessed from the Internet, that licence will not extend, at least in the case of shareware, to unauthorised changes to that material.

Competition law

Competition law in Australia is governed largely by the *Trade Practices Act* 1974 (Cth), supplemented at State level by the *Fair Trading Acts*. Particular attention should be given to the *Trade Practices Act* Part IV which deals with "restrictive trade practices".

In respect of the manufacturer's option to provide maintenance services in respect of software, for example, care should be taken to ensure the distributor is not required to supply end-users on terms which contravene the exclusive dealing provisions of the *Trade Practices Act* 1974 (Cth). Section 47(6) of the Act provides that a corporation engages in the practice of exclusive dealing if it, *inter alia*, supplies goods or services on the condition that the customer will acquire goods or services of a particular kind or description directly or indirectly from another person.

Particular care should also be taken to avoid a pricing structure which infringes the resale price maintenance provisions of the Act. Section 48 of

24 (1996) 34 IPR 481.

the Act prohibits the practice of resale price maintenance, a term which is further defined in Pt VIII. Under s 96(1)(c) in Pt VIII, for example, a corporation engages in resale price maintenance if it supplies goods to another on condition that the recipient will not on-sell the goods at a price less than a specified figure. A "recommended price" is permissible (s 97) unless there is an attempt by the supplier to induce the distributor not to sell at a price less than that price: s 96(1)(b). The fact that a retail price is termed a "recommendation" is not conclusive if, on the evidence, it is a "specified price" for the purposes of s 96: *Trade Practices Commission v Bata Shoe Co of Australia Pty Ltd*.[25]

The question of resale price maintenance was considered in *Trade Practices Commission v Commodore Business Machines Pty Ltd*[26], a case which dealt with computer hardware rather than computer software. A provision in a dealership agreement prohibiting dealers advertising a brand of personal computer at other than the recommended retail price was held to infringe the *Trade Practices Act* 1974 (Cth) s 48. The relevant clause in the contract stated:

> Any advertising of [the computer brand] by the dealer must state the recommended retail price of [the computer brand]. The price must be the only price which appears in the advertisement.

Einfeld J held this was "clearly in contravention of the resale price maintenance provisions of the Act" and, taking into account the facts surrounding the case, imposed a $250,000 penalty on the respondent.

There are many other ways in which a distributorship agreement could infringe Part IV of the *Trade Practices Act*, particularly in relation to exclusionary provisions (s 45), misuse of market power (s 46) or exclusive dealing (s 47). These sections were all considered in *Broderbund Software Inc & Anor v Computermate Products (Australia) Pty Ltd & Ors*.[27]

The *Trade Practices Act* ss 52 and 53 deal with misleading conduct and are clearly of relevance in the present context. Section 52 provides that "a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". Section 53 deals with specific types of false representation.

Section 52 has been the subject of a number of reported decisions in the context of the supply of computer software. One case relating specifically to the importation of computer software was *Star Micronics Pty Ltd v Five Star Computers Pty Ltd*.[28]

25 (1980) 44 FLR 145.
26 (1989) ATPR 40-976.
27 See above n 5.
28 (1990) 18 IPR 225.

Regardless of the operation of the *Trade Practices Act* s 52, liability may also arise in appropriate circumstances in tort for passing off. As the tort essentially embraces one of the circumstances in which s 52 may be applied, it has little independent significance in Australia and is often pleaded in the alternative to an action based on s 52. Hence in *Star Micronics* the respondents were found liable in tort for passing off as well as incurring liability under the *Trade Practices Act*. The tort clearly remains of relevance to software distributors in circumstances where there is a misrepresentation amounting to an appropriation or misuse of the reputation of a rival company or a rival product.

It is also relevant to consider manufacturers' and resellers' liability arising under Part V which deals with "consumer protection" and which is restricted in operation to "consumers".

The *Trade Practices Act* 1974 (Cth) Part V Div 2A provides a "consumer" with a right of action against a manufacturer (or importer) of defective goods in certain circumstances, notwithstanding the absence of a contractual relationship. A "consumer" is the purchaser of goods valued at less than $40,000 or goods of greater value which are normally purchased for personal, domestic or household use or consumption: *Trade Practices Act* 1974 (Cth) s 4B. "Goods" refers to "goods of a kind ordinarily acquired for personal, domestic or household use or consumption" (s 74A). It is debatable whether software is classifiable as "goods" for the purposes of this legislation: *Toby Constructions Products Pty Ltd v Computa Bar (Sales) Pty Ltd;*[29] *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd*.[30] An alternative approach, which appears to be gaining acceptance, is that a contract for the supply of software is a contract for the supply of "services", whereupon the transaction will remain subject to the *Trade Practices Act* Part V Div 2A: see *Caslec Industries Pty Ltd v Windhover Data Systems Pty Ltd*,[31] *Trumpet Software Pty Ltd v OzEmail Pty Ltd*.[32]

Assuming software constitutes "goods", and assuming a software developer is a "manufacturer", and further assuming that the copyright owner is a corporation, the *Trade Practices Act* Part V Div 2A will give end-users rights against manufacturers in relation to certain defects in software in circumstances where it is established that no direct contractual link exists between the end-user and the manufacturer.

In each instance, the manufacturer incurs liability direct to the end-user. Part V Div 2A is clearly of fundamental significance in distribution contracts.

29 [1983] 2 NSW LR 48.
30 (1990) 93 ALR 558.
31 Unreported, FCA, NSW Division, 13 August 1992.
32 (1996) 34 IPR 481.

The operation of the *Trade Practices Act* Part V Div 2A can be contrasted with Part V Div 2 ("Conditions and Warranties in Consumer Transactions"). Part V Div 2 applies only in relation to contracts for the supply of goods or services direct to a "consumer".

The potential liability of a software developer under the *Trade Practices Act* was further expanded on 5 July 1992 with the introduction of Part VA. The amendment imposes liability on suppliers to compensate any person (not just the purchaser/licensee) who suffers certain losses as a result of the supply of defective goods.

Compliance with Standards

It is not uncommon for a software distribution or development agreement to contain a stipulation that the product or services which are the subject of importation must comply with "any relevant standards". In the Australian context, the standards most commonly incorporated into a computer contract are those published by Standards Australia (which in many instances replicate international standards).

Standards Australia was originally the Australian Commonwealth Engineering Standards Association. In 1929 it became the Standards Association of Australia and in 1950 was incorporated under a Royal Charter. In 1988 its relationship with the Commonwealth Government was formalised under a memorandum of understanding and the name was changed to Standards Australia. Standards Australia, as an independent organisation,0 cannot legislate or enforce the use of standards. Whilst some standards are made mandatory as a result of being referenced in legislation, a majority are used voluntarily by manufacturers, designers and purchasers. Nevertheless, standards can also provide a reference point for identifying acceptable industry practice and, as indicated above, are often used in contractual arrangements to identify the required quality of the products to be supplied.

Standards Australia is the Australian member body of the International Organisation for Standardisation (ISO) and the International Electrotechnical Commission (IEC) which prepare international standards to provide a basis for the international alignment of national standards. IEC deals specifically with electrical and electronic technology, whilst ISO deals with all other areas of standardisation. Some areas of standardisation are covered by both bodies in concert, such as standards for Open Systems Interconnection (OSI) for the information technology industry. The policy adopted by Standards Australia is to align the Australian standards as far as possible with ISO and IEC standards. In many instances, the Australian standards are identical with the international standards.

One area which has been the subject of standardisation is "Information Technology" which is categorised under the following broad headings:

A. Open Systems Interconnection ("OSI");
B. computer accommodation;
C. electronic funds transfer;
D. electronic data interchange;
E. credit cards;
F. computer graphics;
G. terminology and symbols;
H. information and data representation;
I. information storage;
J. software engineering and programming languages;
K. hardware;
L. industrial automation;
M. punch cards;
N. paper tape.

Supplying to governments

In June 1991, the Government Information Technology Conditions (GITC) were launched. The conditions were the result of a long and intensive drafting exercise, accompanied by widespread consultation with interested parties, but inevitably the conditions evinced a bias towards the customer and incurred the wrath of sections of industry.

GITC Version 1 was superseded by Version 2 on 2 December 1994 in accordance with a commitment made upon the release of Version 1 in 1991 that, after a period of operation, a substantial review of that document would be undertaken in terms of its structuring content.

In order to understand GITC, it is necessary to understand the normal procedures followed in the course of government acquisition processes. Although the GITC, or an adaption of the GITC, is used in all Australian jurisdictions, it is appropriate at this point to concentrate solely upon the Commonwealth government acquisition process.

The GITC applies to common use contract (CUCs) relating to information technology. Common use contracts are negotiated for a specific period of time, usually with a panel of suppliers, for the supply of information technology goods and services to the government under set terms and conditions. The GITC governs these arrangements.

Reference should be made also to the government contractual terms known as "PE68". This document has many similarities to the GITC but applies only to certain information management consultancy services and special services provided under CUCs. It is principally directed at Commonwealth government agencies and does not embrace, as the GITC does, all States and Territories. Unlike the GITC, the PE68 has no pre-established pricing or price basis, leaving contractors and customers to negotiate commercial aspects with each individual order.

The Commonwealth government acquisition process has been the subject of a number of reports and reviews, of particular significance being the *Bevis Committee Report* (Australian Government Purchasing Policies: Buying our Future, March 1994) and the White Paper (Working Nation: The White Paper on Growth and Employment, May 1994). The White Paper implemented a number of recommendations made by the Bevis Committee.

As a consequence of the White Paper, a National Procurement Board was created, charged with the responsibility of providing independent advice to ministers on purchasing policies and procedures; an Endorsed Supplier Approach was adopted, pursuant to which only pre-qualified Endorsed Suppliers are eligible to compete for admission to the IT and major office machine CUC panels; the concept of Industry Impact Statements was created, pursuant to which, in respect of certain significant purchasers, Commonwealth government departments and agencies are required to identify potential industry development opportunities which are to be addressed by prospective bidders; and the Two-Envelope Tendering system was introduced, pursuant to which bidders are required to identify industry development opportunities in a separate envelope when submitting certain tenders.

Other significant aspects of the Commonwealth government purchasing process, which may impact upon the commercial exploitation of software in the government arena, include the Partnerships for Development program, introduced in 1987, pursuant to which overseas firms seeking to sell, inter alia, software to government of an added value in excess of $40 million are required to enter into a "partnership" with the government and agree to meet a number of targets relating to expenditure on research and development, exports, local value added and/or investment. Also of importance are Fixed Term Arrangements, which extend the Partnerships for Development concept to firms with government sales of less than $40 million, with Australian firms being permitted to participate as well.

Conclusion

The importation and distribution of computer software within Australia requires a knowledge of numerous local laws. This paper attempts to identify only some of them, concentrating principally upon Australia's intellectual property and competition law regimes, together with certain unique features of the Commonwealth government's acquisition procedure.

The fact remains that the law is still only evolving in its application to computer software. Necessarily, it lags behind technological developments and courts are confronted with the unenviable task, in many instances, of seeking to apply legislation, particularly the form of *Copyright Act*, to situations which it was clearly not designed to address. For this reason, if for no other, uncertainty is likely to continue for some time to come.