CHAPTER TWENTY-THREE

DIGITAL ECONOMY FUTURE DIRECTIONS*

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CONSULTATION TOPIC 1: OPEN ACCESS TO PUBLIC SECTOR INFORMATION

Advances in information and communication technologies have brought about an information revolution, leading to fundamental changes in the way information is collected or generated, shared and distributed. The internet and digital technologies are re-shaping research, innovation and creativity. Economic research has highlighted the importance of information flows and the availability of information for access and re-use. Information is crucial to the efficiency of markets and enhanced information flows promote creativity, innovation and productivity. There is a rapidly expanding body of literature which supports the economic and social benefits of enabling access to and re-use of public sector information.[1] (Note that a substantial research project associated with QUT's Intellectual Property: Knowledge, Culture and Economy

[1] Note in particular: Houghton, J., Steele, C. and Sheehan, P., *Research Communication Costs in Australia: Emerging Opportunities and Benefits.* DEST. 2006, at dest.gov.au/NR/rdonlyres/0ACB271F-EA7D-4FAFB3F7-0381F441B175/13935/DEST_Research_Communications_Cost_Report_Sept2006.pdf. Houghton, Steele and Sheehan concluded in their 2006 report that open access models of scholarly communication have the potential to increase the economic and social returns from public investment in R&D. See also Houghton, J., Rasmussen, B., Sheehan, P., Oppenheim, C., Morris, A., Creaser, C., Greenwood, H., Summers, M. and Gourlay, A (2009) *Economic implications of alternative scholarly publishing models: Exploring the costs and benefits.* Project Report to Joint Information Systems Committee (JISC) by Victoria University & Loughborough University, United Kingdom (Unpublished) available at ie-repository.jisc.ac.uk/278/; Newbery, D, et al., *Models of public sector information provision via trading funds*, Department for Business, Enterprise and Regulatory Reform and HM Treasury, London, 2008, at www.opsi.gov.uk/advice/poi/models-psi-via-trading-funds.pdf. See also Kirsti Nilsen, *Economic Theory as it Applies to Statistics Canada: A Review of the Literature,* Submitted to Statistics Canada, 7 May 2007, pp. iii–iv, at www.chass.utoronto.ca/datalib/misc/Nilsen%20Economics%20Paper%202007%20final%20version.pdf, accessed 22 December 2008. See also, presentations at OECD Working Party on the Information Economy workshop on public sector information, *The Socioeconomic Effects of Public Sector Information on Digital Networks: Toward a Better Understanding of Different Access and Reuse Policies,* Paris, 4–5 February 2008, available at www.oecd.org/document/48/0,3343,en_2649_34223_40046832_1_1_1_1,00.html .

(IPKCE) Research Program is engaged in a comprehensive study and analysis of the literature on the economics of access to public sector information.)

The draft Consultation Paper (p. 3) states that the Australian Government acknowledges that economic benefits and social well-being can result from access to certain categories of public sector information (PSI). (The term 'public sector information' (PSI) is used here in the same sense as in the draft Consultation Paper, that is, to include information and data produced by the public sector as well as materials that result from publicly-funded cultural, educational and scientific activities). Governments play a central role in ensuring that PSI can be accessed, used and re-used. As observed in the draft Consultation Paper (p. 3), there is increasing support for 'the notion that the Australian Government should provide access to public sector information (PSI) on terms that clearly permit the use and re-use of that information'. This observation is supported by submissions to the 2008 Review of the National Innovation System, several of which raised the importance of improving the Australian environment for accessing and re-using PSI.[2]

Professor Brian Fitzgerald's submission stated:

> An ability to access and re-use knowledge, data, content and culture (especially that which is digitised) is nowadays a key factor in finding new ways of doing things for social, cultural and economic purposes. There is a broad consensus across the world that the default rule should be that publicly funded knowledge, data, content and culture should be available for open access.[3]

This emergence of a broad consensus on access to and re-use of PSI is increasingly apparent in policy documents and practical initiatives worldwide. The Department has identified some of these in the draft Consultation Paper (p. 3), notably, the OECD's 2008 Seoul Declaration on the Future of the Internet Economy and supporting policy framework,[4] the 2003 European Council and European Union's Directive on the Re-use of Public Sector Information (2003),[5] and the 2007 UK Power of Information Review.[6]

In Australia, however, the current situation with respect to PSI access and re-use is fragmented and lacks a coherent policy foundation, whether viewed in terms of interactions within or

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[2] See, for example, Submission no. 307, Australian Spatial Consortium at p. 1, www.innovation.gov.au/innovationreview/Documents/307-Australian_Spatial_Consortium.pdf, and Submission 428, Brian Fitzgerald, www.innovation.gov.au/innovationreview/Documents/428-Brian_Fitzgerald.pdf.

[3] Submission 428, Brian Fitzgerald at p. 4, www.innovation.gov.au/innovationreview/Documents/428-Brian_Fitzgerald.pdf.

[4] OECD (2008) The Seoul Declaration for the Future of the Internet Economy and the shaping policies for the future of the internet economy, noting in particular the annexed including the Recommendation concerning Access to Research Data from Public Funding and the Recommendation for Enhanced Access and More Effective Use of Public Sector Information, available at www.oecd.org/site/0,3407,en_21571361_38415463_1_1_1_1_1,00.html.

[5] European Council and European Parliament Directive on the Re-use of Public Sector Information (2003) available on the European Commission's website at ec.europa.eu/information_society/policy/psi/library/index_en.htm#Key_documents_(PDF_files).

[6] *The Power of Information: an independent review by Ed Mayo and Tom Steinberg* (2007), commissioned by the Cabinet Office, UK Government, available at www.opsi.gov.uk/advice/poi/index, www.cabinetoffice.gov.uk/newsroom/news_releases/2007/070607_power.aspx and www.cabinetoffice.gov.uk/reports/power_of_information.aspx.

among the different levels of government at the local, State/Territory and Federal levels, or between the government, academic and private sectors.

The issue of information access and re-use has been considered by various government agencies and in reports commissioned by governments over the last 15 years. There is a range of initiatives at the Federal and State/Territory government levels promoting or examining open access to PSI (as noted, pp. 3–5 of the draft Consultation Paper) but these are only loosely connected, deal with different aspects of access and re-use and lack any formal coordination. Where initiatives have occurred, they have generally been in specific information domains (e.g., the results of publicly funded research, either in the form of publications or data; patent specifications; statistical data; and spatial information). The issue of the most appropriate licensing model for use in relation to PSI was the focus of the Queensland Government's Government Information Licensing Framework (GILF) project which influenced the adoption of open content licensing (such as Creative Commons) by other State and Federal Government agencies.[7]

Initiatives such as these are important and provide evidence of a growing awareness of the importance of ensuring access to and re-use of PSI, they remain fragmented and separate and involve relatively few Government departments and agencies.[8] No comprehensive statement of policy, principle or practice relating to information flows has yet been developed by any tier of Australian government or for any information sector.[9]

Section 1 of the draft Consultation Paper (p. 5) raises several questions with respect to PSI: what categories of PSI are most likely to promote innovation and the digital economy?; what issues/factors facilitate the use and re-use of PSI?; what are the best formats in which to provide PSI?; what licensing terms would best facilitate use and re-use of PSI (and should they differentiate between commercial and non-commercial use and re-use)?

Many of these questions raise issues of the kind that would be addressed in a national information policy, the establishment of which was recommended in the *Venturous Australia* report of the Review of the National Innovation System. Of particular significance are the Innovation Review recommendations 7.7 and 7.14:

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[7] Queensland Spatial Information Council (QSIC), *Government Information Licensing Framework (GILF)* project www.qsic.qld.gov.au/QSIC/QSIC.nsf/CPByUNID/6C31063F945CD93B4A257096000CBA1A.

CC Australia blog – 'The Australian census goes CC': www.creativecommons.org.au/node/207; CC blog – 'Australia's census going CC BY': creativecommons.org/weblog/entry/11313; 'Creative Commons licensing is coming to the ABS!': www.abs.gov.au/websitedbs/D3310114.NSF/4a256353001af3ed4b2562bb00121564/8b2bdbc1d45a10b1c a25751d000d9b03!OpenDocument; ePSIplus: www.epsiplus.net/news/abs_sets_an_example; ABS Copyright notice: www.abs.gov.au/websitedbs/D3310114.nsf/home/%C2%A9%20Copyright; Dylan Bushell-Embling, 'Private eyes on public data', *The Age* and *The Sydney Morning Herald*, 25 September 2008, available at www.theage.com.au/news/technology/private-eyes-on-publicdata/2007/09/24/1190486224755.html?page=fullpage and www.smh.com.au/news/technology/private-eyes-onpublic-data/2007/09/24/1190486224755.html?page=fullpage accessed 27 August 2008.

[8] Among the most prominent are Geoscience Australia, Australian Bureau of Statistics, the Department of Education (DEWWR), the Department of Innovation, Industry, Science and Research (DIISR) and AGIMO.

[9] The Australian position can be contrasted with that in New Zealand, where the government published its national information policy in 1997.

Recommendation 7.7 Australia should establish a National Information Strategy to optimise the flow of information in the Australian economy.

The fundamental aim of a National Information Strategy should be to:

- utilise the principles of targeted transparency and the development of auditable standards to maximise the flow of information in private markets about product quality; and

- maximise the flow of government generated information, research, and content for the benefit of users (including private sector resellers of information).

Recommendation 7.14 To the maximum extent practicable, information, research and content funded by Australian governments – including national collections – should be made freely available over the internet as part of the global public commons. This should be done whilst the Australian Government encourages other countries to reciprocate by making their own contributions to the global digital pubic commons.

The draft Consultation Paper notes (p. 5) that several Australian Government departments and agencies are working to scope policy development for a national approach to access to certain categories of PSI and that this work will involve engagement with States and Territories.

As the questions set out in Section 1 of the draft Consultation Paper (p. 5) relate to issues that could appropriately be addressed in a national information policy, it is submitted that, rather than address each of the questions separately, the better approach is to consider how to proceed most directly to the development of a national information policy.

For reasons which have yet to be fully understood, Australia largely failed to engage with developments in the formulation of policies and principles for access to PSI that took place at the national (UK, US, NZ), regional (EU) and the international levels (UNESCO, OECD) over the last decade. At the international level in particular, the Australian government appears not to have played a significant role (via participation in working groups) formed by a range of international organisations (notably UNESCO, OECD and ICSU/CODATA) to advance the policy framework for access to PSI. (Australia only rejoined CODATA, one of the leading international organisations concerned with science data, in 2008 after our membership lapsed many years earlier.) While there have been a number of occasions during the last 10 years when the opportunity arose to address the issue of access to and re-use of government information, these were either not recognised or acted upon.

When the extent and significance of developments internationally is appreciated, it is apparent that Australia needs to work towards facilitating better access to and re-use of PSI. The full economic, cultural and environmental value of information produced or funded by the public sector can be realised through enabling greater access to and re-use of the information. To do this effectively it is necessary to describe and establish a policy framework that supports greater access and re-use among a distributed, online network of information suppliers and users.[10]

There has been little policy advancement in Australia on the matter of access to government information since the Office of Spatial Data Management's (OSDM) Policy on Spatial Data Access and Pricing in 2001.[11] In light of the fact that relatively little attention has been given to

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[10] Professor Anne Fitzgerald (2008, ongoing) *Policies and Principles on Access To and Reuse of Public Sector Information: a review of the literature in Australia and selected jurisdictions*, Chapter 1: Australia, p. 8, available at eprints.qut.edu.au/15649/.

[11] See Australian Government Office of Spatial Data Management, Spatial Data Access and Pricing (webpage)

this issue in Australia, assistance can be derived from a study of developments in other jurisdictions and under the auspices of international organisations and collaborations.

It may be of assistance to the department to consider the research undertaken by Professor Anne Fitzgerald on access policies, principles and practices in Australia and internationally, which has been made available in the form of an annotated literature review that is being progressively published and updated at the auPSI website.[12]

One of the most useful guides to the development of a national information policy is the report prepared by Paul Uhlir for UNESCO in 2004, *Policy Guidelines for the Development and Promotion of Governmental Public Domain Information.*[13] UNESCO's work from the late 1990s provided the basis for work on the development of PSI access and re-use policies at the international level and fed into the more recent work of other bodies such as the OECD, the World Summit on the Information Society (WSIS) and the Internet Governance Forum (IGF).

Uhlir describes three main elements that must be implemented in developing a national information policy:

The establishment of [a national information] policy involves decisions in three main areas:

1. SCOPE OF INFORMATION TO BE MADE AVAILABLE

As a guiding principle, information produced by public entities in all branches and at all levels should be presumed to be available to the public, and any formal exceptions preventing citizens from accessing public information should be specifically justified and formulated as narrowly as possible. National governments should be encouraged to expand access to various types of public information resources and, if necessary, to re-assess the balance between the existing policies and practices for making those information resources available and the legal protections that restrict use or re-use of such information. In addition, all publicly funded intergovernmental organisations should provide open access to all their publications and public databases, especially to potential users in developing countries, free of charge.

2. ACCESS TO AND USE OF PUBLIC INFORMATION AS A LEGAL PRINCIPLE

One of the major elements of a comprehensive approach to promoting access to and use of governmental public domain information is the adoption of a national 'Freedom of Information' (FOI) law, providing for access by citizens on request to the information held by the government that is not otherwise made routinely available. Countries that do not yet have a

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www.osdm.gov.au/OSDM/Policies+and+Guidelines/Spatial+Data+Access+and+Pricing/default.aspx and Australian Government Geoscience Australia, Commonwealth Spatial Data Policy Executive – incorporating Office of Spatial Data Management (webpage) www.ga.gov.au/nmd/asdi/osdm.jsp. See also the report of the Commonwealth Interdepartmental Committee on Spatial Data Access and Pricing (June 2001) *A Proposal for a Commonwealth Policy on Spatial Data Access and Pricing*, p. 2, available at www.osdm.gov.au/osdm/policy/accessPricing/SDAP.pdf. See Professor Anne Fitzgerald (2008, ongoing) *Policies and Principles on Access To and Reuse of Public Sector Information: a review of the literature in Australia and selected jurisdictions,* Chapter 1: Australia, esp. at pp. 10–12 and 41–50, available at eprints.qut.edu.au/15649/.

[12] Professor Anne Fitzgerald (2008, ongoing) *Policies and Principles on Access To and Reuse of Public Sector Information: a review of the literature in Australia and selected jurisdictions*, available at www.aupsi.org/publications/reports.jsp; Chapter 1: Australia and Chapter 2: New Zealand available at eprints.qut.edu.au/15649/; Chapter 6: Canada available at eprints.qut.edu.au/17067/.

[13] For details, see UNESCO at portal.unesco.org/ci/en/ev.php-URL_ID=15862&URL_DO=DO_TOPIC&URL_SECTION=201.html.

FOI law for their public information should adopt one, following a comparative analysis of such similar laws in other countries, while those countries that already do have such a law may wish to further revise their existing legislation. Any exceptions to the principle of availability, such as national security restrictions, and the protection of personal privacy and of trade secrets, should be carefully balanced.

Freedom of Information laws are, however, not in themselves sufficient. In practice, such laws typically involve a bureaucratic, cumbersome, and relatively expensive process that the citizen must undertake in order to obtain information that is legally in the public domain and should be made public. Therefore, the government should also develop a comprehensive Information Policy Framework for the management and active dissemination of governmental information, as outlined below.

3. COMPREHENSIVE GOVERNMENTAL INFORMATION POLICY FRAMEWORK

The Policy Framework that addresses information management and dissemination should be broad enough to encompass information in both paper and digital formats, and should provide special guidance regarding electronic management and dissemination. The focus should always be on producing and disseminating public information that meets the needs of citizens as openly and inexpensively as possible, with special attention to multicultural or disadvantaged communities. Three main areas of action need to be addressed in developing the national public Information Policy Framework:

- Creating the appropriate public information management structure;

- Defining the public information management policy requirements; and

- Adopting strategies on information systems and information technology management.

The following key procedural elements should be taken into account in developing the national Information Policy Framework:

1. The Policy Framework must reference all supporting reports and laws on which it is based

2. In developing the Policy Framework and associated detailed implementation plan at the national level, it is essential to involve representatives of all major stakeholder groups in a consultative process

3. Analytical factors that need to be considered are: legal, economic, institutional, social and cultural, research and educational. Specific applications areas or sectors with special information objectives and implementation requirements, such as health, environment, energy, transportation, finance and defence, also need individual consideration

4. Following the completion and formal approval of the Information Policy Framework, the Chief Information Officers (CIOs) of all major government entities need to develop detailed plans for implementation of all the guiding policies within the context of the official activities and subject matter purview of these entities'.[14]

Uhlir's description of the key elements required for a national information policy highlights the need for governments to:

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[14] Paul Uhlir, *Policy Guidelines for the Development and Promotion of Governmental Public Domain Information*, UNESCO, Paris, 2004, at pp. vi - vii.

- consider what information is to be made publicly available (with open access as the default);

- develop legal frameworks that provide not only for freedom of information (FOI) but also encompass a positive right of access to PSI: and

- develop a comprehensive national Information Policy Framework and detailed plans for implementation of the guiding policy, including strategies on information systems and information technology management.

The implementation plan for the Information Policy Framework could be expected to include guidelines and toolkits (similar to those developed by the Open Access to Knowledge (OAK) Law project in relation to research publications and data).[15] Among the legal issues that would need to be dealt with in the Information Policy Framework is the question of copyright ownership of, and users rights in relation to, materials such as survey plans which are produced by non-government parties but are provided to government to enable certain fundamentally governmental functions to be carried out.[16]

In developing a national information policy, it is necessary to have regard to the international context. Much can be learned from the approaches taken over many years in other countries and in international organisations. The lessons learned from the experiences of other governments can help avoid some of the failures or difficulties experienced elsewhere and identify successful legal and policy models that might be adapted to the Australian context. The importance of adopting an international focus was acknowledged in the *Venturous Australia* report of the National Innovation System (2008), which recommended that 'Australian governments should adopt international standards of open publishing as far as possible'.[17]

Of particular relevance are developments in Europe (with a particular focus on the UK), the United States and New Zealand as well as in entities that form part of the United Nations

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[15] For a list of OAK Law project publications, see www.oaklaw.qut.edu.au/reports.

[16] Of particular relevance here is the High Court's decision in *Copyright Agency Ltd v The State of New South Wales* [2008] HCA 35 at www.austlii.edu.au/au/cases/cth/HCA/2008/35.html.

[17] Recommendation 7.8. Note that this Recommendation also proposed that '[m]aterial released for public information by Australian governments should be released under a creative commons licence'. For more on the application of Creative Commons licences to data and PSI, see generally: Submission 428, Brian Fitzgerald at p. 8, www.innovation.gov.au/innovationreview/Documents/428-Brian_Fitzgerald.pdf; Fitzgerald, Fitzgerald, Middleton, Lim and Beale, *Internet and E Commerce Law* (2007) LBC/Thomson Sydney at 260–269 and references contained therein; Australian Productivity Commission, *Cost Recovery by Government Agencies Report* (2001) 24, 167, 171–2, www.pc.gov.au; Professor David Newbery, Professor Lionel Bently, and Rufus Pollock*, Models of Public Sector Information Provision via Trading Funds,* Cambridge University, February 26, 2008; B Fitzgerald, J Coates and S Lewis (editors) *Open Content Licensing: Cultivating the Creative Commons*, (2007) Sydney University Press, Sydney; E. Bledsoe, J. Coates and B Fitzgerald, *Unlocking the Potential Through Creative Commons: an industry engagement and action agenda,* (2007) ARC Centre of Creative Industries and Innovation, August 2007, creativecommons.org.au/unlockingthepotential; D. Bushell-Embling, 'Private Eyes on Public Data' *Sydney Morning Herald* (25.09.07) www.smh.com.au/news/technology/private-eyes-on-public-data/2007/09/24/1190486224755.html?page=fullpage; Queensland Spatial Information Council, *Government Information and Open Content Licensing: An Access and Use Strategy* (2006) www.qsic.qld.gov.au/QSIC/QSIC.nsf/0/F82522D9F23F6F1C4A2572EA007D57A6/$FILE/Stage%202 %20Final%20Report%20-%20PDF%20Format.pdf?openelement; M van Eechoud and B van der Wal, *Creative Commons Licensing for Public Sector Information: Opportunities and Pitfalls* (2007) www.ivir.nl/creativecommons/index-en.html.

system, inter-governmental organisations and international (non-government) organisations.[18] The US and the UK governments are endeavouring to establish effective practices to give effect to policies supporting open access to PSI. Importantly, these developments have been possible because of long-established policies on access to PSI, which have been implemented at a whole-of-government level. In the US, OMB Circular A-130 establishes the policy framework,[19] while in the UK and Europe the policy framework consists of the broad-reaching Directive on the Re-use of Public Sector Information (2003),[20] as well as the specific Directive establishing an Infrastructure for Spatial Information (2007) (the INSPIRE Directive)[21] and the Directive on Public Access to Environmental Information (2003).[22]

Further developments are already underway in 2009. In the US, key features of President Obama's technology policy are aimed at creating 'a transparent and connected democracy'. The Obama administration's technology policy includes the following objectives:

- Open Up Government to its Citizens: Use cutting-edge technologies to create a new level of transparency, accountability, and participation for America's citizens

- Bring Government into the 21st Century: Use technology to reform government and improve the exchange of information between the federal government and citizens while ensuring the security of our networks.[23]

Immediately upon coming to office in January 2009, President Obama issued a Directive encouraging transparency in government and instructing US government agencies to err on the side of making information public.[24]

Meanwhile, in the UK the government has been at the forefront of EU Member States in pursuit of the objective of 'freeing up the UK's public sector information for innovative new

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[18] The range of materials to be considered would include: the EU Directives on Re-use of Public Sector Information (2003) and the Directive establishing an Infrastructure for Spatial Information (INSPIRE) (2007); the US Office of Management and Budget (OMB) Circular A-130 (2000); the OECD Seoul Declaration on the Future of the Internet Economy (2008), including the Recommendation concerning Access to Research Data from Public Funding and the Recommendation for Enhanced Access and More Effective Use of Public Sector Information; and the work of international organisations such as the International Council for Science (ICSU), and its specialist science data committee CODATA, and international scientific collaborations such as the Scientific Committee on Antarctic Research (SCAR) operating under the Antarctic Treaty system. .

[19] Office of Management and Budget (OMB) (2000) Circular A-130 – Management of Federal Information Resources, www.whitehouse.gov/omb/circulars/a130/a130trans4.html.

[20] European Council and European Parliament Directive on the Re-use of Public Sector Information (2003) available on the European Commission's website at ec.europa.eu/information_society/policy/psi/library/index_en.htm#Key_documents_(PDF_files).

[21] European Council and European Parliament Directive establishing an Infrastructure for Spatial Information (the INSPIRE Directive) (2007) inspire.jrc.ec.europa.eu/.

[22] European Parliament and European Council Directive on Public Access to Environment Information (2003) Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC (2003) See: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0004:EN:HTML, Official Journal L 041, 14/02/2003 P. 0026 – 0032.

[23] See the Technology Policy on the White House web site at www.whitehouse.gov/agenda/technology/.

[24] Barack Obama, *Transparency and Open Government,* Memorandum for the Heads of Executive and Agencies, Office of the Press Secretary, The White House, 21 January 2009, s3.amazonaws.com/propublica/assets/docs/transparencymemo.pdf.

services… [and] to move into the mainstream activities that are currently minority best practice'.[25] On 4 March 2009, the UK Power of Information Taskforce released its final report online.[26] The Executive Summary of the report states:

> Data and information are the lifeblood of the knowledge economy. The report's recommendations on liberalising non-personal government information would provide an information stimulus if implemented.
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> The report refers specifically to the need for a more liberal approach to the re-use of mapping and address data in the UK based on the evident demand for this type of information. It makes recommendations for Ordnance Survey, the UK's official mapping agency, to free up their licensing regime in general and to make information available for free, on simple terms, for innovators and the third sector.
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> If data is to be truly useful for a broad range of innovators it must be easy to obtain and the terms under which it can be used have to be as open and intelligible as possible. The report therefore recommends actions on the cataloguing of public sector information and on government licensing terms, especially in respect of the most common government licensing scheme, Crown Copyright.
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> Finally, the Taskforce recognises that when mainstreaming any innovation, systemic culture and behaviour change is required. It believes firmly that now is the time for the innovative approaches that it recommends to be brought into the mainstream of UK government. The report therefore calls for action to help the public sector acquire the new skills and practices required to support this.[27]

Given that the OECD Ministers' Seoul Declaration on the Future of the Internet Economy (together with its associated supporting documents)[28] represents the most significant and recent statement agreed upon in a multilateral forum, it should be closely considered in the development of an Australian national information policy. As a member of the OECD and a signatory to the Seoul Declaration, Australia is committed (although not strictly legally bound) to implementing the principles which it sets out. OECD Recommendations are OECD legal instruments that describe standards or objectives which OECD member countries are expected to implement, although they are not legally binding. However, through long-standing practice of member countries, a Recommendation is considered to have great moral force.[29]

Of immediate relevance for the purposes of the draft Consultation Paper are the OECD's Principles and Guidelines for Access to Research Data from Public Funding and the Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information. Key principles in each of these documents were included in the Seoul Declaration and the two documents form part of the supporting materials annexed to the Seoul

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[25] Power of Information Taskforce Report (beta, February 2009), available at poit.cabinetoffice.gov.uk/poit/.

[26] Power of Information Taskforce Report (final, February 2009), released 4 March 2009, available at poit.cabinetoffice.gov.uk/poit/.

[27] ibid., p. 4.

[28] Adopted by the OECD Ministers on 18 June 2008.

[29] OECD, *Principles and Guidelines for Access to Research Data from Public Funding*, 2007, see www.oecd.org/dataoecd/9/61/38500813.pdf at p. 8.

Declaration.[30] It is submitted that in seeking to answer the questions set out in Section 1 of the draft Consultation Paper (p. 5) regard should be had to the principles set out in Annex F to the Seoul Declaration, which the OECD recommends that Member countries take into account and implement in establishing or reviewing their policies regarding access and use of PSI.

In developing strategies on information systems and information technology management in the Information Policy Framework, direction should be taken from current thinking and practice in jurisdictions which are most advanced in the development of their national information policies.[31]

While noting that considerable progress in making PSI accessible has recently been made by agencies including Geoscience Australia and the Australian Bureau of Statistics, in general Australian governments have yet to grasp the potential of web 2.0 digital technologies. The value of using web 2.0 technologies was demonstrated during the February 2009 Victorian bushfires when, without delay, Google uploaded Country Fire Authority data into Google Maps to deliver online, real-time mapping of the location and intensity of the fires.[32]

A good illustration of the thinking which has (to date) prevailed among Australian governments is found in the diagrams used to explain data flows in the report prepared for the Intergovernmental Committee on Surveying and Mapping (ICSM),[33] *Spatially Enabling Australia Recommendations: ICSM ASDI Consultancy* ('the ICSM Report').[34] In particular, Figures 4 and 5 in the ICSM Report[35] should be compared with Diagram 2 ('The Power of Information model') in the UK Power of Information Taskforce report.[36] Although these reports were produced only

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[30] See OECD, *Shaping Policies for the Future of the Internet Economy*, Annexes, available at www.oecd.org/dataoecd/1/28/40821729.pdf. *The Principles and Guidelines for Access to Research Data from Public Funding* is Annex D; and the *Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information* is Annex F. The *Recommendation* is reproduced in this book as Chapter 25.

[31] See in particular, the recent article by Professor Ed Felten (and associates) of Princeton University's Centre for Information Technology Policy: Robinson, Yu, Zeller and Felten, 'Government Data and the Invisible Hand', *Yale Journal of Law and Technology* 11: 160 (2009) available at SSRN at papers.ssrn.com/sol3/papers.cfm?abstract_id=1138083; see also the *Power of Information Taskforce report* (released in beta form in February 2009; final report forthcoming 2009).

[32] For a description of the bushfire-tracking service on Google Maps, see www.zdnet.com.au/news/software/soa/Google-map-tracks-deadly-bushfires-in-Victoria/0,130061733,339294842,00.htm. For comment, see Nicholas Gruen, *Copyright, exclusive ownership, Web 2.0 and fighting bushfires,* The Age, 14 February 2009; also posted at Club Troppo at clubtroppo.com.au/2009/02/13/copyright-exclusive-ownership-web-20-and-fighting-bushfires/.

[33] The Intergovernmental Committee on Surveying and Mapping (ICSM) is a standing committee of ANZLIC (the Australia and New Zealand Land Information Council – see www.anzlic.org.au/about.html). It was established by the Prime Minister, State Premiers, and the Chief Minister of the Northern Territory in 1988. Since that time the Australian Capital Territory and New Zealand have joined ICSM. The Australian Defence forces are also represented on ICSM. Membership is comprised of senior representatives of surveying and mapping agencies. For information on ICSM see www.icsm.gov.au/icsm/about/index.html.

[34] Geomatic Technologies, *Spatially Enabling Australia Recommendations: ICSM ASDI Consultancy,* January 2008, available at www.icsm.gov.au/icsm/asdi/ASDI-Spatially_Enabling_Australia-V2.pdf Note that it appears from the confidentiality statement at the beginning of this document that it was initially distributed on a commercial-in-confidence basis. The 'print date' of the document is given as 22 July 2008.

[35] ibid., at pp. 18–19.

[36] *Power of Information Taskforce Report,* (released in beta form in February 2009; final report released on 4 March 2009), p. 27, available at poit.cabinetoffice.gov.uk/poit/.

12 months apart, the Power of Information Taskforce report evidences a big shift in the UK government's thinking about how web 2.0 technologies can be harnessed to enable users to directly access PSI. The UK Power of Information Taskforce report recommends:

Recommendation 13

As the internet changes, so should the way information is published. The taskforce has developed with stakeholders a model to inform online publishing. This breaks out information into several layers with external interfaces at each layer, allowing re-use both of the raw data and the intervening software interfaces. OPSI should develop and further test the model and publish it with a delivery mechanism, implementation plan and explanatory material by end June 2009. It should become the standard to which new systems, or re-implemented versions of existing systems, are implemented from a date determined by the CIO Council.

Recommendation 14

The government should ensure that public information data sets are easy to find and use. The government should create a place or places online where public information can be stored and maintained (a 'repository') or its location and characteristics listed (an online catalogue). Prototypes should be running in 2009.[37]

As Uhlir's 2004 UNESCO report makes clear, in developing a national information policy, a broad approach must be taken. The Information Policy Framework for the management and active dissemination of PSI should be comprehensive and integrated, although individual consideration may be required for specific areas or sectors with special information objectives and implementation requirements (such as health, environment, energy, transportation, finance and defence).

To date, Australian activities aimed at enabling information access and re-use have been largely focused on two key areas: spatial data and publicly funded research outputs (whether in the form of publications or data). Much of the impetus for access to public sector materials has come from the spatial community, which has for many years been a proponent of the view 'that government held information, and in particular spatial information, will play an absolutely critical role in increasing the innovative capacity of this nation'.[38] (Note that access to government-owned geospatial data has also featured centrally in the UK Power of Information Taskforce's report.[39])

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[37] *Power of Information Taskforce Report,* (released in beta form in February 2009; final report released on 4 March 2009), p. 7, available at poit.cabinetoffice.gov.uk/poit/.

[38] Submission no. 307, Australian Spatial Consortium, at p. 2.

[39] ibid. at p. 6 and pp. 19–21. Recommendation 7 is as follows:

It is the Taskforce's view that 'freeing up' geospatial data should be a priority. The Ordnance Survey requires urgent reform. Recent announcements of cost reductions at the Ordnance Survey point the way to wider reforms. This reform should include at a minimum:

Basic geographic data such as electoral and administrative boundaries, the location of public buildings, etc should be available for (re)use free of charge to all.

There should be simple, free access to general mapping and address data for modest levels of use by any user.

Voluntary and community organisations pursuing public policy objects should benefit from straightforward standard provisions for ensuring access to geospatial data at all levels of use

In Australia, the most advanced policy on data access is the *Spatial Data Access and Pricing Policy* (2001) developed by the Office of Spatial Data Management (OSDM)[40] which forms the basis of the free data download services offered by Geoscience Australia.[41] Other significant initiatives have also had their origins in demands for improved access to spatial data. Of note here is the Queensland Spatial Information Council's proposal for a Government Information Licensing Framework (GILF)[42] to provide a policy and legal framework supporting the sharing and re-use of spatial and other information (e.g. water data) within and across the various levels of government and between government and the private sector.[43]

Various initiatives relating to publicly funded research results were developed within the Accessibility Framework for Publicly Funded Research established in 2004 as part of the *Backing Australia's Ability – Building Our Future through Science and Innovation* package.[44] The Accessibility Framework was designed to manage research information, outputs and infrastructure in order to enable them to be more readily discovered, accessed and shared. It aims to provide a regulatory environment that both enables and encourages the population of digital repositories in order to provide better access to information.[45] The Prime Minister's Science, Engineering and Innovation Council (PMSEIC) in *From Data to Wisdom: Pathways to Successful Data Management for Australian Science* (2006)[46] recommended that 'Australia's government, science, research and business communities establish a nationally supported long-term strategic framework for scientific data management, including guiding principles, policies, best practices and

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Licensing conditions should be simplified and standardised across the board and, for all but the heaviest levels of use, should be on standard terms and conditions and should not depend on the intended use or the intended business model of the user.

The OpenSpace API, similar to but currently a constrained version of Google Maps, should become the primary delivery point for the Ordnance Survey's services.

Creation of a freely available single definitive address and postcode available for the UK for (re)use.

[40] See www-ext.osdm.gov.au/osdm/policy/accessPricing/SDAP.pdf and generally www.osdm.gov.au/OSDM/Policies+and+Guidelines/Spatial+Data+Access+and+Pricing/default.aspx.

[41] See www.ga.gov.au/products/servlet/controller?event=DEFINE_PRODUCTS.

[42] Queensland Spatial Information Council, *Government Information and Open Content Licensing: An Access and Use Strategy* (2006), available at www.qsic.qld.gov.au/QSIC/QSIC.nsf/CPByUNID/BFDC06236FADB6814A25727B0013C7EE. For the report of the National Information Summit, Brisbane, 13 July 2007, see www.qsic.qld.gov.au/QSIC/QSIC.nsf/0/D6C8E0616BC7FB414A2573B7000C42E5/$FILE/Conference%20Report%20-%20National%20Summit%20Open%20Access.pdf?openelement.

[43] See the comment on the Power of Information Task Force website, 27 June 2008, at powerofinformation.wordpress.com/2008/06/27/australian-licensing-examples/; See also the West Australian government initiative, the Shared Land Information Platform (SLIP) which aggregates data government-wide and provides a data download facility.

[44] See www.dest.gov.au/sectors/research_sector/policies_issues_reviews/key_issues/accessibility_framework/ and backingaus.innovation.gov.au/ accessed 24 April 2008.

[45] See www.dest.gov.au/sectors/research_sector/policies_issues_reviews/key_issues/accessibility_framework/.

[46] Prime Minister's Science, Engineering and Innovation Council, Working Group on Data for Science, *From Data to Wisdom: Pathways to Successful Data Management for Australian Science,* (2006) www.dest.gov.au/sectors/science_innovation/publications_resources/profiles/Presentation_Data_for_Science.htm; see also pandora.nla.gov.au/tep/75221.

infrastructure'[47] and the adoption of 'mechanisms to enable the discovery of, and access to, data and information resources'.[48]

The Open Access to Knowledge (OAK) Law and Legal Framework for e-Research projects established as part of the Research Information Infrastructure Framework for Australian Higher Education under *Backing Australia's Ability* have dealt extensively with the legal issues involved in managing open access publication of research papers and data so as to enable access and re-use.[49] Several universities (including QUT)[50] have introduced open access policies for academic publications and, in December 2006, the two major Australian public research funding bodies – the Australian Research Council (ARC) and the National Health and Medical Research Council (NHMRC) – announced the introduction of open access guidelines for published papers and data resulting from funded research projects, effective 2008.[51] Both policies encourage researchers to:

> Consider the benefits of depositing their data and any publications arising from a research project in an appropriate subject and/or institutional repository [because in order to] maximise the benefits from research, findings need to be disseminated as broadly as possible to allow access by other researchers and the wider community.[52]

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[47] Recommendation 1.

[48] Recommendation 6.

[49] See www.oaklaw.qut.edu.au and www.e-research.law.qut.edu.au/.

[50] See eprints.qut.edu.au/. In 2008, QUT amended clause 3.1.5 of its IP policy to ensure open access to scholarly works published by QUT academics – see
www.mopp.qut.edu.au/D/D_03_01.jsp#D_03_01.05.mdoc . It states:

QUT assigns the right to publish scholarly works to the creator(s) of that work. The assignment is subject to a perpetual, irrevocable, worldwide, royalty-free, non-exclusive licence in favour of QUT to allow QUT to use that work for teaching, research and commercialisation purposes and to reproduce and communicate that work online for non-commercial purposes via QUT's open access digital repository.

If required, QUT will sign documents to more fully record the staff member's ownership of the right of publication of the copyright in a scholarly work and QUT's non-exclusive licence to that work.

The version of the scholarly work that QUT can make available via the digital repository may be the published version or the final post-peer review manuscript version. QUT will agree to third party publisher-requested embargoes of 12 months or less (from date of publication by the third party publisher) on the publication of the manuscript via the digital repository.

Open access requirements have also been adopted by the University of Tasmania (see eprints.utas.edu.au/) and Charles Sturt University (see
bilby.unilinc.edu.au:8881/R?func=search&local_base=GEN01-CSU01) and are being considered at Macquarie University (see www.earlham.edu/~peters/fos/2008/07/macquarie-vc-preparing-to-propose-oa.html).

[51] Australian Research Council, *Discovery Projects Funding Rules for funding commencing in 2008* www.arc.gov.au/pdf/DP08_FundingRules.pdf; National Health and Medical Research Council, *Project Grants Funding Policy for grants commencing in 2008* www.nhmrc.gov.au/publications/_files/profundingpol.pdf. See also the ARC's response to the Productivity Council's draft research report on Public Support for Science and Innovation (2006), recommending that consideration be given to the funding of institutional open access repositories: Australian Research Council, *Response to the Productivity Commission Draft Research Report – Public Support for Science and Innovation* (2006)
www.arc.gov.au/pdf/response_PCdraftresearchreport_06.pdf.

[52] Australian Research Council, *Discovery Projects Funding Rules for funding commencing in 2008,* [1.4.5.1] www.arc.gov.au/pdf/DP08_FundingRules.pdf; National Health and Medical Research Council, *Project*

While most of the work on PSI access and re-use in Australia has focused on spatial information (particularly within the context of the development of State/Territory and Australian spatial data infrastructures) and research outputs (publications and data), in developing an Information Policy Framework, the importance of a comprehensive and integrated strategy should not be overlooked. The draft Consultation Paper (p. 4) correctly refers to the social and economic importance of spatial information, providing several examples of advantages to be gained from the use of spatial data and high precision positioning systems. However, it is important that the issues that arise from specific data domains or economic sectors (such as those that arise in the development of an Australian spatial data infrastructure or the development of open access systems for academic publications) are not superimposed over the national Information Policy Framework. Rather, it is submitted that the focus should be on developing a comprehensive and integrated high level Information Policy Framework, within which consideration can be given to specific issues arising in particular sectors or information domains.

CLARIFYING THE LAW ON THE PROTECTION OF DATA

As well as development of a whole-of-government open access policy, to maximise the innovation and economic benefits of Australia's data resources it is also important that steps be taken to clarify the law in relation to the copyright status of data. As the *ICE TV* case[53] currently before the High Court demonstrates, there is currently much confusion and uncertainty regarding the protection afforded to data by Australian copyright law. The 2002 case *Desktop Marketing Systems v Telstra*[54] introduced a broad rule which seemingly moved the boundaries of copyright protection in Australia to require permission to re-use even very small and factual excerpts of data and information. This is out of line with both the historic and international conventions of copyright law, which have traditionally stated that mere facts do not attract copyright protection, and has created much confusion and uncertainty as to when data can be re-used in the Australian context. This uncertainty has, in turn, led to a situation in which corporations and individuals alike are afraid to make use of material, such as mere facts, that should under the traditional boundaries of copyright be part of the public sphere. As a result copyright law is acting to quell innovation and prevent the development of competition in new markets.

The *ICE TV* case has the potential to address this problem by reaffirming the boundaries of copyright protection of data and mere facts. However, should this case fail to sufficiently clarify the situation, the Government may wish to consider stepping in to do so. In particular, amendments should be introduced to the *Copyright Act* to realign Australian law with that of its international contemporaries, such as the US and Canada, by clarifying that:

- mere facts and data are not protected by copyright law; and

- whether the exercise of labour in assembling a compilation of data or facts is in itself sufficient to give rise to rights of exclusion in relation to that compilation (or whether there should be further threshold requirements before such rights arise, such as the

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Grants Funding Policy for grants commencing in 2008, [16.2].
www.nhmrc.gov.au/publications/_files/profundingpol.pdf.

[53] *IceTV Pty Ltd & Anor v Nine Network Australia Pty Limited* [2008] HCATrans 308 (26 August 2008).

[54] *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112 (15 May 2002).

exercise of some degree of creativity in how the facts have been selected and arranged).[55]

ACCESS TO AUSTRALIA'S ARCHIVES

Of equal importance to the issue of public access to government data, but often neglected in debates surrounding innovation and market development, is the issue of access to and use of creative material owned by and stored within public archives.

The internet, digital recording devices and the ready availability of content production software have together drastically changed the creative landscape, making it easy for anyone, from every-day bedroom experimenters to professionals, to find and re-use content. As a result, linear models of knowledge and cultural production and commercialisation are rapidly being supplanted by more distributed, collaborative, user-generated and open networking models. In this context the ability to create, access and re-use digital content is paramount. Remixing, recycling and online distribution are integral to the digital environment's creative capacity, and to the economic, educational and cultural benefits that it brings.

Yet Australians have great difficulty gaining access to quality online content about their own culture and history. Unlike countries such as the US and UK, which have led the digital revolution and dominate online content, it is very difficult to locate Australian-specific content online that can be legally and safely viewed and re-used. Cultural institutions such as the ABC, SBS, Screen Australia, the National Film and Sound Archive (NFSA) and the National Library of Australia (NLA) create and preserve large quantities of Australian creative content which could be used to fill this gap. Much of this material is owned by the government, or has fallen into the public domain, and so would be appropriate for public release.

Over the last decade, these institutions have increasingly undertaken small initiatives aimed at testing the viability of releasing material for re-use online. The ABC remix site, Pool,[56] the Powerhouse Museum[57] and the NFSA's Australian Screen Online[58] have all experimented with providing increased access to works from their collections, as have Film Australia[59] and the NLA[60] through their Zero-Fee Licensing and Click and Flick initiatives. The Powerhouse Museum's collaboration with the Flickr Commons project has been particularly successful, with nearly 40,000 views and a 'tonne' of tags added to the released photos in the first month alone.[61] However, to date, strict copyright laws, lack of funding and little policy support from above has led to static archiving practices, which focus on preservation but not access or use. As a result, the vast majority of this material remains unused in warehouses and databases, searchable and retrievable only by staff librarians, making little or no contribution to Australia's

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[55] See also Atkinson, Benedict A. and Fitzgerald, Brian F. (2008) *Copyright as an Instrument of Information Flow and Dissemination: the case of ICE TV Pty Ltd v Nine Network Australia Pty Ltd.,* available at eprints.qut.edu.au/15208/.

[56] www.pool.org.au.

[57] www.powerhousemuseum.com/commons.

[58] australianscreen.com.au/.

[59] www.filmaust.com.au/library/.

[60] www.pictureaustralia.gov.au/contribute/individual.html.

[61] www.powerhousemuseum.com/dmsblog/index.php/2008/05/06/commons-on-flickr-one-month-later/.

cultural and economic growth. After all, people cannot seek to license, build upon or add value to material they do not know exists.

Allowing creators to share, repurpose, remix and reinterpret government owned and public domain content held within our cultural institutions would stimulate Australia's creative economy and cultural identity by:

- promoting growth and fostering innovation and skills development in the film, music, art and journalism industries, to name only a few;

- increasing the reach and impact of Australian cultural content;

- providing a pool of 'safe' material that can be readily accessed and used by teachers and parents seeking to engage children and provide them with the skills necessary for the digital age, without risk of encountering inappropriate or illegal content;

- encouraging public research and life-long learning by increasing resources and information;

- assisting with the preservation of our cultural heritage by ensuring material that would otherwise deteriorate and become unusable remains accessible for future generations;

- driving growth in surrounding markets such as broadband deployment, digital technology and e-commerce; and

- promoting awareness and appreciation of the role of Australia's cultural institutions and making more effective use of the tax dollars devoted to them.

Using the ABC as an example, the *Venturous Australia* report had this to say about the provision of public access to content held in Australia's archives:

> ABC free to air broadcasts used to be Australian public goods. Today, digital distribution over the internet makes them global public goods. The same could be said for a good deal of information and other content produced and funded by government agencies.
>
> There can be clear benefits in making such content available to all comers globally. Often it will be impossible to foresee all the ways in which others will find or develop value in that content. And there will be negligible costs in making the content available.
>
> Accordingly, both for its direct and indirect benefits to Australia and for the greater global good, Australia should energetically and proudly maximise the extent to which it makes government funded content available as part of the global digital commons.[62]

The report then went on to recommend that:

> To the maximum extent practicable, information, research and content funded by Australian governments – including national collections – should be made freely available over the internet as part of the global public commons. This should be done

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[62] *Venturous Australia: building strength in innovation* (Cutler and Co, August 2008) pp. 97–98 www.innovation.gov.au/innovationreview/Documents/NIS_review_Web3.pdf .

whilst the Australian Government encourages other countries to reciprocate by making their own contributions to the global digital public commons.[63]

We strongly endorse the *Venturous Australia* recommendation and propose that it form the basis of policy for the provision of public access to content owned by the Australian government and held in our national institutions, making material currently locked within our archives available for both viewing and re-use by the public.

APPROPRIATE LICENSING TERMS

In most cases, Government material should be made available under the broadest possible licensing terms. As the GILF report[64] recognised, only a very small percentage of material produced by the Australian government is subject to privacy, security or commercial interests that would warrant limiting public access.

In particular, government material should by default be made available under a licence which permits the adaptation and remixing of the material for commercial purposes, such as the Creative Commons Attribution licence. Any limitations on commercial or transformative use will, by their very nature, undermine the goals of using PSI to spur innovation and economic growth. Consistency, accessibility and clarity should also be major goals in licensing of Australian PSI. Using a proven standardised legal framework such as the Creative Commons licensing suite, or a similar standardised suite created by the government itself, will provide legal certainty and ensure that ordinary Australians are readily able to understand their rights and obligations with respect to the material they are accessing, maximising its usability and usefulness.

This finding is supported by a number of national and international reviews, including the previously mentioned GILF report, the UK Power of Information Taskforce report, as well as other reports from the United Kingdom[65] and the Netherlands.[66] More significantly, both the Australian Bureau of Statistics[67] and President Obama's official White House portal[68] have recently chosen to apply these principles, introducing a Creative Commons Attribution-only licence as the default licence for their material.

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[63] *Venturous Australia: building strength in innovation* (Cutler and Co, August 2008) Recommendation 7.14 www.innovation.gov.au/innovationreview/Documents/NIS_review_Web3.pdf.

[64] Queensland Government, Queensland Spatial Information Council (QSIC), Office of Economic and Statistical Research (OESR), Queensland Treasury *Government Information and Open Content Licensing: an Access and Use Strategy,* Government Information Licensing Framework (GILF) Project Stage 2 Final Report (2006) www.qsic.qld.gov.au/qsic/QSIC.nsf/CPByUNID/BFDC06236FADB6814A25727B0013C7EE.

[65] *The Power of Information* (2007) the Cabinet Office www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/strategy/power_information.pdf; see similarly Intrallect Ltd (E. Barker, C. Duncan) and AHRC Research Centre (A. Guadamuz, J. Hatcher and C. Waelde) *The Common Information Environment and Creative Commons: Final Report to the Common Information Environment Members of a study on the applicability of Creative Commons Licenses* (2005) www.intrallect.com/cie-study/; creativearchive.bbc.co.uk/.

[66] Mireille van Eechoud and Brenda van der Wal, *Creative commons licensing for public sector information: Opportunities and pitfalls* (2007) Institute for Information Law, University of Amsterdam www.ivir.nl/publications/eechoud/CC_PublicSectorInformation_report.pdf.

[67] abs.gov.au/websitedbs/D3310114.nsf/Home/Website+Changes+Coming+Soon.

[68] www.whitehouse.gov/copyright/.

Notably, the UK Power of Information Taskforce report makes the following recommendations:

Recommendation 8

- Government should ensure that there is a uniform system of release and licensing applied across all public bodies; individual public bodies should <u>not</u> develop or vary the standard terms for their sector

- The system should create a 'Crown Commons' style approach, using a highly permissive licensing scheme that is transparent, easy to understand and easy to use, modelled on the 'Click Use' license, subject to the caveats below.

- OPSI, part of the National Archives, should investigate how source code can be handled within the public sector information framework, and look into appropriate licensing terms drawing on best practice in the open source community.

- The Government should report on the options for these three recommendations by end 2009 and if required, statutory measures should be brought forward not later than the 2009/2010 session.

Recommendation 12

OPSI should begin a communications campaign to re-present and improve understanding of the permissive aspects of Crown Copyright along the lines of creative commons by end June 2009. This should be combined with 'permission to scrape' being given over Crown Copyright data, removing any risk of prosecution under the Computer Misuse Act. This might fall under the banner of a 'Crown Commons' brand. OPSI should begin a communications campaign to that end by end June 2009.[69]

ADDITIONAL INFORMATION

There is already an enormous amount of excellent work that has been undertaken on the issues raised in this submission. Some of this material has been highlighted in the footnotes. In particular, we would encourage the Department to examine the following documents:

In relation to access to government material and PSI specifically –

Fitzgerald, A Policies and Principles on Access To and Re-use of Public Sector Information: a review of the literature in Australia and selected jurisdictions (2008, ongoing) www.aupsi.org/publications/reports.jsp; Chapter 1: Australia and Chapter 2: New Zealand available at eprints.qut.edu.au/15649/; Chapter 6: Canada available at eprints.qut.edu.au/17067/; Chapter 3: International available at eprints.qut.edu.au/17560/ (Note – please check www.aupsi.org/publications/reports.jsp for further chapters and new versions).

Queensland Government, Queensland Spatial Information Council (QSIC), Office of Economic and Statistical Research (OESR), Queensland Treasury *Government Information and Open Content Licensing: an Access and Use Strategy,* Government Information Licensing Framework (GILF) Project Stage 2 Final Report (2006)

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[69] *Power of Information Taskforce Report,* (released in beta form in February 2009; final report released on 4 March 2009), pp. 6–7, available at poit.cabinetoffice.gov.uk/poit/.

www.qsic.qld.gov.au/qsic/QSIC.nsf/CPByUNID/BFDC06236FADB6814A25727B0013C7EE

Fitzgerald, B, Fitzgerald, A, Middleton, G, Lim, Y and Beale, T (2007) *Internet and E Commerce Law* LBC/Thomson Sydney, pp. 260–69 (and 191–92)

Fitzgerald, B et al. *Open Content Licensing: Cultivating the Creative Commons* (2007) eprints.qut.edu.au/6677/, in particular the section on Government and Creative Commons, pp 67–92, which includes the chapters: Lavarch, L 'The Government's Role in Supporting Creative Innovation' and Cunningham et al. 'Why Governments and Public Institutions Need to Understand Open Content Licensing'

Robinson, Yu, Zeller and Felten, 'Government Data and the Invisible Hand' 11 *Yale J.L. & TECH.* 160 (2009) available from SSRN papers.ssrn.com/sol3/papers.cfm?abstract_id=1138083.

In relation to open access generally –

These publications address open access to research publications and data. However, there is a large overlap between the open access to research initiative and open access to PSI, as a large percentage of the research produced by academic institutions is government-funded.

Fitzgerald, B. et al. *Creating a Legal Framework for Copyright Management of Open Access within the Australian Academic and Research Sectors* (2006) www.oaklaw.qut.edu.au

Fitzgerald, A. and Pappalardo, K. *Building the Infrastructure for Data Access and Re-use in Collaborative Research: An Analysis of the Legal Context* (2007) eprints.qut.edu.au/8865/

Fitzgerald, A. and Pappalardo, K. *Practical Data Management: A Legal and Policy Guide* (2008) eprints.qut.edu.au/14923/

Pappalardo, K. *Understanding Open Access in the Academic Environment: A Guide for Authors* (2008) eprints.qut.edu.au/14200/

In relation to copyright and other applicable laws –

Fitzgerald, B. 'Copyright 2010: The Future of Copyright' [2008] *European Intellectual Property Review* 43 eprints.qut.edu.au/archive/00013305

Fitzgerald, B., Fitzgerald, A., Middleton, G., Lim, Y. and Beale, T. (2007) *Internet and E Commerce Law* LBC/Thomson Sydney, in particular chapters 1, 4 and 12 on copyright reform, chapter 10 on privacy reform, chapters 7 and 8 on e-transactions and reform and chapter 13 on future directions.

CONSULTATION TOPIC 4: ENSURING AUSTRALIA'S REGULATORY FRAMEWORK ENABLES THE DIGITAL ECONOMY

Reform of Australia's copyright regime is vital to ensuring the full potential is wrought from our digital services. For too many years Australian copyright law has been out of step with technological developments and the reasonable expectations of ordinary Australians. Over the past decade the careful balance struck by copyright law between the rights of copyright owners and users has been tipped sharply in favour of owners.

Legislative amendments introduced by the *US Free Trade Agreement Implementation Act 2004* and the *Copyright Amendment Act 2006* widened the gap between ordinary consumer behaviour and

the operation of Australian copyright law. As the Labor Party noted in its dissenting report for the Senate Committee for Legal and Constitutional Affairs Inquiry on Provisions of the Copyright Amendment Bill 2006, these amendments created 'difficulties from the perspectives of both copyright holders and consumers … [and did] not solve the fundamental and ongoing problem of Australian copyright law's inability to recognise rapid changes in technology and the use of new technology by consumers'. Furthermore, they did little to address a number of fundamental inequities within our law, such as the fact that content funded by the public purse is not available for public use, or the fact that a use that is permissible if it is humorous or satirical will be illegal if it is done for the purpose of serious political, social or artistic commentary.

As a result, Australian citizens are at a significant disadvantage to their peers in the United States where the broad 'fair use' doctrine allows the law to adapt more flexibly, ensuring that innovative and unanticipated uses of copyright material by ordinary consumers will be permitted as long as they remain 'fair' to the copyright owner. It also promotes copyright infringement by fostering public disregard for the law. To quote the Hon Ms Roxon MP, 'if the laws are out of touch with personal practice then they do end up being treated with contempt and they do not encourage the purchase of legitimate materials and their lawful use'.[70]

CARRIAGE SERVICE PROVIDER LIABILITY

Clarification of the law in relation to liability of online service providers for actions undertaken by their users is one area in which reform is necessary to ensure that Australian copyright law does not hinder the flow of ideas and full use of new technologies. In particular, as the paper suggests, it is important that the safe harbours currently provided for carriage service providers be clarified to ensure they include other service providers who merely act as a conduit for the actions of others, such as user-generated content and social networking sites.

CRIMINAL LIABILITY OF CARRIAGE SERVICE PROVIDERS

The so-called 'safe harbour' provisions[71] of the *Copyright Act 1968* limit the civil remedies available to copyright owners against 'carriage service providers' for copyright infringement. While these provisions are to be applauded, no such safe harbours are available to the same carriage service providers that immunise them from criminal prosecution.

Many of the new criminal provisions enacted by the *Copyright Amendment Act 2006* are strict liability offences, which means that the more traditional mechanism for ensuring innocent agents are not criminally liable for offences – a *mens rea* element to the crime – will not protect carriage service providers. In many cases, common activities undertaken by intermediaries in the digital environment open up the potential for civil and criminal liability. That the civil liability has been limited by a clearly understood and sound policy, while criminal liability remains for the similar activity, is an anathema. We have undertaken work to identify and chart this inconsistency between policy and the criminal law[72] and submit that this issue should be addressed without delay.

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[70] Hansard (House of Representatives, 1 November 2006).

[71] *Copyright Act 1968* (Cth), s118AG.

[72] See further Gething, S. and Fitzgerald, B. 'The Criminalisation of Copyright Law: Where Do Intermediaries Stand?' (forthcoming). For more information contact Steven Gething or Brian Fitzgerald at Queensland University of Technology.

OTHER AMENDMENTS

Other legislative reforms that would go a long way to restoring the balance in Australian copyright law and making Australia a leader in copyright and innovation policy include:

1. clear rights for consumers to re-use copyright material in circumstances where the use is 'fair';

2. new exceptions that permit transformative uses of copyright material, such as in works of art or as part of political commentary;

3. rights for Australians to re-use Crown copyright and publicly funded research material for, at a minimum, non-commercial purposes;

4. legislative clarification that fundamental user rights such as the fair dealing and library and archive provisions cannot be over-ruled by private contract;

5. reform of the *Copyright Act*'s criminal provisions at very least to the point of limiting the disproportionate penalties that apply to ordinary consumer behaviour;

6. the extension of the current scheme for the compulsory deposit of all printed publications with the relevant national or state institutions to include audiovisual and electronic materials;

7. the introduction of a scheme to allow for the reasonable use of 'orphaned works' i.e. works for which permissions cannot be obtained because the author is either unidentifiable or untraceable; and

8. clarification of the application of the fair dealing exception for research and study to the publication of material online.[73]

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[73] See generally: Fitzgerald et al. *Creating a Legal Framework for Copyright Management of Open Access within the Australian Academic and Research Sectors* (2006) Chapter 6, at www.oaklaw.qut.edu.au.