



PRACTICAL DATA MANAGEMENT: A LEGAL AND POLICY GUIDE

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Legal Framework for e-Research Project
and
Open Access to Knowledge (OAK) Law Project
Legal Protocols for Copyright Management: Facilitating Open Access to Research at
the National and International Levels

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The Legal Framework for e-Research Project:

<http://www.e-research.law.qut.edu.au/>

The Legal Framework for e-Research Project led by Professor Brian Fitzgerald at Queensland University of Technology (QUT) and funded by the Department of Education, Employment and Workplace relations (DEEWR) is examining ways in which the legal framework can be made as dynamic and effective as the advancing technology. By investigating issues such as contractual frameworks, data ownership, access and reuse, IP licensing, privacy and liability the Legal Framework for e-Research Project will analyse the role of the law in the e-Research environment and make proposals for a more effective legal framework that can better enable the adoption of e-Research methods.

The OAK Law Project:

<http://www.oaklaw.qut.edu.au/>

The Open Access to Knowledge (OAK) Law Project is part of the Queensland University of Technology Faculty of Law and is funded by receives funding from the Australian Federal Government Department of Education, Science and Training (now DEEWR). The OAK Law Project seeks to promote strategies for the management of copyright in order to facilitate optimal access to research output, particularly publicly funded research.

Publications:

The Legal Framework for e-Research Project and the OAK Law Project have produced a range of publications which are available on the Legal Framework for e-Research Project website (<http://www.e-research.law.qut.edu.au/>) and the OAK Law Project website (<http://www.oaklaw.qut.edu.au/>), including:

- The OAK Law Project Report: *Creating a Legal Framework for Copyright Management of Open Access within the Australian Academic and Research Sector*;
- The OAK Law Project and The Legal Framework for e-Research Project Report: *Building the Infrastructure for Data Access and Reuse in Collaborative Research: An Analysis of the Legal Context*;
- The Legal Framework for e-Research Project Report: *Legal and Project Issues in Collaboration and e-Research: Survey Results*; and
- The OAK Law Project Report: *Survey on Academic Authorship, Publishing Agreements and Open Access*.

This guide is based on the recommendations made in chapter 10 of *Building the Infrastructure for Data Access and Reuse in Collaborative Research: An Analysis of the Legal Context* (2007), Dr Anne Fitzgerald and Kylie Pappalardo (with the assistance of Professor Brian Fitzgerald, Anthony Austin, Dr John Abbott, Brendan Cosman, Damien O'Brien and Bill Singleton), an OAK Law Project and Legal Framework for e-Research Project joint publication available online at <http://www.oaklaw.qut.edu.au/node/33> and <http://www.e-research.law.qut.edu.au/node/14>.

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1. Introduction

Researchers are increasingly involved in data-intensive research projects that cut across geographic and disciplinary borders.¹ Quality research now often involves virtual communities of researchers participating in large-scale web-based collaborations, opening their early-stage research to the research community to encourage broader participation and accelerate discoveries.² The result of such large-scale collaborations has been the production of ever-increasing amounts of data. In short, we are in the midst of a data deluge.³

Accompanying these developments has been a growing recognition that if the benefits of enhanced access to research are to be realised, it will be necessary to develop the systems and services that enable data to be managed and secured.⁴ It is now apparent that to achieve seamless access to data it is necessary not only to adopt appropriate technical standards, practices and architecture, but also to develop legal frameworks that facilitate access to and use of research data.⁵

The collection, management and use of research data occurs in a legal context. Quite simply, data is surrounded by law.⁶ For example, arrangements between a researcher and other researchers, research institutions or funding bodies may be set out in a contract negotiated by project participants. Data compilations may attract copyright protection and data may also be subject to confidentiality or privacy obligations.

In 2007, QUT's Legal Framework for e-Research Project⁷ published the report, *Legal and project agreement issues in collaboration and e-Research: Survey Results*,⁸ documenting the findings of a survey of Australian participants in collaborative

¹ International Council for Science (ICSU), *Scientific Data and Information: A report of the CSPR Assessment Panel* (2004) 7; see also Dr Anne Fitzgerald and Kylie Pappalardo, *Building the Infrastructure for Data Access and Reuse in Collaborative Research: An Analysis of the Legal Context* (2007) p6, OAK Law Project <<http://www.oaklaw.qut.edu.au/reports>> (hereinafter A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007)) and Professor Anne Fitzgerald, Kylie Pappalardo and Anthony Austin, "Understanding the Legal Implications of Data Sharing, Access and Reuse in the Australian Research Landscape" in B Fitzgerald (ed), *Legal Framework for eResearch: Realising the Potential* (2008) Sydney University Press (hereinafter A Fitzgerald, K Pappalardo and A Austin, "Understanding the Legal Implications" (2008)).

² A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p6 and A Fitzgerald, K Pappalardo and A Austin, "Understanding the Legal Implications" (2008).

³ In an interview with Richard Poynder, Tony Hey said, 'We are going to be deluged with data in almost every field': Richard Poynder, Interview with Tony Hey 'A Conversation with Microsoft's Tony Hey' *Open and Shut?* (Blog, 12 December 2006) <<http://poynder.blogspot.com/2006/12/conversation-with-microsofts-tony-hey.html>> at 5 May 2008.

⁴ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) pp6-7 and A Fitzgerald, K Pappalardo and A Austin, "Understanding the Legal Implications" (2008).

⁵ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p9 and A Fitzgerald, K Pappalardo and A Austin, "Understanding the Legal Implications" (2008).

⁶ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p263 and A Fitzgerald, K Pappalardo and A Austin, "Understanding the Legal Implications" (2008).

⁷ See <<http://www.e-research.law.qut.edu.au>>.

⁸ Maree Heffernan and Nikki David, *Legal and project agreement issues in collaboration and e-Research: Survey Results* (2007) Legal Framework for e-Research Project, Queensland University of Technology (QUT) <<http://www.e-research.law.qut.edu.au>> (hereinafter M Heffernan and N David (2007)).

research. The survey, conducted online in May 2007, found that many researchers consider legal agreements to be an impediment to timely research and often begin working on collaborative research projects before agreements about data ownership and other legal interests are finalised.⁹ The survey highlighted the need for simple and easy-to-use resources to assist researchers in managing their legal rights in data and e-Research, particularly where they are involved in collaborative research projects. Similarly, scoping study interviews conducted by Oxford University in 2008 showed that one of the top demands from Oxford researchers was for:

[a]dvice on practical issues related to managing data across their life cycle...[including] assistance in producing a data management/sharing plan...¹⁰

This guide has been produced to meet the demand uncovered in the QUT and other surveys for resources to assist researchers with data management. It is designed to help researchers and database managers understand the legal and management questions that arise in relation to research data, such as:

- How are ownership interests in data determined and allocated?
- Is the data to be made available for access by the public and, if so, on what basis?
- Will sharing and reuse of data be permitted?
- What legal restraints apply to the data?

This guide explains the principal areas of law that are relevant to the collection, management and use of research data, in particular:

- copyright;
- moral rights;
- patents;
- confidentiality;
- contract; and
- privacy.

However, it is not enough for researchers and database managers to simply be aware of the laws applying to the data they produce. Data must also be properly managed. Failure to establish legal protocols for data management is likely to diminish the potential for valuable research outputs to be made available for access, sharing and reuse within the research community.¹¹

Researchers and database managers can more effectively manage their legal rights, interests and obligations in relation to research data if they develop or adopt a “data sharing infrastructure”.

⁹ M Heffernan and N David (2007), p38 and p62.

¹⁰ Luis Martinez-Uribe, Digital Repositories Research Co-ordinator, Oxford e-Research Centre, *Findings of the Scoping Study Interviews and the Research Data Management Workshop* (July 2008) p2 <<http://www.ict.ox.ac.uk/odit/projects/digitalrepository/findings.xml?style=screen>>.

¹¹ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p263 and A Fitzgerald, K Pappalardo and A Austin, “Understanding the Legal Implications” (2008).

This guide describes a data sharing infrastructure consisting of three main components:

- **Data management policies and principles:** A data management policy contains high-level statements about how data generated or compiled by the research project is to be made available for access and use. It may also contain principles which expand on the high-level policy statements and explain how they are to be applied.¹²
- **Data management plans:** A data management plan (DMP) addresses how data is collected, stored, managed and disseminated. It is also concerned with data ownership and the legal controls surrounding data. The DMP focuses on practical measures rather than making broad statements of policy or principle. It also addresses issues such as expenditure and technical measures to ensure sustainability of data.¹³ Model intellectual property provisions for inclusion in a DMP are set out in **Appendix B**.
- **Data management toolkits:** A data management toolkit (DMT) is a document designed for use by researchers, which provides practical guidelines on implementing the DMP. A DMT can assist individual researchers in ascertaining their role and responsibilities in a research project and in understanding how the research data is to be dealt with. A DMT can inform researchers about who is able to access the research data and the extent to which it can be reused. It can also assist researchers in determining their obligations, both legal and otherwise, in relation to the research data.¹⁴ A Model Data Management Toolkit is set out in **Appendix C**.

¹² A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p240 and A Fitzgerald, K Pappalardo and A Austin, "Understanding the Legal Implications" (2008).

¹³ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) pp247-56 and A Fitzgerald, K Pappalardo and A Austin, "Understanding the Legal Implications" (2008).

¹⁴ A Fitzgerald, K Pappalardo and A Austin, "Understanding the Legal Implications" (2008).

2. Copyright

Where research data is protected by copyright, whether and how that data can be used by others is largely determined by the copyright owner. Therefore, a practical understanding of how copyright law applies is of central importance to the management of research data.¹⁵ This section provides an overview of copyright law as it relates to data and e-Research and explains how copyright affects the ownership and use of research data. It is intended to address some of the misunderstandings and confusion about copyright law that have been demonstrated in recent surveys.

2.1 Overview

A general principle of copyright law is that copyright protects the material form in which ideas, information or facts are expressed and not the ideas, information or facts themselves. It follows under this general principle that copyright does not protect raw data. However, in Australia, copyright law may operate to protect compilations of data, such as datasets or databases, provided that the compilation meets the originality threshold required by law (see [2.3] below). Under the *Copyright Act 1968* (Cth), which is the law governing copyright in Australia, a compilation is protected as a literary work.¹⁶

Compiled data is not always simply raw data – a compilation may also include written materials, reports, diagrams, tables and graphs. These items may be protected by copyright as independent works (for example, a written report will be protected in its own right as a literary work). An important distinction lies between copyright in discrete data items and copyright in a database as a whole. In the latter, copyright serves to protect the *arrangement* of the collected components. Copyright interests may co-exist independently in components contained within the database and in the database itself, and may be owned by different parties.¹⁷

The owner of copyright in a database, dataset or where applicable, a discreet item of data has rights over how that database, dataset or data is used, copied and shared. If it is intended that the data generated by a research project is to be openly shared and reused, it would be wise to formulate plans and policies that properly define, allocate and manage copyright interests in the data and database.

The following section explains the operation of copyright law in relation to research data, in particular:

- what copyright is and what it protects;
- who owns copyright;
- how copyright owners can control the use of their material; and
- how copyright licences (including open content licences) can be used to

¹⁵ See, for example, Margaret Henty, “Developing the Capability and Skills to Support eResearch”, *Ariadne*, Issue 55, April 2008 <<http://www.ariadne.ac.uk/issue55/henty/>>.

¹⁶ *Copyright Act 1968* (Cth) s10(1).

¹⁷ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p137 and A Fitzgerald, K Pappalardo and A Austin, “Understanding the Legal Implications” (2008).

provide access to copyright materials.

Other legal interests are discussed further below in **Section 3 – Other legal aspects of data management**.

2.2 What is copyright?

Copyright is a set (or “bundle”) of legal rights that attach to an original work when it is created. These rights permit the owner of copyright to control the doing of certain acts in relation to their material (such as making copies of it) and to prevent others from using the material without their permission. The rights of a copyright owner are referred to as “exclusive rights” because they enable the copyright owner to exclude others from engaging in the same acts in relation to the copyright material.

Copyright is a property right which can be owned by individuals, organisations and governments. It can be sold or licensed in the same way that other forms of property can be.

The exclusive rights of copyright owners are explained in [2.5] below. However, before considering the nature of the exclusive rights, it is important to determine:

- What is the work to which the exclusive rights attach? – See [2.3] below; and
- Who is the copyright owner holding the exclusive rights? – See [2.4] below.

2.3 What does copyright protect?

Copyright protects a very wide range of materials in different formats, including:

- tables;
- compilations of data;
- datasets;
- databases;
- written materials (“literary works”) such as reports, accounts, documented observations etc;
- photographs and other pictures (“artistic works”);
- sound recordings; and
- video and multimedia works.

For the purposes of copyright law, an original dataset or database may be a compilation which comes within the category of literary works protected under the *Copyright Act 1968* (Cth).

Copyright only protects works that display the requisite level of originality under law. In the 2002 case, *Desktop Marketing v Telstra*,¹⁸ the court considered the issue of whether a compilation is sufficiently original to attract copyright protection. The question for the court was whether Telstra held copyright in their White Pages and Yellow Pages directories, which are essentially a compilation of names, addresses and phone numbers listed alphabetically. In a landmark judgment, the court held that Telstra did own copyright in their compilations, thereby establishing that the originality threshold for copyright protection is low. The court held that copyright can be claimed in a compilation that:

1. has been produced as a result of the exercise of skill, judgment or knowledge in the selection, presentation or arrangement of the materials; or
2. has required the investment of a substantial amount of labour or expense to generate or collect the material included in the compilation (the so-called “sweat of the brow” approach).¹⁹

Telstra, in undertaking substantial labour and incurring substantial expense, had met the originality threshold in compiling the Yellow Pages and White Pages directories, notwithstanding that there may have been minimal intellectual input or creativity involved in the selection and arrangement of the material.

While there is no copyright in information in itself, if data has been compiled into a dataset or database in the ways described in the *Desktop Marketing v Telstra* case, the compilation is a form of literary work that can be protected by copyright.

Copyright protects data which has been:

- compiled into a dataset or a database;
- organised, analysed and imbued with meaning; or
- collected through expenditure of effort and/or money.

2.4 Who owns copyright?

The basic principle of copyright ownership is that the author or creator of the copyright material is the first owner of copyright. In the case of databases and datasets, the author will usually be the person(s) who has compiled the information.

Data may be compiled for an organisation or institution by its employees. If the work has been performed in the ordinary course of an employee’s duties, then generally the employing institution will own copyright in the work rather than the employee. If the employing institution is a government department or agency, the government (which may be the Commonwealth Government or a State or Territory Government) will own copyright.

¹⁸ *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112.

¹⁹ *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112, [409].

These basic ownership rules apply unless there is an agreement (contract) to the contrary between the employer and employee, under which copyright is to belong to the employee or some other party (for example, another organisation that has paid for research to be carried out).

Copyright ownership for materials created or compiled by employees

Generally an employer owns copyright in materials that are created or compiled by their employee in the ordinary course of the employee's duties and in pursuance of the terms of employment.

This basic rule of ownership can be changed by the terms of an agreement between the employer and employee which grants copyright ownership to the employee or some other party (such as a research funding organisation).

Factors that may be relevant to whether materials are created or compiled "in pursuance of the terms of employment" are:

- whether the employee was engaged to perform the task that results in the materials being created;
- whether the employee creates the materials with the understanding and intention that the employer will own copyright; and
- whether the materials were created or compiled during the employee's usual work hours (or by contrast, in the employee's own time).

Where the author or creator of the copyright material is an independent contractor rather than an employee, the independent contractor generally owns copyright in any materials that they create or compile under the contract for services. Again, this basic rule can be - and often is - varied by the terms of the contract between the independent contractor and the contracting institution that:

- state that any copyright material created or compiled by the independent contractor will be owned by the contracting institution; or
- require copyright to be assigned to the institution.

Copyright ownership for materials created or compiled by an independent contractor

Copyright in materials created or compiled by an independent contractor under a contract for services is owned by the independent contractor, unless there is a written agreement to the contrary between the party who has commissioned the material to be produced and the independent contractor.

However, even where copyright in the material produced under the contract belongs to the independent contractor, it will often be possible to imply a licence so that the party who has commissioned the material will be able to use it for the purpose for which it was commissioned.

2.4.1 How can you tell whether someone is an employee or an independent contractor?

It is sometimes unclear whether a person is an employee or an independent contractor. Generally, an employee is someone who is working under a **contract of service** for an employer. An independent contractor is someone who is engaged under a **contract for services** and is in business on their own account.

When ascertaining whether a person is an employee or independent contractor, it is important to consider the totality of the relationship between that person and the person or institution that is employing or contracting them. One relevant factor is whether or not there is a right of control by the employer over the employee's manner of doing the work.

Other factors that may indicate the existence of a contract of service for an employee are:

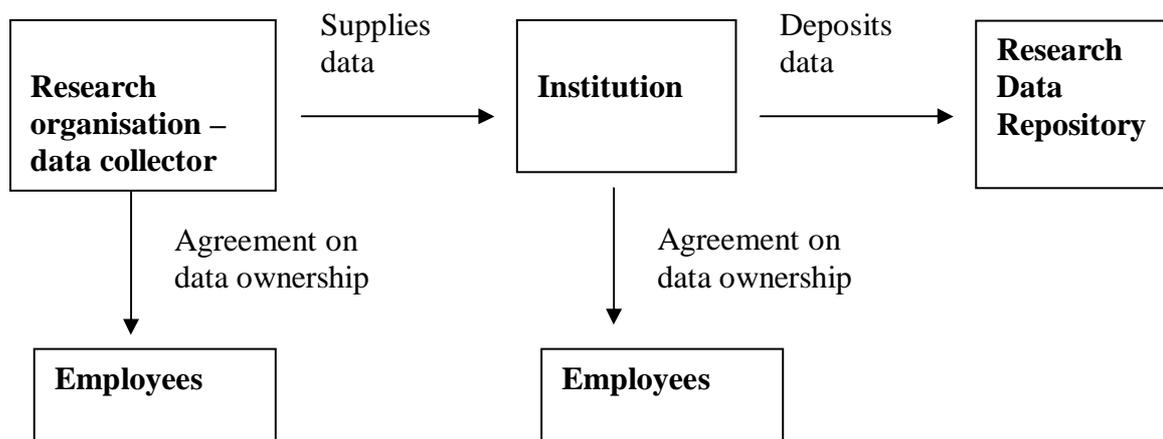
- a regular salary;
- holiday leave;
- PAYE tax deductions;
- the provision of equipment and resources; and
- the provision of an office space.

Factors that may indicate a contract for services for an independent contractor are:

- the person is engaged to carry out a specific task;
- the person is paid a lump sum;
- the person is not required to give their services exclusively; and
- the person has autonomy as to how and when the work is performed.

Important note: A research organisation and any person or organisation that provides data to a research organisation should have entered into appropriate arrangements for data ownership with their employees and contractors prior to depositing the data into a repository.

Diagram 1: Relationships Between the Parties



It is important to be aware that there may be other contractual arrangements affecting ownership of copyright in research data. For example, an organisation that provides funding for a research project may, as a condition of funding, do so on the basis that it will own intellectual property rights (including copyright) in the data generated by the project. In this case, the funding agreement will usually contain clauses addressing the question of copyright ownership of the data produced by the project.

Important note: A research organisation should carefully check all contracts with other parties, including research funding agreements, to ascertain whether these contracts affect copyright ownership in research data created or compiled by the research organisation.

2.5 What are the rights of copyright owners?

Copyright confers on the copyright owner the exclusive proprietary right to do a range of acts in relation to the protected work. The copyright owner also has the exclusive right to authorise the doing of any of those acts by someone else, whether by sale (assignment) or by licence.²⁰

²⁰ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p141.

The economic rights of a copyright owner of a literary, dramatic or musical work are the rights to:

- reproduce the work in a material form;
- publish the work;
- perform the work;
- communicate the work to the public;
- make an adaptation of the work (for example, a translation); and
- control rental of the work, where the work is a computer program or is reproduced in a sound recording.²¹

For artistic works, the exclusive rights are the rights to:

- reproduce the work in a material form;
- publish the work; and
- communicate the work to the public.²²

The right to communicate to the public is an important right in the online environment. “Communicate” is defined to mean:

Make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject matter.²³

Making a database available online or through a computer network is an exercise of the copyright owner’s right to communicate the database to the public.²⁴

2.6 Making data available in a repository – how is copyright relevant?

Research data can be made openly accessible to the public through an open access digital repository (referred to in this guide as “research data repository” or “repository”).

Uploading data into the repository and making it available online to users is an exercise of two of the copyright owner’s exclusive rights:

- the right to **reproduce** the work (the act of “copying” the data into the repository); and
- the right to **communicate** the work to the public (making the data available to users online).

Permission (a licence) from the copyright owner is required before these rights can be

²¹ *Copyright Act 1968* (Cth) s31(1).

²² *Copyright Act 1968* (Cth) s31(1).

²³ *Copyright Act 1968* (Cth) s10(1).

²⁴ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p141.

exercised by a person other than the copyright owner.²⁵

An organisation that is hosting a research data repository may require depositors to enter into a Repository Deposit Licence (RDL). The RDL requires depositors to declare that they are the copyright owner or have permission from the copyright owner to deposit the data. The RDL also requires the depositor to grant a licence to the hosting organisation to allow the organisation to reproduce the data and make it available online for users to access. For example, the Australian National University's (ANU) institutional repository (called "Demetrius") has a RDL that can be used by depositors to give the repository permission to store and maintain the data, whilst leaving ownership of the data with the researcher.²⁶ A Sample Repository Deposit Licence is included in **Appendix A**.

Users may access and view any data that is made available online in a research data repository. However, the permission of the copyright owner is required if users are to be granted any further rights to reuse the data. An open content licence, which gives permission in advance to the world at large, is an ideal way for a copyright owner to provide permission to users to reuse the data openly. Open content licensing is explained further below at [2.7.2].

At the time of depositing data into a repository, a researcher will usually be asked to enter certain metadata about the data item. Metadata is information describing the data item, and will usually include the name of the data item, the name of the custodian organisation, a description of the data (e.g. geographic coverage, or keywords or subject topics to describe the content) and contact information for the research project or custodians of the data. It is important for researchers to enter comprehensive and accurate metadata because this will enable the data item to be found by users searching online. An example of the metadata information that may be included when depositing a data item in a repository is included in the Model Data Management Toolkit in **Appendix C**.

2.7 Copyright licensing

A copyright licence is a grant of permission from the copyright owner that allows someone else to exercise one or more of the exclusive rights of the copyright owner in relation to the copyright material.²⁷ A licence does not assign (transfer) ownership of copyright to another person – it simply permits them to exercise certain rights.

Licences are relevant to data management because a repository or database manager is unable to legally reproduce and make available any copyright protected research data or datasets without a licence from the copyright owner. Usually, a copyright owner will grant permission to a repository manager to allow these uses through a

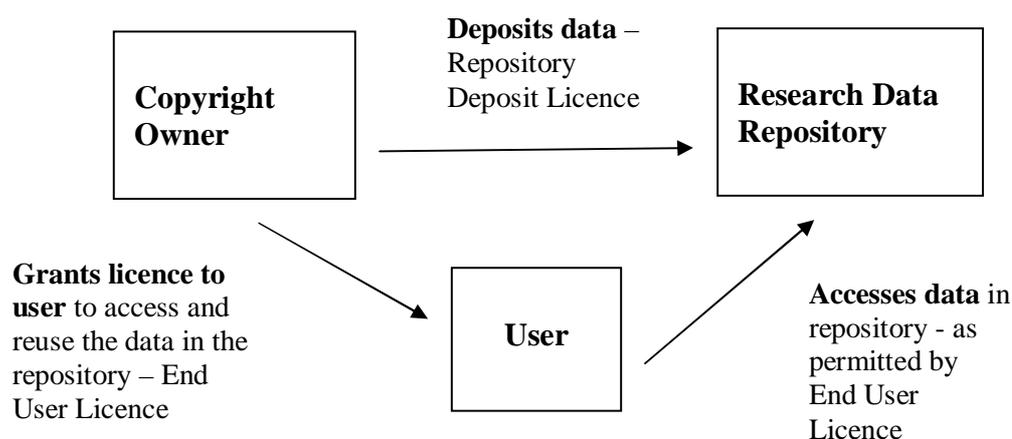
²⁵ See section 2.6 below.

²⁶ The Australian National University (ANU) Information Literacy Program, *ANU Data Management Manual: Managing Digital Research Data at the Australian National University*, Version 1.0 (July 2008) p18 <http://ilp.anu.edu.au/dm/ANU_DM_Manual_v1.0.pdf> (hereinafter, *ANU Data Management Manual* (2008)). This Data Management Manual comprises the materials for the new course in Data Management Planning now being offered at ANU <<http://ilp.anu.edu.au/dm/>>.

²⁷ For more on the exclusive rights of the copyright owner, see section 2.4.

Repository Deposit Licence (RDL). RDLs are discussed above at [2.6] and a Sample RDL is included in **Appendix A**. Additionally, users accessing the data in the repository will be unable to use or otherwise deal with the data without the copyright owner's permission. A copyright owner will usually grant permission to end users through an End User Licence (EUL). An EUL may take the form of a standard licence provided by the repository institution for the copyright owner to adopt, a licence individually provided by the copyright owner or an open content licence. Open content licences are explained further below at [2.7.2].

Diagram 2: Copyright Licensing for Research Data



2.7.1 Types of copyright licences

A licence can be exclusive or non-exclusive. Under an exclusive licence, the licensee (i.e. the recipient of the licence) is the only person who can use the material in the way or ways covered by the licence (even to the exclusion of the copyright owner).²⁸ A non-exclusive licence merely provides the right to exercise one or more of the copyright owner's rights in the work but not to the exclusion of the copyright owner or other licensees.²⁹

A licence can be limited in terms of:

- the length of operation (for example, the licence may grant permission for a one-time use only or it may grant permission to use the material for a period of six months);
- the rights granted (for example, the licence may grant permission to exercise the right of reproduction only or it may grant permission to

²⁸ Professor Brian Fitzgerald et al, *OAK Law Project Report No. 1: Creating a Legal Framework for Copyright Management of Open Access within the Australian Academic and Research Sector* (August 2006) p44, OAK Law Project <<http://www.oaklaw.qut.edu.au>> (hereinafter B Fitzgerald et al, *OAK Law Project Report No. 1* (2006)).

²⁹ B Fitzgerald et al, *OAK Law Project Report No. 1* (2006) p44.

- exercise multiple rights);
- the geographical region in which the rights may be exercised (for example, the licence may operate worldwide or only within Australia); or
- the purposes for which the rights may be exercised (for example, the licence may provide that it allows non-commercial use only).

A licence can be contractual or non-contractual. A contractual licence operates like a standard contract – in exchange for permission to exercise the relevant rights, the licensee agrees to do or give something in return (at law this is called “consideration”). A non-contractual licence is essentially a bare permission to exercise the rights granted. A copyright owner can still place restrictions on a non-contractual licence, but the licensee is not contracting to fulfill any additional obligations.³⁰ There are also standard-form open content licences that can be adopted by organisations or individuals, the most common of these being Creative Commons licences.

2.7.2 Open (content) licences

The emergence of open content licensing models has made it much simpler for copyright owners to licence their material to a wide range of people, especially where it is distributed over the internet.³¹ Open content licensing involves making copyright material available on liberal terms, to ensure that it is readily accessible and available for reuse.³² The last few years have seen an increasing appreciation of open content licences to grant access to copyright-protected data collections in open collaborative research projects.³³

A central feature of open licensing is that while copyright is claimed in the material, the copyright owner exercises their exclusive rights to ensure ready accessibility and to permit reuse while still reserving some rights – notably, the right to be recognised at the originator of the material. Open licences grant rights to users to do acts that fall within the scope of the copyright owner’s exclusive rights and do not impose further obligations on the users of the copyright material.

Open licences will be useful for organisations that:

- own copyright in the research data or have been granted a broad licence by the copyright owner; and
- want to make research data openly accessible and available for reuse.

³⁰ Kylie Pappalardo, *Understanding Open Access in the Academic Environment: A Guide for Authors* (2008) p22 (web version) OAK Law Project <<http://www.oaklist.qut.edu.au>> (hereinafter K Pappalardo *Understanding Open Access* (2008)).

³¹ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p146.

³² A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p146.

³³ A Fitzgerald and K Pappalardo, *Building the Infrastructure*, p148. See for example, *ANU Data Management Manual* (2008) p18; Editorial, ‘Let data speak to data’ (2005) p438 *Nature* 531 <<http://www.nature.com/nature/journal/v438/n7068/full/438531a.html>>; Don Tapscott and Anthony Williams, ‘The New Science of Sharing’ (March 2007) *BusinessWeek.com* <http://www.businessweek.com/innovate/content/mar2007/id20070302_219704.htm?chan=technology_technology+index+page_more+of+today's+top+stories>; Charlotte Waelde and Mags McGinley, ‘Designing a licensing strategy for sharing and re-use of geospatial data in the academic sector’ (2007) GRADE <<http://edina.ac.uk/projects/grade>>.

Open licensing to enable open access

Copyright comes into existence automatically, without any need to register or comply with other formalities. As soon as a dataset is created, copyright attaches to the dataset and the copyright owner has rights over it. In particular, the copyright owner has the exclusive rights to make copies of the dataset, post the dataset online and produce other works that include a substantial part of the dataset. These rights are exclusive in the sense that they give the copyright owner the right to exclude others from doing those acts in relation to the copyright dataset.

However, if other researchers wish to use a copyright dataset by doing any act that falls within the scope of the copyright owner's exclusive rights (for example, to make a copy of a substantial part of a dataset) they will generally need to obtain permission from the copyright owner to do so. Where a copyright owner wants to make their data available on an open access basis, it is advisable to expressly state the basis on which the dataset can be accessed and used. Simply uploading a dataset online and leaving potential users to guess as to whether or not they are permitted to use the dataset and the terms on which it can be used, only leads to confusion and uncertainty. Failure to clearly state the terms on which research datasets can be reused makes it less likely that they will in fact be reused, because users may fear that they will be subject to liability or penalties for infringing copyright.

By making data available through open licences, a copyright owner can facilitate open access by giving express permission to the world at large to use the dataset.

Benefits of open licensing

Open licences provide a broad permission to users to reuse the data or materials that are subject to the licence. However, they also allow the copyright owner to retain some control over *how* the data or materials may be reused. For example, if a copyright owner chooses to licence their material under a Creative Commons 2.5 Non-Commercial licence, users may only reuse the licensed material for any purpose that is not commercial. They must seek further permission from the copyright owner to use the material for a commercial purpose.

The Open Knowledge Foundation has described the benefits of open licensing as:

- allowing others to circulate the licensed work freely and widely;
- not forcing others to seek permission every time they wish to use or circulate a copy of the licensed material, which can be time consuming;
- encouraging others to continuously add value to the work; and
- encouraging others to create new works based on or derived from the original work.³⁴

³⁴ Open Knowledge Foundation <<http://www.opendefinition.org/guide?action=print>> at 4 September 2007.

The benefits of open access to research data are well recognised. Providing open access to research data facilitates reuse of the data by other researchers, which:

- prevents duplicative research;
- encourages innovation, collaboration and more advanced research; and
- increases the wider benefits to the public of publicly-funded research.

Ways of open licensing

There are a number of standard-form open licences in use. These include the GNU Free Documentation License (GFDL) and the suite of Creative Commons licences.³⁵ Most open licences can be accessed online and can be easily attached to copyright material.

The GFDL is a “copyleft” licence, meaning that any works derived from the licensed material must be made available under the same or similar licence.³⁶ The GFDL is recommended “principally for works whose purpose is instruction or reference.”³⁷ Its most prominent user is Wikipedia.³⁸

Creative Commons licences can be applied to most copyright materials. The licences consist of:

- a legal code;
- a short “human readable” summary of the legal code;
- a digital code that can be understood by computers; and
- a set of icons that can be recognised internationally regardless of language.

Creative Commons licences are described in more detail below at [2.7.3].

³⁵ For a more complete list and more information on open licences, see: <<http://www.opendefinition.org/licenses#head-4712a6a96f10cc9d008b83d615f0fd01c5d75a2c>> at 5 September 2007.

³⁶ For the full text of the GFDL, see <<http://www.gnu.org/copyleft/fdl.html>> at 5 September 2007.

³⁷ See <<http://www.opendefinition.org/licenses#head-4712a6a96f10cc9d008b83d615f0fd01c5d75a2c>> at 5 September 2007.

³⁸ See <www.wikipedia.org>.

Important note: Any research group that intends to provide open access to research data and outputs should display a copyright notice on its website or database or should attach a copyright notice to its datasets.

The copyright notice should assert copyright and name the copyright owner. Then, licensing terms granting access and reuse rights to the data can be displayed together with the copyright notice, in such a way that they can be understood by all recipients of the data. Creative Commons licences, with their standard set of icons that are easily recognisable worldwide, provide an excellent licensing framework for data sharing.

2.7.3 Creative Commons licences

Creative Commons (CC) licences provide a way to give permission in advance to the world at large to use a copyright material. The licence attaches to the copyright material so that it moves with the copyright material. A copyright owner only needs to give permission once, rather than having to respond to numerous separate requests from those seeking permission to use the material.

A CC licence gives users rights in relation to copyright material, subject to certain conditions as selected by the licensor. The rights given are the rights to copy, distribute, display and perform the work. Where one or more elements of a database attracts copyright, a CC licence can be used to licence that copyright to users.

For example, the CC licensing model is utilised by the Universal Protein Resource (UniProt), a comprehensive resource for protein sequence and annotation data and a collaboration between the European Bioinformatics Institute (EBI), the Swiss Institute of Bioinformatics (SIB) and the Protein Information Resource (EBI).³⁹ UniProt has chosen to apply the Creative Commons Attribution-No Derivatives (BY-ND) licence to all copyrightable parts of its databases.⁴⁰

The conditions that may be imposed in a Creative Commons licence are:

- **Attribution (BY)** – this applies to every Creative Commons licensed work and means that whenever the work is copied or redistributed the author/creator must be reasonably credited;
- **Non-Commercial (NC)** – the work can be used for non-commercial purposes only;
- **No Derivatives (ND)** – only exact copies of the work (not derivative works based on the original work) can be made, displayed, distributed and performed; and
- **Share-Alike (SA)** – users may distribute derivative works, but only under

³⁹ 'About UniProt' <<http://beta.uniprot.org/help/about>> at 22 April 2008.

⁴⁰ *License & disclaimer* <<http://beta.uniprot.org/help/license>> at 22 April 2008.

a licence identical to the one that governs the original work.

These conditions may be combined in multiple different ways. For example, a copyright owner may wish to licence their copyright material under an Attribution-Share-Alike (BY-SA) licence, which allows others to use the material as long as they credit the creator of the material and they licence any derivative material that they create under the same type of licence. The only conditions that are incompatible and may not feature in the same licence are the No Derivatives and Share-Alike terms.⁴¹

Important note: The Creative Commons 2.5 Attribution licence may be most practical of the Creative Commons licences for research organisations as it is generally considered the most “open” of all the Creative Commons licences.

⁴¹ For more information about Creative Commons licences, see <<http://www.creativecommons.org.au>> and <<http://www.creativecommons.org>>.

3. Other legal aspects of data management

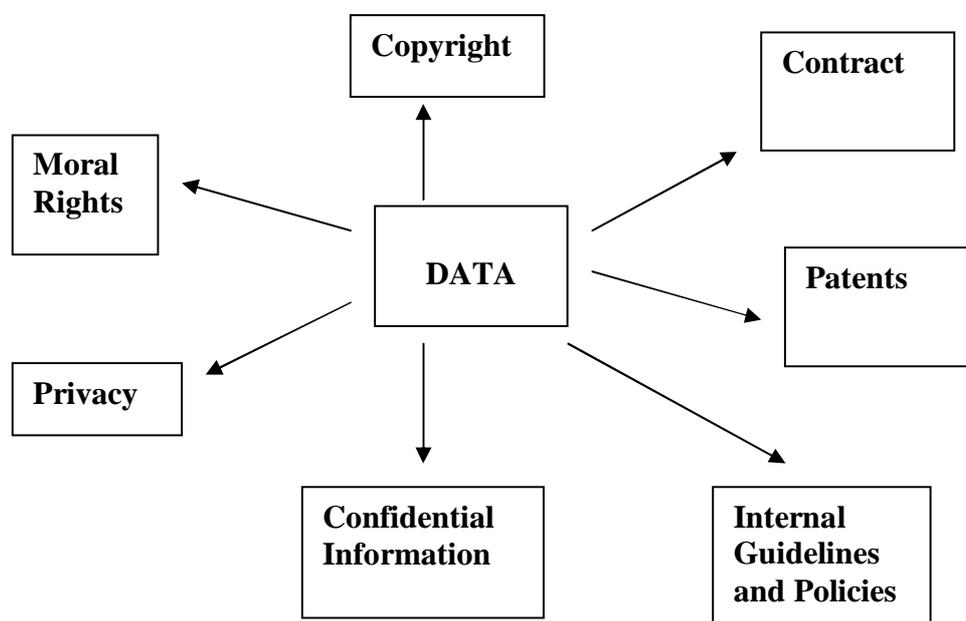
Quite apart from copyright there is a myriad of legal rights relevant to the question of whether - and how - open access can be provided to research data. Not every legal right will apply in every case, but it is important to understand how these rights operate and whether, in any particular case, they will affect the level of access that can be provided to the research data.

This section considers the other legal aspects of data management, including:

- moral rights;
- confidential information;
- contracts;
- privacy; and
- patents.

This section provides a brief overview of the relevant areas of law that may affect how research data is collected, compiled, managed and made available for access and reuse. Where applicable, this guide also offers practical suggestions about how researchers, research projects and repository managers can deal with these legal rights to enable proper management of and provide wide access to research data.

Diagram 3: Legal Rights in Data



3.1 Moral rights

In addition to copyright, a person who has created copyright materials (including data compilations as literary works) will have moral rights in their work. Again, these rights come into existence automatically upon the creation of the material.

There are three primary moral rights:

- the right to have **authorship attributed** to the work;
- the right **not to have the work falsely attributed**; and
- the right of **integrity of authorship**, which is the right not to have the work treated in a derogatory manner.

Moral rights can only be held by an individual, not a corporation. Where an organisation or corporation owns copyright in material produced by an employee in the course of employment, the question of how the employee's moral rights will be dealt with will usually be addressed in the employment contract or in the organisation's intellectual property policy.

Moral rights cannot be transferred to another person, although the person who produces the copyright material may consent to other persons dealing with their work in ways that would otherwise infringe their moral rights.

Important note: It is important to be aware of the existence of moral rights. However, like the issue of copyright ownership, moral rights issues should be dealt with in contracts between the employing organisation and research employees or contractors of the organisation, before research data is deposited into a repository.

3.2 Confidential Information

A database or dataset may contain information or data that has not been released to the public. In some cases, the information or data may also be secret or confidential. A researcher who has expended considerable time and energy in generating or collecting data may have an interest in controlling who can access or use it. Apart from using physical or technological controls (eg encryption or passwords) to protect the data against unauthorised access and use, there are legal mechanisms which can be applied to exercise control over access to and dissemination of data.

From a practical point of view, the most important of the legal controls that can be exercised in relation to data are those provided by:

- (a) **contract law:** Usually, confidentiality will be protected through the use of confidentiality or non-disclosure agreements, which provide for the disclosure of information on the condition that the contracting party does not further disclose the information and does not use the information except for

the purposes set out in the agreement.⁴² Contractual protection of confidential information is considered at greater length in [3.3.1] below; and

(b) **common law protection for confidential information:** If the information or data is confidential, the common law action for breach of confidence can be used to prevent it being disclosed and disseminated.⁴³

The law of confidentiality is based on the equitable principle that a person who receives information in confidence shall not take unfair advantage of that information.⁴⁴ An action for breach of confidence can be brought to restrain the disclosure of confidential information or provide a remedy where it has been released without permission if each of the following elements is present:

1. the information is confidential in nature;
2. the information was provided in circumstances that establish an obligation to treat it as confidential; and
3. there is an actual or threatened unauthorised use of the information to the detriment of the person claiming the right to maintain confidentiality.⁴⁵

Data can only be protected as confidential if it is not in the public domain. A breach of confidence action can still be established where more than one person knows about or has access to the data, provided that not so many people know about the data that it can no longer be regarded as secret.

Confidentiality is lost if enough people know about the data such that it passes into the public domain, or if the data is independently discovered by someone else.⁴⁶ Where data loses its quality of secrecy, it is still possible for a researcher to control access to and use of the data through contract (see [3.3.1] below).

Important note: If confidentiality restrictions have been imposed, a research organisation must ensure that appropriate safeguards are in place so that secret information is not disclosed to the public. Confidentiality restrictions may also prevent the licensing of data under a Creative Commons licence or may limit the potential scope of the licence.

3.3 Contracts

In practice, the most important legal mechanism used to allocate rights to data is the

⁴² See section 3.5 below, and see further: A Fitzgerald, K Pappalardo and A Austin, “Understanding the Legal Implications” (2008).

⁴³ See further: A Fitzgerald, K Pappalardo and A Austin, “Understanding the Legal Implications” (2008).

⁴⁴ *Seager v Copydex Ltd* [1967] 2 All ER 415, 417.

⁴⁵ *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47.

⁴⁶ *Attorney General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 10 IPR 153.

contractual agreement. There are many different types of contractual agreements, including:

- confidentiality agreements;
- contractual copyright licences;
- access agreements;
- funding agreements; and
- other agreements between the various institutions and entities that are contributing data to the database or repository.

Important note: It is important to ensure that any contractual obligations are complied with before providing open access to the data affected by the contractual arrangement.

3.3.1 Confidentiality agreements

Confidentiality agreements – also called non-disclosure agreements – serve to protect secret information by disclosing the information in a controlled way so that it remains confidential and is not released into the public domain. Confidentiality agreements generally:

- identify the owner of rights in relation to the confidential information;
- identify the information that is to be treated as confidential;
- impose obligations on the person to whom the information is disclosed to maintain the secrecy of the information;
- define the scope of the permitted use of the information; and
- provide for the consequences of a failure to comply with the confidentiality obligations.⁴⁷

3.3.2 Contractual copyright licences

Copyright licences have already been discussed at length in [2.7] above. Copyright licences grant permission to a person to deal with a database or a dataset in a way that would otherwise infringe copyright. For example, a copyright owner may permit – through a licence – a researcher to reproduce copyright material and make the material available on a website where it can be accessed and downloaded by other researchers.

A contractual copyright licence may also contain terms that are not strictly related to copyright. For example, the licence may require the researcher to undertake not to hold the copyright owner liable for consequences resulting from any inaccuracies that may be contained in the data supplied.⁴⁸

⁴⁷ A Fitzgerald, K Pappalardo and A Austin, “Understanding the Legal Implications” (2008) and A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p175.

⁴⁸ A Fitzgerald, K Pappalardo and A Austin, “Understanding the Legal Implications” (2008) and A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p173.

Contractual licences usually indicate:

- the copyright material to which the licence refers;
- the permitted acts that the licensee is authorised to do;
- any restrictions upon the party acting under the licence;
- the consideration provided for the licence;
- whether or not the licence is exclusive (or non-exclusive); and
- whether it can be revoked or is irrevocable.⁴⁹

3.3.3 Access agreements

Access agreements operate where a researcher or research organisation has control over the database in which their data is stored. The researcher or research organisation may require persons interested in obtaining access to the data to first enter into an access agreement.

Access agreements may:

- identify the data to be accessed;
- identify the person/s or class of persons who are permitted to access the data;
- state that access rights cannot be transferred to third parties;
- limit the purposes for which the data may be used;
- contain a disclaimer that the researcher is not responsible for any inaccuracies in the data; and
- provide for the consequences of a failure to comply with the agreement.⁵⁰

For example, an access agreement may provide that the data can be accessed and used for non-commercial purposes only, or may provide that if a user engages in commercial uses of the data, they must account back to the researcher for a proportion of the profits. Access agreements can be used to control access to and use of data that was formerly protected through confidentiality agreements but which has lost its quality of confidence.

3.3.4 Funding and other agreements

Agreements with funding bodies or with other parties (for example, with research collaborators) may contain provisions dealing with how the research data is to be collected or generated, how it is to be stored and managed, whether it is to be made available for access and the basis on which it can be reused.

⁴⁹ A Fitzgerald, K Pappalardo and A Austin, “Understanding the Legal Implications” (2008) and A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p177.

⁵⁰ A Fitzgerald, K Pappalardo and A Austin, “Understanding the Legal Implications” (2008) and A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) pp176-7.

3.4 Privacy

Some research, particularly research in medical fields, gives rise to privacy concerns about the handling and use of personally identifying and health information.⁵¹

Privacy restrictions will apply if the research data collected includes information about people, such as:

- personally-identifying information (names, addresses etc);
- information about people's locations and movements; or
- health and medical information.

In Australia, the principal legislation governing privacy of personal information is the *Privacy Act 1988* (Cth). It defines "personal information" as:

Information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.⁵²

The *Privacy Act 1988* applies to Commonwealth government departments and agencies. It provides that personal information cannot be collected except for a lawful purpose directly related to a function or activity of the Commonwealth government agency. Where personal information is collected, it must be stored safely and the *Privacy Act 1988* limits the extent to which the personal information may be accessed, used and disclosed.

Since 2001, the *Privacy Act 1988* has also applied to most private sector organisations. It provides that personal information cannot be used by a relevant private sector organisation except for the lawful purpose for which it was collected.

For state government agencies, there is corresponding state legislation and/or administrative protocols. All Australian States and Territories except Queensland and South Australia have enacted privacy legislation or introduced privacy bills relating to health information and/or the collection and use of personal information in the State public sector.⁵³ In South Australia, the Privacy Committee is responsible for administrative protocol PC012 – Information Privacy Principles Instruction, which applies to public sector handling of personal information. In Queensland, there are two administrative protocols applying to the State's public sector. Information Standard 42: Information Privacy applies to the collection of personal information in

⁵¹ See further: A Fitzgerald, K Pappalardo and A Austin, "Understanding the Legal Implications" (2008).

⁵² *Privacy Act 1988* (Cth) s6.

⁵³ *Privacy and Personal Information Act 1998* (NSW), *Health Records and Information Privacy Act 2002* (NSW), *Information Privacy Act 2000* (Vic), *Health Records Act 2001* (Vic), *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* (Cth), *Health Records (Privacy and Access) Act 1997* (ACT), *Information Act 2002* (NT), *Personal Information Protection Act 2004* (Tas), *Health Complaints Act 1995* (Tas). For Western Australia, see *State Records Act 2000* (WA) s 49 and *Freedom of Information Act 1992* (WA) s 3. In March 2007, the *Information Privacy Bill 2007* (WA) was introduced into the Legislative Assembly. It passed the Legislative Assembly on 27 November 2007 and reached the second reading speech stage in the Legislative Council on 4 December 2007 (see <<http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Bills+-+Current>> at 20 May 2008).

the public sector generally, while Information Standard 42A: Information Privacy for the Queensland Department of Health applies to the collection of health information.

Between the federal *Privacy Act 1988*, which sets out different privacy principles applicable to public sector entities and to private sector entities, and the State and Territory legislation and administrative protocols, there is a complex array of privacy laws applying to research activities that collect or use personal or sensitive information.

Where research is conducted solely within a public university, the relevant privacy law will usually be the State or Territory privacy legislation or protocols. However, where a university is engaged in collaborative research with the private sector or the federal public sector, or with research projects in other jurisdictions, then it will be necessary to have regard to the requirements of the *Privacy Act 1988* (Cth) as well as the legal and administrative privacy protections that apply in the other jurisdictions.

For research groups, the best practice approach will be, where practicable, to adopt the highest standard of privacy compliance that is applicable to all of the parties. Often, this will involve complying with the Commonwealth privacy law. However, it is also necessary to be aware of, and comply with, any specific requirements imposed by the laws of the State or Territory where the research is being conducted.

Important note: It is important to monitor data collecting by researchers so that any personal information is kept secure and private in accordance with relevant privacy legislation. Before personally identifying data can be used for research, it may be necessary to take certain measures such as:

- seeking consent from the person to whom it relates; or
- de-identifying data so that it no longer reveals a person's identity or compromises their information privacy.

Both the Australian Law Reform Commission (ALRC) and the Australian Privacy Commissioner have strongly endorsed consistent privacy legislation throughout Australia.⁵⁴ In 2007, in the *Discussion Paper 72 – Review of Australian Privacy Law*,

⁵⁴ See Australian Law Reform Commission (ALRC) *Review of Australian Privacy Law: An Overview of Discussion Paper 72* (2007) pp 3-6 <<http://www.austlii.edu.au/au/other/alrc/publications/dp/72/overview.pdf>>; Australian Law Reform Commission (ALRC) *Discussion Paper 72 – Review of Australian Privacy Law* (2007) Chapter 4 Achieving National Consistency, Chapter 10 Overview – Interaction, Inconsistency and Fragmentation and Chapter 14 Interaction with State and Territory Laws <<http://www.austlii.edu.au/au/other/alrc/publications/dp/72/>>; Karen Curtis, Privacy Commissioner, *Submission to the Australian Law Reform Commission's Review of Privacy – Issues Paper 31* (8 March 2007) <<http://www.privacy.gov.au/publications/alrc280207.html>>; Karen Curtis, Privacy Commissioner, *Submission to the Australian Law Reform Commission's Review of Privacy – Discussion Paper 72* (21 December 2007) <<http://www.privacy.gov.au/publications/alrc211207.html>>; Karen Curtis, Privacy Commissioner, *Media Release: Merge privacy principles to enhance national consistency*, says Privacy Commissioner (8 March 2007) <http://www.privacy.gov.au/news/media/07_04.html>; Karen Curtis, Privacy Commissioner, *Media*

the ALRC proposed that:

- there should be one set of privacy principles for the public and private sectors;
- there should be one set of privacy principles for health services; and
- there should be consistent laws in the States and Territories (both among the States and Territories and with the federal law).⁵⁵

In mid-2008, the ALRC completed a major review of Australia's privacy laws.⁵⁶ The ALRC's final report and recommendations (entitled, *For Your Information: Australian Privacy Law and Practice*) were published on 11 August 2008. In the Executive Summary to the report, the ALRC states:

To achieve greater consistency, the ALRC recommends that the *Privacy Act* should apply to the federal public sector and the private sector – to the exclusion of state and territory laws dealing specifically with the privacy of personal information, including personal health information, handled by organisations.

The Commonwealth, state and territory governments should establish an intergovernmental cooperative scheme, under which the states and territories will agree to enact legislation to regulate the handling of personal information in each state's and territory's public sector by adopting the key elements of the *Privacy Act* – such as the same set of privacy principles, important definitions, data breach notification schemes and other key provisions.

The approach recommended by the ALRC would make it far easier for individuals to understand the general rules that apply to personal information – regardless of whether it is being handled by a private organisation, a federal agency, or a state or territory agency – and would ease the compliance burden significantly and reduce costs for business.⁵⁷

The recommendations of the ALRC report that are particularly relevant to research groups and university-based research activities are:

- Recommendation 3 (especially 3-1 to 3-4): Achieving National Consistency;
- Recommendation 17-1: Interaction with State and Territory Laws;
- Recommendation 65: Research: Recommendations for Reform; and
- Recommendation 66: Research: Databases and Data Linkage.⁵⁸

Release: Privacy Commissioner endorses consistency in Privacy law in Australia (21 December 2007) <http://www.privacy.gov.au/news/media/2007_24.html>.

⁵⁵ See Australian Law Reform Commission (ALRC) *Review of Australian Privacy Law: An Overview of Discussion Paper 72* (2007) pp 3-6 <<http://www.austlii.edu.au/au/other/alrc/publications/dp/72/overview.pdf>>; Australian Law Reform Commission (ALRC) *Discussion Paper 72 – Review of Australian Privacy Law* (2007) Chapter 4 Achieving National Consistency, Chapter 10 Overview – Interaction, Inconsistency and Fragmentation and Chapter 14 Interaction with State and Territory Laws <<http://www.austlii.edu.au/au/other/alrc/publications/dp/72/>>.

⁵⁶ Australian Law Reform Commission (ALRC) *Review of Australian Privacy Law: An Overview of Discussion Paper 72* (2007) p1 <<http://www.austlii.edu.au/au/other/alrc/publications/dp/72/overview.pdf>>.

⁵⁷ Australian Law Reform Commission (ALRC) (2008) Report 108 *For Your Information: Australian Privacy Law and Practice*, Executive Summary, p8 <<http://www.austlii.edu.au/au/other/alrc/publications/reports/108>> at 26 August 2008; see also <<http://www.alrc.gov.au/inquiries/title/alrc108/index.html>> at 26 August 2008.

⁵⁸ Australian Law Reform Commission (ALRC) (2008) Report 108 *For Your Information: Australian Privacy Law and Practice*, List of Recommendations

Interestingly, the ALRC report also contains the following discussion concerning better facilitation of research:

Similarly, the ALRC found – despite the frequent use of the absolutist language of ‘rights’ – that there is general community appreciation for the need to strike a common sense balance between privacy interests and practical concerns in a range of areas. For example, while personal health information is regarded as ‘sensitive’ and deserving of the highest level of protections, individuals understand that a premium may be placed on prompt access to, and disclosure of, such information in the case of a medical emergency...

... The ALRC heard many concerns, however, from researchers in the health and medical field—as well as social scientists, criminologists and others—that an overly cautious approach to the application of the Privacy Act was inhibiting the conduct of research, even where the threat to individual privacy was limited or non-existent and the potential value of the research was very high...

... The ALRC recommends that the research exception to the ‘Collection’ and ‘Use and Disclosure’ principles in the model UPPs [Uniform Privacy Principles] allow information to be collected, used and disclosed for research purposes—including in areas other than health and medical research—where a number of conditions are met, including approval by a Human Research Ethics Committee.⁵⁹

3.4 Patents

Patents protect products and processes that are novel, useful and involve an inventive or innovative step.⁶⁰ They confer on the patentee the exclusive right to exploit the patented product or process for a period of time (usually 20 years from the time of filing the patent application).⁶¹

Data or information can be practically applied in such a way that it forms part of or gives rise to a patentable invention. This situation has commonly arisen in the context of patenting genomic data.⁶²

Researchers collecting data may be concerned with patents for one of two reasons. Firstly, some researchers may be interested in obtaining a patent over a product or process that incorporates data which they have collected. For these researchers, disclosure of data could prevent a patent being obtained because releasing information into the public domain could preclude the ‘novel’ or ‘inventive’ aspect of a product or process that is required by law to secure a patent.⁶³ In these circumstances, prior to obtaining a patent, data should only be disclosed under

<<http://www.austlii.edu.au/au/other/alrc/publications/reports/108>> at 26 August 2008; see also <<http://www.alrc.gov.au/inquiries/title/alrc108/index.html>> at 26 August 2008.

⁵⁹ Australian Law Reform Commission (ALRC) (2008) Report 108 *For Your Information: Australian Privacy Law and Practice*, Executive Summary, p5, 16 <<http://www.austlii.edu.au/au/other/alrc/publications/reports/108>> at 26 August 2008; see also <<http://www.alrc.gov.au/inquiries/title/alrc108/index.html>> at 26 August 2008.

⁶⁰ *Patents Act 1990* (Cth) s 18.

⁶¹ *Patents Act 1990* (Cth) ss 13 and 67.

⁶² See A Fitzgerald, K Pappalardo and A Austin, “Understanding the Legal Implications” (2008) and A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) pp116-23.

⁶³ See *Patents Act 1990* (Cth) s 7.

confidentiality agreements to ensure that the data is kept out of the public domain.⁶⁴

Secondly, some researchers may want to ensure that their data is kept free of legal restrictions including patents, in order to allow the data to continue to be shared and reused. For these researchers, simply releasing data into the public domain may be enough to create prior art and thus prevent successful patent applications by others.⁶⁵ However, even where data is released publicly it may be possible for another party to use the disclosed data to produce a patentable invention. Where data is used to develop a patentable invention, the subsequent patent rights may be broad enough to cover use of the actual data forming part of the invention.⁶⁶ Fortunately, there are contractual and licensing options that can be employed to keep data free of restrictive patent claims. One option is to release data via an online database where users accessing the database are required to first enter into a click-wrap agreement that governs use of the data (see “access agreements” below). The agreement can prohibit patent applications based on certain data, or may allow patent applications but provide that the patent must not be restrictive and must allow further use of the data.⁶⁷ Another option is to actually obtain a patent over a product or process based on or encompassing the research data, but then to licence the use of the protected data under liberal terms.⁶⁸

⁶⁴ See further, sections 3.2 and 3.5, and see A Fitzgerald, K Pappalardo and A Austin, “Understanding the Legal Implications” (2008).

⁶⁵ This was the approach underlying the Bermuda Principles, which were developed in 1996 by a consortium of researchers involved in the Human Genome Project. For more information, see A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) pp118-20.

⁶⁶ See A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) pp119-20; Donna M Gitter, ‘Resolving the Open Source Paradox in Biotechnology: A Proposal for a Revised Open Source Policy for Publicly Funded Genomic Databases’ (2007) 43(4) *Houston Law Review* 4 <<http://ssrn.com/abstract=901994>>; Rebecca Eisenberg and Arti Rai, ‘Harnessing and Sharing the Benefits of State-Sponsored Research: IP Rights and Data Sharing in California’s Stem Cell Initiative’ (2006) 21 *Berkeley Technology Law Journal* 1187, 1207; Claire T Driscoll, ‘NIH data and resource sharing, data release and intellectual property policies for genomics community resource projects’ (2005) 15(1) *Expert Opinion on Therapeutic Patents* 4.

⁶⁷ This was the approach adopted by the International Haplotype Project (commonly known as the HapMap Project), which ran from 2002 to 2005. For more information, see A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) pp120-21.

⁶⁸ This was the approach adopted by the CAMBIA project. See CAMBIA, ‘About BiOS (Biological Open Source) Licenses and MTAs’ <<http://www.bios.net/daisy/bios/licenses/398.html>> at 11 April 2008. See also, Richard Jefferson, ‘Science as Social Enterprise: The CAMBIA BiOS Initiative’ (2006) 1(4) *Innovations: Technology, Governance, Globalization* 13; and A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) pp121-3.

4 Data management policies and principles

All research projects should have in place an easily accessible data management policy. The policy will usually contain high-level statements about how data generated or compiled in the research project is to be made available for access and use.⁶⁹

A data management policy should explain and address:

- the research discipline of the project;
- how research is to be conducted;
- the funding arrangements for the research project;
- the kind of data generated or collected by the project;
- how and when data is to be deposited into a database or repository;
- when and on what basis data is to be shared and made available for access by other researchers;
- any legal obligations imposed on the research project or individual researchers; and
- how intellectual property rights are to be managed.⁷⁰

The Australian Partnership for Sustainable Repositories (APSR) has highlighted the importance of data management policies for research organisations.⁷¹ It has commented that:

[r]esearch data management would be easier for all concerned if researchers, research units and research organisations all had policies and plans surrounding the creation and management of data.⁷²

APSR emphasises the importance of including clear definitions of concepts and terms used in the policy, so they are readily understood.⁷³

4.1 Issues to be addressed by a data management policy

A research project must give careful consideration to formulating a data management

⁶⁹ A Fitzgerald, K Pappalardo and A Austin, “Understanding the Legal Implications” (2008) and A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p240.

⁷⁰ A Fitzgerald, K Pappalardo and A Austin, “Understanding the Legal Implications” (2008) and A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p241.

⁷¹ Anna Shadbolt et al, *Sustainable Paths for Data-intensive Research Communities at the University of Melbourne: A Report for the Australian Partnership for Sustainable Repositories* (August 2006) pp38-39 <http://www.apsr.edu.au/aeres/sustainable_paths.pdf> (hereinafter A Shadbolt et al, *Sustainable Paths* (2006)).

⁷² Margaret Henty, The Australian National University; Belinda Weaver, The University of Queensland; Stephanie Bradbury, Queensland University of Technology; and Simon Porter, The University of Melbourne, *Investigating Data Management Practices in Australian Universities* (July 2008) Australian Partnership for Sustainable Repositories (APSR) p8 <http://www.apsr.edu.au/investigating_data_management> (hereinafter, M Henty, B Weaver, S Bradbury and S Porter, *Investigating Data Management* (2008)).

⁷³ A Shadbolt et al, *Sustainable Paths* (2006) pp38-39. The *ANU Data Management Manual* (2008) takes care to define the terms “data”, “data management” and “data management plan”: see p4.

policy that ensures that researchers' objectives, needs and responsibilities in each research situation are properly addressed.⁷⁴ For example, where a research project is publicly funded, it may be appropriate for a policy to strongly support immediate open access to research data. However, immediate open access may not be appropriate for data generated by research projects involving private sector funding bodies or project partners.

Research projects should take care to distinguish in their policies between data that is to be made accessible and data that will not be available for access and reuse. This is particularly important where a research project is collecting data subject to privacy limitations or data that is to be commercially exploited.

Data management policies and principles must explain the conditions under which data is to be made available for access and use and should provide clear definitions of concepts and terms.⁷⁵ For example, access may be limited to certain categories of researchers, or researchers may only be permitted to use the data for specified purposes. In order to properly ascertain and set out the conditions of access and use, each research project should develop a clear and comprehensive listing of all legal restrictions applying to the management, dissemination and reuse of the different kinds of data that may be generated by the project.⁷⁶

4.2 National Principles and Intellectual Property Principles

Australian publicly funded research institutions are strongly encouraged to apply the *National Principles of Intellectual Property Management for Publicly Funded Research* ("National Principles") to their research activities. The National Principles were developed by a working party comprised of organisations including the Australian Research Council (ARC), the Australian Vice-Chancellors' Committee, the Australian Government Department of Science, Industry and Resources and IP Australia. The Foreword to the National Principles states:

The purpose of developing the National Principles of IP Management for Publicly Funded Research is to assist researchers, research managers and their research institutions, in ensuring that they have access to best practices for the identification, protection and management of [intellectual property], and therefore, to maximise the national benefits and returns from public investment in research.⁷⁷

The National Principles include:

- **Principle 1 – Institutional policies:** Research institutions will have policies approved by their Governing Body relating to the ownership,

⁷⁴ A Fitzgerald, K Pappalardo and A Austin, "Understanding the Legal Implications" (2008) and A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p241.

⁷⁵ A Shadbolt et al, *Sustainable Paths* (2006) pp38-39.

⁷⁶ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p244.

⁷⁷ The Australian Research Council, the Australian Tertiary Institutions Commercial Companies Association, the Australian Vice-Chancellor's Committee, the Department of Education, Training and Youth Affairs, the Department of Industry, Science and Resources, IP Australia, the National Health and Medical Research Council, *National Principles of Intellectual Property Management for Publicly Funded Research*, p2 <http://www.arc.gov.au/pdf/01_01.pdf> (hereinafter *National Principles*).

protection and exploitation of IP;

- *Principle 4 – Ownership of IP:* ...Research institutions will have policies and relevant procedures in place for determining the subsequent ownership and/or assignment of intellectual property (IP) rights, and will have clear agreements with employees and grant holders registered through the research institutions on ownership and/or associated rights of IP...; and
- *Principle 7 – Sharing of benefits:* Research institutions will have policies that recognise the rights and needs of all stakeholders involved in the research supported by public funds. These policies will define the way in which benefits from the development and exploitations of the IP will be allocated.⁷⁸

Additionally, Australian Government agencies are required to implement the *Intellectual Property Principles for Australian Government agencies* (“Intellectual Property Principles”).⁷⁹

The Intellectual Property Principles state:

- *Principle 1* – Australian Government agencies are responsible for managing IP in their control or custody in an effective, efficient and ethical manner;
- *Principle 2* – Agencies should periodically evaluate the overall effectiveness, including cost, risks, and benefits of the policies and practices they have in place for the management and use of IP;
- *Principle 3* – Each agency should have an IP management policy which reflects its objectives and these IP Principles;
- *Principle 4* –Implementation of the IP management policy should be supported by appropriate training and resources, including access to expert advice;
- *Principle 5* – Agencies should maintain appropriate systems and process to identify and record IP;
- *Principle 6* – Agencies should have strategies and guidelines to ensure that IP is protected in an appropriate manner;
- *Principle 7* – Agencies should have procedures in place to reduce the risk of infringement of the IP rights of others;

⁷⁸ *National Principles*, pp5-6.

⁷⁹Intellectual Property Principles for Australian Government agencies, <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(22D92C3251275720C801B3314F7A9BA2\)~Statement+of+IP+Principles+for+Australian+Government+Agencies-t.pdf/\\$file/Statement+of+IP+Principles+for+Australian+Government+Agencies-t.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(22D92C3251275720C801B3314F7A9BA2)~Statement+of+IP+Principles+for+Australian+Government+Agencies-t.pdf/$file/Statement+of+IP+Principles+for+Australian+Government+Agencies-t.pdf)> (hereinafter, Intellectual Property Principles).

- *Principle 8* – Agencies should maintain a flexible approach in considering options for ownership, management and use of IP;
- *Principle 9* – Agencies should recognise innovation and creativity in the development of IP in an appropriate manner which is consistent with agency objectives;
- *Principle 10* – Contracts and other agreements must address IP issues where relevant; and
- *Principle 12* – Australian Government agencies should be mindful of opportunities to share IP for which they are responsible with other agencies.⁸⁰

Principle 3 of the Intellectual Property Principles is significant in that it relates to frameworks, requiring each agency to have an IP management policy. An IP policy should be supported by a management plan, strategy and/or guidelines. An IP management policy should outline an agency's approach to:

- dealing with acquisition, use, sharing, commercialisation, disposal and public access to IP;
- identifying and recording ownership of IP; and
- monitoring and protecting IP.⁸¹

4.3 Example Data Management Policies and Principles

This section provides some example policies and principles that have been adopted by international organisations and groups in relation to open access to research data.

When drafting Data Management Policies and Principles for your own institution, it would be useful to have regard to these documents, both in terms of the principles contained in the policies and the language used.

4.3.1 OECD Committee for Scientific and Technological Policy, Declaration on Access to Research Data from Public Funding

In January 2004, the Organisation for Economic Co-operation and Development (OECD) Committee for Scientific and Technological Policy met at a Ministerial level to consider "Science, Technology and Innovation for the 21st Century".⁸²

At this meeting, the Ministers highlighted the benefits that society can derive from

⁸⁰ Intellectual Property Principles, pp2-5.

⁸¹ Intellectual Property Principles, p2.

⁸² OECD Committee for Scientific and Technological Policy, *Science, Technology and Innovation for the 21st Century*, Meeting of the OECD Committee for Scientific and Technological Policy at Ministerial Level, 29-30 January 2004, Final Communique, <http://www.oecd.org/document/0,2340,en_2649_34487_25998799_1_1_1_1,00.html> accessed on 15 September 2008.

advances in science and technology and reaffirmed that knowledge creation and diffusion are increasingly drivers of innovation, sustainable economic growth and social well-being.⁸³

Importantly, the Ministers recognised that fostering open access to and wide use of research data will enhance the quality and productivity of science systems worldwide.⁸⁴ To further this goal, the OECD Committee for Scientific and Technological Policy adopted a Declaration on Access to Research Data from Public Funding:

DECLARATION ON ACCESS TO RESEARCH DATA FROM PUBLIC FUNDING

adopted on 30 January 2004 in Paris

The governments (1) of Australia, Austria, Belgium, Canada, China, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Russian Federation, the Slovak Republic, the Republic of South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States

Recognising that an optimum international exchange of data, information and knowledge contributes decisively to the advancement of scientific research and innovation;

Recognising that open access to, and unrestricted use of, data promotes scientific progress and facilitates the training of researchers;

Recognising that open access will maximise the value derived from public investments in data collection efforts;

Recognising that the substantial increase in computing capacity enables vast quantities of digital research data from public funding to be put to use for multiple research purposes by many research institutes of the global science system, thereby substantially increasing the scope and scale of research;

Recognising the substantial benefits that science, the economy and society at large could gain from the opportunities that expanded use of digital data resources have to offer, and recognising the risk that undue restrictions on access to and use of research data from public funding could diminish the quality and efficiency of scientific research and innovation;

Recognising that optimum availability of research data from public funding for developing countries will enhance their participation in the global science system, thereby contributing to their social and economic development;

Recognising that the disclosure of research data from public funding may be constrained by domestic law on national security, the protection of privacy of citizens and the protection of intellectual property rights and trade secrets that may require additional safeguards;

Recognising that on some of the aspects of the accessibility of research data from public funding, additional measures have been taken or will be introduced in OECD countries and that disparities in national regulations could hamper the optimum use of publicly funded data on the national and international scales;

Considering the beneficial impact of the establishment of OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980, 1985 and 1998) and the OECD Guidelines for the Security of Information Systems and Networks (1992, 1997 and 2002) on

⁸³ Ibid.

⁸⁴ Ibid.

international policies for access to digital data;

DECLARE THEIR COMMITMENT TO:

Work towards the establishment of access regimes for digital research data from public funding in accordance with the following objectives and principles:

Openness: balancing the interests of open access to data to increase the quality and efficiency of research and innovation with the need for restriction of access in some instances to protect social, scientific and economic interests.

Transparency: making information on data-producing organisations, documentation on the data they produce and specifications of conditions attached to the use of these data, available and accessible internationally.

Legal conformity: paying due attention, in the design of access regimes for digital research data, to national legal requirements concerning national security, privacy and trade secrets.

Formal responsibility: promoting explicit, formal institutional rules on the responsibilities of the various parties involved in data-related activities pertaining to authorship, producer credits, ownership, usage restrictions, financial arrangements, ethical rules, licensing terms, and liability.

Professionalism: building institutional rules for the management of digital research data based on the relevant professional standards and values embodied in the codes of conduct of the scientific communities involved.

Protection of intellectual property: describing ways to obtain open access under the different legal regimes of copyright or other intellectual property law applicable to databases as well as trade secrets.

Interoperability: paying due attention to the relevant international standard requirements for use in multiple ways, in co-operation with other international organisations.

Quality and security: describing good practices for methods, techniques and instruments employed in the collection, dissemination and accessible archiving of data to enable quality control by peer review and other means of safeguarding authenticity, originality, integrity, security and establishing liability.

Efficiency: promoting further cost effectiveness within the global science system by describing good practices in data management and specialised support services.

Accountability: evaluating the performance of data access regimes to maximise the support for open access among the scientific community and society at large.

Seek transparency in regulations and policies related to information, computer and communications services affecting international flows of data for research, and reducing unnecessary barriers to the international exchange of these data;

Take the necessary steps to strengthen existing instruments and - where appropriate - create within the framework of international and national law, new mechanisms and practices supporting international collaboration in access to digital research data;

Support OECD initiatives to promote the development and harmonisation of approaches by governments adhering to this Declaration aimed at maximising the accessibility of digital research data;

Consider the possible implications for other countries, including developing countries and economies in transition, when dealing with issues of access to digital research data.

INVITE THE OECD:

To develop a set of OECD guidelines based on commonly agreed principles to facilitate optimal cost-effective access to digital research data from public funding, to be endorsed by the OECD Council at a later stage.⁸⁵

In June 2008, at the Ministerial Meeting on the Future of the Internet Economy in Seoul, Korea, the OECD released the report, *Shaping Policies of the Future of the Internet Economy*, which includes the *OECD Principles and Guidelines for Access to Research Data from Public Funding* as Annex D.⁸⁶ These Principles and Guidelines were developed in response to the invitation contained in the Declaration on Access to Research Data from Public Funding.

4.3.2 The Seoul Declaration for the Future of the Internet Economy

In June 2008, the OECD Member countries organised the OECD Ministerial Meeting on the Future of the Internet Economy in Seoul, Korea. From this meeting came the *Seoul Declaration for the Future of the Internet Economy*, which was adopted by 39 countries, including Australia, and the European Community.

The following extract of the *Seoul Declaration for the Future of the Internet Economy* may provide some guidance when formulating a data management policy:

THE SEOUL DECLARATION FOR THE FUTURE OF THE INTERNET ECONOMY

WE DECLARE that, to contribute to the development of the Internet Economy, we will:

....

b) Foster creativity in the development, use and application of the Internet, through policies that:

- Maintain an open environment that supports the free flow of information, research, innovation, entrepreneurship and business transformation.
- Make public sector information and content, including scientific data, and works of cultural heritage more widely accessible in digital format.
- Encourage basic and applied research on the Internet and related ICTs.
- Encourage universities, governments, public research, users and business to work together in collaborative innovation networks and to make use of shared experimental Internet facilities.
- Combine efforts to combat digital piracy with innovative approaches which provide creators and rights holders with incentives to create and disseminate works in a manner that is beneficial to creators, users and our economies as a whole.
- Encourage new collaborative Internet-based models and social networks for the creation, distribution and use of digital content that fully recognise the rights of creators and the interests of users.
- Strengthen the development of human resources to take full advantage of the Internet

⁸⁵ Ibid, Declaration on Access to Research Data from Public Funding, Annex 1.

⁸⁶ OECD, *Shaping Policies for the Future of the Internet Economy: Annexes*, OECD Ministerial Meeting on the Future of the Internet Economy, Seoul, Korea, 17-18 June 2008, Annex D – Principles and Guidelines for Access to Research Data From Public Funding, pp 22-29, available at <http://www.oecd.org/site/0,3407,en_21571361_38415463_1_1_1_1_1,00.html> accessed on 15 September 2008.

and related ICTs, and further develop ICT skills and digital and media literacy.⁸⁷

4.3.3 OAK Law Project, Sample Open Access Policy for academic institutions

In April 2007, the Open Access to Knowledge (OAK) Law Project released *A Guide to Developing Open Access Through Your Digital Repository*.⁸⁸ This guide provides a sample Open Access Policy for academic institutions, based on several international open access policies including:

- the Budapest Open Access Initiative (2002)⁸⁹;
- the Bethesda Statement on Open Access Publishing (2003)⁹⁰;
- the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (2003)⁹¹; and
- the Messina Declaration (2004).⁹²

Some of the principles set out in the OAK Law sample Open Access Policy for academic institutions are relevant to research data:

General Open Access Principles Endorsed by the Institution

We support the principles of open access to knowledge.

Open access facilitates the wide dissemination of knowledge including, but not limited to, original research results, scholarly articles, raw data and metadata, source materials, digital representations of pictorial and graphic materials, and scholarly multimedia materials.

Open access to knowledge is important for the following reasons:

- Research is an interdependent process whereby later work is informed by the earlier works of others. Easy and open access to scholarly and research output allows for the production of more accurate and progressive research results, providing for scholarly and intellectual advancement;
- Broader access to information aids more rapid scientific development, which benefits the community at large, particularly in the area of medicine;
- The global sharing of knowledge and learning encourages social unity and cultural advancement; and
- The principle that all people, whether rich or poor, should have free and equal access to information.

We believe that the traditional methods of sharing information, primarily through

⁸⁷ OECD Directorate for Science, Technology and Industry, Committee for Information, Computer and Communications Policy (2008), *The Seoul Declaration for the Future of the Internet Economy*, OECD Ministerial Meeting on the Future of the Internet Economy, Seoul, Korea, 17-18 June 2008, available at <http://www.oecd.org/site/0,3407,en_21571361_38415463_1_1_1_1_1,00.html> accessed on 15 September 2008.

⁸⁸ Kylie Pappalardo and Dr Anne Fitzgerald (2007) *A Guide to Developing Open Access Through Your Digital Repository*, OAK Law Project, April 2007, available at <<http://www.oaklaw.qut.edu.au/node/29>>.

⁸⁹ <<http://www.soros.org/openaccess/read.shtml>>.

⁹⁰ <<http://www.earlham.edu/~peters/fos/bethesda.htm>>.

⁹¹ <http://www.zim.mpg.de/openaccess-berlin/berlin_declaration.pdf>.

⁹² <http://www.google.com.au/url?sa=t&source=web&ct=res&cd=2&url=http%3A%2F%2Fwww.aepic.it%2Fconf%2Fviewappendix.php%3Fid%3D49%26ap%3D1%26cf%3D1&ei=q_vNSIuGLqe2pgSYyJnWBQ&usq=AFQjCNEJ5xwqrlJ-kWjZy4Xt8Cq72ztwyw&sig2=BzGZOdeOLVd2hKTfpu8f1g>.

conventional print publishing, while still relevant, are no longer suitably adapted to the wider dissemination of knowledge that new technology allows. Electronic publishing and the Internet offer the opportunity to exchange information globally, immediately and effectively. We commit to embracing these new technologies and their role in removing traditional barriers to access.

We adopt this policy on the basis that where researchers and scholars are willing to share their work, without payment, for the sake of inquiry, knowledge and public benefit, they should not be prevented by restrictive laws, practices or publishing contracts.

We assert the importance of open access to the results of publicly funded research in particular. This research, as well as being funded by the community, is undertaken to benefit the physical, social and cultural health of the community. Therefore, ideas and knowledge derived from publicly funded research should be made accessible to the community as rapidly and effectively as possible...⁹³

Important note: A research institution should have policies and procedures in place that:

- conform with the *National Principles of Intellectual Property Management for Publicly Funded Research* and, where relevant, the *Intellectual Property Principles for Australian Government agencies*;
- consider international policies on open access to research data (such as the *OECD Declaration on Access to Research Data from Public Funding*) and other relevant international policies;
- determine who owns copyright and other IP rights in the research generated by the institution; and
- determine how copyright and IP rights are to be dealt with and shared.

⁹³ Kylie Pappalardo and Dr Anne Fitzgerald (2007) *A Guide to Developing Open Access Through Your Digital Repository*, OAK Law Project, April 2007, pp8-11, available at <<http://www.oaklaw.qut.edu.au/node/29>> and <<http://www.oaklaw.qut.edu.au/files/OAK%20Law%20Project%20Repository%20Guide.pdf>>.

5 Data Management Plan

A Data Management Plan (DMP) should be in place from the conception and commencement of a research project. A DMP addresses how data is collected, stored, managed and disseminated. It also addresses data ownership, data security and legal rights applicable to the research data. Unlike a data management policy, the DMP concentrates on practical measures rather than setting out principles or broad policy statements.

In the *ANU Data Management Manual: Managing Digital Research Data at the Australian National University*, a DMP is defined as “a document that describes what data will be created during a project, and how it will be managed.”⁹⁴ In particular, it is:

[a] document that describes what research data will be created, what policies (funding, institutional, and legal) apply to the data, who will own and have access to the data, what data management practices (backups, access control, archiving) will be used, what facilities and equipment will be required (hard-disk space, backup server, repository), and who will be responsible for each aspect of the plan.

The best time to develop your data management plan is at the beginning of your research. Any time spent on creating a robust and easy to use data management framework will be rewarded many times over during your research.⁹⁵

A comprehensive DMP acknowledges the diverse range of parties involved in a research project – collectors and compilers of data, data analysts, database managers, parties that have funded the research project and consumers or users of the data and database – and applies to each of them.⁹⁶

5.1 Issues to be addressed by a Data Management Plan

A DMP establishes protocols for dealing with data both within the research project and externally. The DMP should envisage, to the extent possible, the many different ways and purposes for which users may seek to access and use the research data. The DMP should also consider unusual situations that may arise in the collection and collation of data. For example, where data generated by the research project is to be integrated with existing data from other sources, the DMP will need to explain how this will be done and how data from each source will be identified once combined. It must also ensure that legal rights and obligations are respected.

5.1.1 Data ownership and responsibilities

Two central issues to be addressed in the DMP for each research project are:

⁹⁴ *ANU Data Management Manual* (2008) p2. This Data Management Manual comprises the materials for the new course in Data Management Planning now being offered at ANU <<http://ilp.anu.edu.au/dm/>>.

⁹⁵ *ANU Data Management Manual* (2008) p5.

⁹⁶ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) pp247-8.

- who owns the data generated or collected by the research project; and
- who is responsible for managing the data?

Data may be owned by more than one person. An owner may be the researcher who has collected or generated the data; the researcher's employer, under the terms of the researcher's employment contract; the funder of the research, under the terms of the funding agreement; or the database owner or provider. Each party's ownership rights will need to be defined in the DMP. Additionally, the DMP should set out who is responsible for managing the data. Management responsibilities may include recording, organising and archiving the data and managing access to the data. A comprehensive DMP will address the management roles of each party and will set out the formal levels of responsibility required for database management and maintenance.⁹⁷

5.1.2 Legal rights

As explained in sections 2 and 3 above, data collection, access and reuse are affected by law. Consequently, a DMP must address the legal and regulatory controls applying to the data generated by the research project. Such legal controls may include confidentiality restrictions for secret information, copyright assignments and licences, deposit agreements for inclusion of data in a database and agreements governing access to that database. All contractual obligations should be considered and addressed.⁹⁸ In particular, a DMP should describe the conditions under which the research project is funded and any obligations – contractual or otherwise – that the researchers have to the funding body. Finally, a DMP should consider whether legislation applies to the collection or use of data, such as the application of privacy requirements in projects dealing with personal information.⁹⁹

5.1.3 Data security and sustainability

Data security and sustainability are two important considerations for any DMP. The level of security that will operate in relation to the data collected will vary depending on the type of data concerned. For example, more stringent security may be applied to data that is confidential or which may form the basis of a patent application. For these types of data, access may be limited to select individuals (access may be password protected) and reuse rights may be minimal. Contractual agreements may regulate what disclosures can and cannot be made in relation to the data. For less sensitive data, the applicable security measures are likely to be less strict. A DMP will need to set out the different security measures relevant to the different levels of data and how these security measures are to be implemented.¹⁰⁰

Careful consideration must be given to the potential future relevance of any data

⁹⁷ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p250, p254.

⁹⁸ See section 3.5 above.

⁹⁹ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) pp251-252.

¹⁰⁰ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) pp252-254.

collected or generated by the research project. Where it is envisaged that data could be useful for future research, sustainability of data will be an important issue to address. A DMP should describe whether long-term preservation of the data is necessary and if so, how long the data will be preserved and who will be responsible for ensuring its preservation. A related issue will be how to ensure the ongoing, long-term funding of the database even after the research project that gave rise to the database is finished.¹⁰¹

5.1.4 Access and reuse

A DMP should deal with access issues, including:

- which data is to be made accessible (some data may be subject to legal restrictions (such as confidentiality or privacy restrictions) and may not be able to be made openly accessible);
- when the data is to be made accessible (at the conclusion of the research project or before?);
- who may access the data (open or restricted access?);
- how the data will be made accessible (via an online repository?); and
- how wide are the access rights to be granted (for example, access to the entire dataset, or will some parts of the dataset require the user to enter a password to access the data?).

Additionally, a DMP should address reuse of the data, namely, what reuse rights are to be granted to end users and how these rights will be granted (for example, will they be granted through an end user copyright licence such as a Creative Commons licence?).

In July 2008, the Australian Partnership for Sustainable Repositories (APSR) released the report, *Investigating Data Management Practices in Australian Universities*, documenting a survey about data management practices conducted at the University of Queensland (UQ), University of Melbourne and Queensland University of Technology (QUT). On the issue of data sharing, APSR reported that:

[a]t a time when researchers are being encouraged to make their data available to others, ... over three-fifths of respondents are willing to share their data, whether “openly” (8.6%), “via negotiated access” (44.0%), “only after the formal end of a project” (6.4%) or “only some years after the end of a project” (2.3%)...Some respondents pointed out that, in some cases, it is necessary for data to be made available together with journal publication, and it is likely that this is a trend which will grow.¹⁰²

A DMP should consider the willingness of researchers to share their data, and should determine whether this will be done openly, via negotiated access (and if so, how that access will be negotiated) or by other means.

¹⁰¹ A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) p255.

¹⁰² M Henty, B Weaver, S Bradbury and S Porter, *Investigating Data Management* (2008) p13.

Important note: A data management plan will need to be consistent with the research institution's intellectual property policies and data management policies.

All data collection, storage, management, use and dissemination procedures should comply with any institutional data management policies and data management plans (whether relating to data management or intellectual property) and administrative requirements.

5.2 Example Data Management Plans

Various institutions around Australia have begun to draft DMPs for their own institutions and research groups, or have at least begun to articulate what they consider to be the central issues and topics that should be addressed in a DMP. Set out below are some brief examples of DMPs and model structures for DMPs, acquired from Australian universities and research groups. These examples are current as at 26 August 2008.

5.2.1 Example 1: University of Queensland (UQ)

Belinda Weaver, Manager of the University of Queensland (UQ) eSpace institutional repository, lists the components that should be covered by DMP as:

- Originators and owners of the data;
- Description of project;
- Metadata used (schema, standards);
- Types of data to be collected;
- Volume of data (estimate of disc and/or tape storage required);
- Retention requirements;
- Format/s of and software used in creation and use of the data;
- Access policies and provisions;
- Confidentiality requirements; and
- Storage, preservation and archiving of data.¹⁰³

5.2.2 Example 2: Australian National University (ANU)

The *ANU Data Management Manual* recommends that a DMP should cover the following topics:¹⁰⁴

¹⁰³ Belinda Weaver, *Constructing a Research Project Data Management Plan* (PowerPoint presentation) (2008) University of Queensland <http://www.library.uq.edu.au/escholarship/BW_dmp.pdf>.

¹⁰⁴ This Data Management Manual comprises the materials for the new course in Data Management Planning now being offered at ANU <<http://ilp.anu.edu.au/dm/>>.

- Project description.
- Survey of existing data.
- Data to be created.
- Data Organisation Methods (optional).
- Data Administration Issues:
 - Funding & Legislative Requirements.
 - Data owners & Stakeholders.
 - Access & Security.
 - Backups.
- Data Sharing & Archiving.
- Responsibilities.
- Budget.¹⁰⁵

Specifically on the question of data sharing, the *ANU Data Management Manual* asks:

- what data will be shared?
- what facilities will be used/required to distribute the data?
- how will the data be licensed?
- what Access Restrictions will be placed on each item of data?¹⁰⁶

5.2.3 Example 3: Persistent Identifier Linking Infrastructure (PILIN) Project

The PILIN Project¹⁰⁷ has produced the following documents to assist with data management, with an emphasis on the importance of good persistent identifier practice in e-research:

- *Using Persistent Identifiers in Data Management Plans:* A template for data management plans, with a focus on identifiers including discussion of information modelling by researchers and technical impacts for maintaining persistent identifiers.
- *Information Modelling Guidelines:* An introduction to information modelling for researchers, driven by the requirement to identify which entities should be persistently identified as part of data management planning.
- *Research Data Management Plan Example:* An example of a data management plan, including consideration of persistent identifier issues. It includes simulation, clinical, historical and survey data, in order to capture discipline-specific constraints on identifiers, particularly with regard to privacy.¹⁰⁸

¹⁰⁵ *ANU Data Management Manual* (2008) p30.

¹⁰⁶ *ANU Data Management Manual* (2008) p32. ANU has also released a Data Management Plan (DMP) template, which is available at: Australian National University (ANU) Information Literary Program, Data Management Planning website <<http://ilp.anu.edu.au/dm/>> and Data Management Plan Template <http://ilp.anu.edu.au/dm/dmp_template.pdf>.

¹⁰⁷ <https://www.pilin.net.au/Welcome/Welcome.htm> at 26 August 2008.

¹⁰⁸ Provided by email on 21 August 2008. Thank you to Nick for his contribution.

Appendix B: Model Provisions for a Data Management Plan

Model provisions for a data management plan are set out in Appendix B to this guide. They can be used for a plan that facilitates the inclusion of research data into digital repositories.

The provisions address issues of access to data, ownership of data and licensing of data under a Creative Commons 2.5 Attribution Licence.

6 Data Management Toolkit

A Data Management Toolkit (DMT) is a document that provides practical guidance to researchers about managing their data in compliance with the project's data management policies and procedures, DMP and the relevant legal framework.

A DMT can assist individual researchers in ascertaining their role and responsibilities within a research project and with understanding what is to be done with the data collected or generated by the project. It informs researchers about who will be able to access the data collected by the researchers and how they may use that data. It can also assist researchers in determining their obligations, both legal and otherwise, in relation to the data that they generate or collect.¹⁰⁹

A DMT can be tailored to different levels of research and researchers. A DMT for a small research team within a single institution may be quite different from the DMT for a larger research team that is participating in a collaborative project spread across a number of institutions.¹¹⁰

A DMT should take the form most accessible to a project's researchers, whether this is in the form of a textual document, a series of questions, diagrams or multimedia tools. Irrespective of form, the DMT should enable researchers to understand:

- the ownership and management issues surrounding data collection and compilation;
- the legal and technical restraints applying to collection, storage, handling and use of data; and
- the access, sharing, use and reuse framework for the project's data.¹¹¹

A Model Data Management Toolkit is set out in **Appendix C**.

¹⁰⁹ A Fitzgerald, K Pappalardo and A Austin, "Understanding the Legal Implications" (2008).

¹¹⁰ A Fitzgerald, K Pappalardo and A Austin, "Understanding the Legal Implications" (2008).

¹¹¹ See A Fitzgerald and K Pappalardo, *Building the Infrastructure* (2007) pp256-257.



APPENDIX A:

SAMPLE REPOSITORY DEPOSIT LICENCE FOR RESEARCH DATA

Legal Framework for e-Research Project
and
Open Access to Knowledge (OAK) Law Project
Legal Protocols for Copyright Management: Facilitating Open Access to Research at
the National and International Levels

Funded by the Australian Government Department of Education, Employment
and Workplace Relations (DEEWR)

Also available online at: <http://www.e-research.law.qut.edu.au> and
<http://www.oaklaw.qut.edu.au>

September 2008



This work is licensed under an Australian Creative Commons Attribution-
NonCommercial-ShareAlike 2.5 License
<http://creativecommons.org/licenses/by-nc-sa/2.5/au>

DISCLAIMER: PLEASE ENSURE THAT YOU OBTAIN LEGAL ADVICE BEFORE YOU USE THIS SAMPLE LICENCE. THIS SAMPLE LICENCE IS PROVIDED FOR ILLUSTRATIVE PURPOSES ONLY. IT WILL NOT SUIT ALL LICENSING SITUATIONS AND MAY NEED TO BE RE-DRAFTED TO MEET THE REQUIREMENTS OF YOUR INSTITUTION.

[Square brackets are used in this Sample Licence to indicate that information needs to be inserted or that alternative terms can be used. The requested information should be inserted or the option selected or deleted as appropriate.]

THIS LICENCE is made on:

BETWEEN: **[Insert: Name of repository]** (“Repository”)

AND: **[Insert: Name of person depositing material into repository]** (“Depositor”)

RECITALS

- A. The Depositor is the owner **[or co-owner]** of copyright in the research data that is being deposited into the digital repository or has been authorised by the owner/s of copyright to deposit the research data into the digital repository and to make it available under this Licence.
- B. The Repository agrees to store the research data in the digital repository and to make it available for access by other persons on the terms set out in this Licence.
- C. The Repository agrees to make the research data available for access and viewing in the digital repository and any additional uses permitted by the Repository Distribution (End-User) Agreement.
- D. By entering into this Licence and depositing the research data into the digital repository, the Depositor does not thereby assign copyright in the research data.
- E. The owner of copyright in the research data reserves the right to make the research data available in other locations and media.

Interpretation

- 1. **End-User** means a person accessing the Item made available by the Repository in the digital repository.
Item means the research data provided by the Depositor to the Repository for inclusion in the digital repository, including any metadata describing the research data, and which is subject to the terms of this Licence.
Licence means this Repository Deposit Licence.
Repository Distribution (End-User) Agreement means the licence provided to End-Users under Clause 11(2) of this Licence.

Term of Licence

- 2. This Licence commences on the day on which it is agreed to by the parties and continues for the duration of copyright in the Item or until terminated in accordance with the terms of this Licence.

Depositor's Declaration

3. The Depositor declares that the Depositor:
 - (a)
 - (i) is the owner of copyright in the Item; or
 - (ii) has the permission of the owner/s of copyright to grant to the Repository and End-Users the rights granted by this Licence.

Depositor's Representations and Warranties

4.
 - (1) The Depositor represents and warrants that:
 - (a) the Item, to the best of the Depositor's knowledge, does not infringe someone else's copyright; or
 - (b) if the Item contains material for which the Depositor does not own the copyright, the Depositor has:
 - (i) obtained all necessary permissions from the copyright owner/s to:
 1. include the material in the Item;
 2. provide the Item to the Repository; and
 3. grant to the Repository and End-Users the rights given under this Licence; and
 - (ii) clearly identified and acknowledged all third-party owned copyright materials within the content or metadata of the Item.
 - (2) The Depositor warrants that the Item does not contain any defamatory, offensive or other unlawful matter and makes no improper invasion of the privacy of any person.
 - (3) The Depositor warrants that neither the execution of this Licence nor the performance by the Depositor of its obligations under this Licence will cause the Depositor to be in breach of any agreement to which the Depositor is a party or is subject.
 - (4) If the Item is based upon work that has been sponsored or funded by an agency or organisation other than the Repository, the Depositor represents that the Depositor has fulfilled any right of review or other obligation required of the Depositor under the contract or agreement with that agency or organisation.

Grant of Rights by Depositor to Repository Copyright

5.
 - (1) In consideration of the Repository storing and making the Item available through the digital repository, the Depositor grants to the Repository the non-exclusive right to reproduce, adapt, publish, communicate and distribute the Item for the purpose of:
 - (a) making the Item available in the digital repository for End-Users to:
 - (i) access and view the Item; and
 - (ii) make such additional uses of the Item as permitted under the terms of the Repository Distribution (End-User) Agreement set out in Clause 11(2);

- (b) modifying the Item as required for the technical operation or organisation of the digital repository; and
- (c) making and keeping copies of the Item for use by the Repository for security, back-up and preservation.

Depositor's Rights

- 6. (1) The Depositor reserves the right to use the Item and future versions in other ways, locations and media.
- (2) To avoid doubt, the parties acknowledge that by entering into this Licence and depositing the Item into the digital repository, the Depositor does not assign copyright in the Item, in whole or in part, to the Repository.

Repository's Warranties and Obligations

- 7. (1) The Repository undertakes that it will not alter or deal with the Item except as permitted by this Licence.

Repository's Limitation of Liability

- 8. (1) The Repository is not responsible for any mistakes, omissions, or legal infringements within the Item nor is it obliged to undertake legal action on the Depositor's behalf in respect of the Item.

Assignment of Depositor's Rights to a Third Party

- 9. (1) The Depositor may assign all or any of the Depositor's rights in the Item under this Licence [, subject to Clause 9(2) and 9(3)].
- [(2) Upon assignment of copyright in the Item to a third party, the Depositor must inform the Repository of the assignment and provide to the Repository detailed contact information to facilitate the Repository making contact with the assignee.]
- [(3) The Depositor agrees that in the event of assigning copyright in the Item to a third party, the Depositor shall use its best endeavours to secure from the third party assignee all necessary rights to enable the Depositor to continue the operation of this Licence on the basis of:
 - (a) the Depositor being a licensee of the copyright owner in the Item; and
 - (b) with a view to continuing unaltered the operation of this Licence.]

Termination

- 10. (1) The Repository may at any time immediately and without notice terminate this Licence upon the occurrence of any of the following events:
 - (a) where it is discovered that the Item contains or describes research that has been falsified or produced as a result of fraudulent or deceptive actions by any person;
 - (b) where the Item infringes the legal rights of any third party;

- (c) where the Item contains defamatory, offensive, confidential or culturally sensitive information that necessitates removal of the Item from the digital repository; or
 - (d) where it is discovered that the Depositor is not the owner of copyright or does not have the permission of the owner/s of copyright in the Item to deposit it into the digital repository under this Licence.
- (2) The Repository shall, upon demand being made by the Depositor, promptly remove the Item from the digital repository.
 - (3) The Repository will remove the Item from the digital repository within 7 days of termination of this Licence, however the metadata describing the Item will be retained and a copy of the Item will be archived by the Repository but will not be publicly accessible.
 - [(4) Where copyright in the Item has been assigned to another party and the Depositor has been unable, despite its best endeavours in accordance with Clause 9(3), to secure the rights necessary to enable the continuing operation of this Licence, this Licence shall automatically terminate.]

Repository Distribution (End-User) Agreement

- 11. (1) The Depositor authorises the Repository to make the Item available for access by End-Users for viewing in the digital repository.
- (2) The Depositor authorises the Repository to make the Item available for use by End-Users in accordance with the terms of the Creative Commons 2.5 Attribution Licence.
- (2) The Repository will take all reasonable steps to ensure that the terms of this Licence, including the terms of the Repository Distribution (End-User) Agreement selected by the Depositor under Clause 11(2), are brought to the attention of End-Users accessing the Item in the digital repository.
- (3) To avoid doubt, this Licence does not extinguish any rights available to End-Users under the *Copyright Act 1968*, including but not limited to fair dealing for personal research or study.

Governing Law

- 12. This Licence is governed by the law of the State of **[state or territory in which the repository is located e.g.** Tasmania]**.

[OPTIONAL CLAUSE – Delete if not required

Depositor's Indemnity

- 13. The Depositor indemnifies the Repository against any claim that may arise regarding the Item, the Repository's use of the Item and any breach by the Depositor of its obligations, representations and warranties under this Licence.]

Execution

- I ACCEPT the terms of this Licence**
- I DO NOT ACCEPT the terms of this Licence**

ATTACHMENT 1

**Licence provided by Repository – Clause 11(2)
Creative Commons 2.5 Attribution Licence**



APPENDIX B:

MODEL PROVISIONS FOR A DATA MANAGEMENT PLAN

Legal Framework for e-Research Project
and
Open Access to Knowledge (OAK) Law Project
Legal Protocols for Copyright Management: Facilitating Open Access to Research at
the National and International Levels

Funded by the Australian Government Department of Education, Employment
and Workplace Relations (DEEWR)

Also available online at: <http://www.e-research.law.qut.edu.au> and
<http://www.oaklaw.qut.edu.au>

September 2008



This work is licensed under an Australian Creative Commons Attribution-
NonCommercial-ShareAlike 2.5 License
<http://creativecommons.org/licenses/by-nc-sa/2.5/au>

1. Access and reuse

[Insert name of depositing entity] intends to make its research data available for open access and use by other researchers and members of the public. In furtherance of this goal, *[insert name of depositing entity]* will deposit its research data into *[insert name of digital repository in which data will be deposited]* and make the data available for access and reuse under a Creative Commons 2.5 Attribution Licence.

2. Ownership

The research data has been generated or compiled by *[insert name of depositing entity]*'s employees or contractors. *[Insert name of depositing entity]* is the owner of copyright in the research data or has a licence from the copyright owner to deposit the data into *[insert name of digital repository in which data will be deposited]*. Where copyright in the research data is owned by another party, *[insert name of depositing entity]* has obtained all necessary licences and permissions from the copyright owner to deposit the data into *[insert name of digital repository in which data will be deposited]* and to make the data available for access and reuse under a Creative Commons 2.5 Attribution Licence.

3. Licensing

All data deposited by *[insert name of depositing entity]* into the *[insert name of digital repository in which data will be deposited]* will be made available for access and reuse under a Creative Commons 2.5 Attribution Licence. This licence grants to users the rights to copy, distribute and display the data, subject to inclusion of a notice in the form specified by *[insert name of depositing entity]* attributing *[insert name of depositing entity]* and/or its employees or contractors as the originators of the data.



APPENDIX C:

MODEL DATA MANAGEMENT TOOLKIT FOR RESEARCHERS

Legal Framework for e-Research Project
and
Open Access to Knowledge (OAK) Law Project
Legal Protocols for Copyright Management: Facilitating Open Access to Research at
the National and International Levels

Funded by the Australian Government Department of Education, Employment
and Workplace Relations (DEEWR)

Also available online at: <http://www.e-research.law.qut.edu.au> and
<http://www.oaklaw.qut.edu.au>

September 2008



This work is licensed under an Australian Creative Commons Attribution-
NonCommercial-ShareAlike 2.5 License
<http://creativecommons.org/licenses/by-nc-sa/2.5/au>

Is your data protected by copyright?

1. Is it a:

- dataset or data compilation?
- database?
- table?
- map?
- photograph?
- other visual image?
- written material (e.g. report, documented observations etc)?
- sound file?
- film recording?
- other multimedia file?

If you ticked any of the boxes above, copyright protection is likely to apply (proceed to next question)

2. When was it created/compiled?

- <25 years – *copyright protection is likely to apply*
- < 50 years – *copyright protection is likely to apply*
- > 50 years – *copyright protection may apply, or the copyright term may have elapsed. You may need to discover when exactly the data was created or compiled.*

3. Was it created/compiled in Australia?

- Yes – *copyright protection under Australian law is likely to apply*
- No – *Australian copyright law is unlikely to apply. However, copyright protection may be accorded under the law of another jurisdiction.*

If applicable, insert description of the data collected:

Who owns the copyright?

1. Who created or compiled the data?

Insert names of person/s here:

2. Was the data created or compiled by an employee in the ordinary course of their employment? [If the data has been created or compiled by an independent contractor – answer NO here]

No  Creator/compiler owns copyright

Yes  Employing institution may own copyright

Name of employing institution:

3. Is there an agreement in place between the employer and any employees/contractors about copyright ownership?

If yes, insert the relevant terms of the agreement:

4. **Are there any other contractual agreements that may affect copyright ownership (e.g. does your research funding agreement require some/all of the copyright rights (or other rights) to be invested in the funding organisation)?**

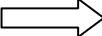
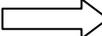
If yes, insert the relevant terms of the agreement:

5. **Taking into consideration all of the above - who owns copyright?**

Insert name/s of copyright owner/s here:

Open access and open copyright licensing

Is the data to be made openly accessible to the public?

- Yes  Attach the appropriate open licence
- No  Ensure the appropriate restrictions are imposed

<p>(If you selected “Yes” above)</p> <p>Licence–</p> <p>[SELECT ONE ONLY OF THE FOLLOWING LICENCE OPTIONS]</p> <p><input type="checkbox"/> Creative Commons Attribution Licence</p> <p><input type="checkbox"/> Creative Commons Non Commercial Licence</p> <p><input type="checkbox"/> Creative Commons Attribution Non Commercial Licence</p> <p><input type="checkbox"/> Creative Commons Share Alike Licence</p> <p><input type="checkbox"/> Creative Commons Attribution Share Alike Licence</p> <p><input type="checkbox"/> Creative Commons Attribution Non Commercial Share Alike Licence</p> <p><input type="checkbox"/> Other Licence – please specify:</p>	<p>(If you selected “No” above)</p> <p>Restrictions –</p> <p>Please specify the restrictions that are imposed on the database so that your data is kept secure:</p> <p>(For example – you may state that only certain classes or groups of people may access the data; data may be password protected; or data may be available for viewing but the database must attach a copyright notice that the data cannot be used without first obtaining written permission.)</p>
--	---

Attribution

If you have selected a licence that requires attribution, please specify how you want your data attributed:

Confidential information

1. Does the dataset contain confidential information?

- Yes – *Proceed to questions 2 and 3.*
- No – *Skip this section.*

2. What confidentiality restrictions have been imposed?

Restrictions:

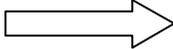
3. What safeguards have been put in place to guard against disclosure of the confidential information?

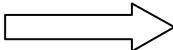
Safeguards:

Will privacy restrictions apply?

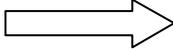
1. Does the data collected contain personal information about an individual, such as:

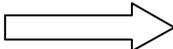
- personally identifying information?
- health information?

Yes  The *Privacy Act 1998* (Cth) or the equivalent state legislation may apply. *Proceed to steps 2 – 5.*

No  Privacy legislation will not apply. *Skip this section.*

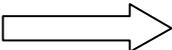
2. Do you have consent from the person identified to use or disclose this information?

Yes  Privacy restrictions will not apply, provided that the data is only used or disclosed within the scope of the consent. *Skip this section.*

No  Privacy restrictions under the relevant legislation may apply. *Proceed to steps 3 – 5.*

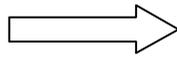
3. Has the data been collected or compiled by:

- a Commonwealth government agency or body?
- a private sector organisation?
- employees of a private sector organisation?

 The *Privacy Act 1988* (Cth) may apply – *See your institution's lawyer for advice.*

4. Has the data been collected or compiled by:

- a State or Territory government agency or body?
- a university institution enacted under a State Act?



State or Territory privacy legislation or protocols may apply – *See your institution's lawyer for advice.*

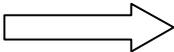
Take note of which states or territories are involved in the research project and which legislation or protocols are likely to apply. Your institution's lawyer will be able to assist in determining which legislation you need to abide by.

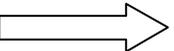
5. If privacy obligations apply, what measures have been put in place to ensure that the relevant data or information is kept private?

Privacy measures:

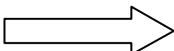
Patents

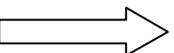
1. Does the data relate to an invention?

Yes  *Proceed to the next step.*

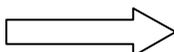
No  *Skip this section.*

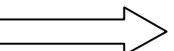
2. Do you (or your institution or organisation) want to obtain a patent for the invention to which the data relates?

Yes  It is essential that take steps to ensure that the information is not publicly disclosed. Do not disclose the data to anyone else without ensuring that it is properly protected, e.g. under a confidentiality agreement.

No  *Proceed to the next step.*

3. Do you want to share your data and keep the data free of legal restrictions?

Yes  You may want to release your data openly (into the public domain), which may be enough to preclude patent applications by other parties. *Proceed to next step.*

No  You may want to control access to your data with an access agreement. However, you should consider the benefits of sharing your data.

Contractual obligations

Have you fulfilled all contractual obligations relating to the data?

Obligation	Yes	No

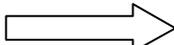
Policy and administrative requirements

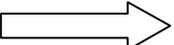
Have you fulfilled all policy and administrative requirements within your own organisation that relate to the data?

Restriction/Obligation	Yes	No

Depositing data

1. Do you understand the process for depositing data into the [open access] repository?

Yes  Proceed to step 2.

No  Contact the repository manager or the relevant administration staff member to assist you with the deposit process.

2. Is the data:

In the right format for depositing in the repository?

Appropriately licensed for inclusion in the repository (e.g. under a Creative Commons 2.5 Attribution Licence)? (*See below*)

3. Have you:

Entered into the Repository Deposit Licence?

Completed the relevant metadata fields? (*See below*)

Licensing information

Example of relevant licensing information:

Title of information product	Data Item 1
Custodian organisation	University X
Copyright notice	© The Research Project 2008
Recommended source	The Research Project, University X (2008), <i>Data Item 1 (Study on Climate Change)</i>
Distribution format	PDF
URL	http://universityx.edu.au/dataitem1
Customers	General public, other research groups
Licence	Creative Commons: Attribution (BY)

Copyright Statements for Creative Commons Licences:

Creative Commons Symbol

<http://creativecommons.org/licenses/by/2.5/au>

For example:

Attribution



<http://creativecommons.org/licenses/by/2.5/au>

[optional] For further permissions beyond the scope of this licence, contact

For example:

Copyright Contact Officer/Research Project Manager

Address: University X

GPO Box 111

Brisbane QLD 4001

Email:copyright@universityx.edu.au

Metadata

Example of relevant metadata information:

Title	For example: Data Item 1
Contact Information	<p>Contact Information is the contact details in relation to access and use.</p> <p>For example:</p> <p>Address enquiries regarding the use of this material to:</p> <p>Copyright Contact Officer/Research Project Manager Address: University X GPO Box 111 Brisbane QLD 4001 Email: copyright@universityx.edu.au</p>
Description	<p>The description can include information such as:</p> <ul style="list-style-type: none">• an abstract;• geographic coverage, for example - Queensland;• keywords or subject topics to describe the content, for example – climate change data;• purpose or mandate for the data’s creation, for example to ascertain the rate of climate change in south east Queensland by measuring temperatures;• time period that the information was collected in, for example – data collected during period of April 2008;• quality of the product and inputs to the product, for example – all data and information in this publication are believed to be accurate and have come from sources believed to be reliable;• a unique resource identifier (URL) for the product if available elsewhere online;• an official identifier, for example – an ISBN (if relevant); and• the format that the material appears in, for example – PDF.

Final Checklist

Have you:

- Ascertained whether copyright subsists in the data?
- Determined who owns copyright in the data?
- Licensed the data under an appropriate licence (e.g. a Creative Commons Attribution Licence), with the consent of the copyright owner?
- Determined (and specified) how the data is to be attributed by users under the appropriate licence?
- Determined whether any privacy obligations apply?
- Ascertained whether the dataset contains confidential information and, if it does, adopted safeguards to prevent its unauthorised disclosure?
- Determined whether patent law will apply?
- Identified, understood and complied with all your contractual obligations?
- Satisfied all policy or administrative requirements within your own organisation?
- Familiarised yourself with the process for depositing data into the repository and:
 - entered into the Repository Deposit Licence?
 - completed the relevant metadata fields?