

Report to the Government 2.0 Taskforce: Project 4

Copyright Law and Intellectual Property

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Abbreviations and Acronyms

| | |
|-------------|--|
| ABC | Australian Broadcasting Corporation |
| ABS | Australian Bureau of Statistics |
| AWRIS | Australian Water Resources Information System |
| BoM | Bureau of Meteorology |
| BY | Attribution (under Creative Commons licences) |
| CAL | Copyright Agency Limited |
| CC | Creative Commons |
| CCA | Commonwealth Copyright Administration |
| CCau | Creative Commons Australia |
| CDPA | Copyright, Designs and Patents Act 1988 (UK) |
| CLRC | Copyright Law Review Committee |
| Cth | Commonwealth |
| CUPI | The Commercial Use of Public Information report (2006) |
| EDIC | Economic Development and Infrastructure Committee |
| ERMI | Electronic rights management information |
| EU | European Union |
| GA | Geoscience Australia |
| GILF | Government Information Licensing Framework |
| GLAM Sector | Galleries, Libraries, Archives, Museums |
| HMSO | Her Majesty's Stationery Office |
| IP | Intellectual Property |
| JISC | UK Joint Information Systems Committee |
| LACA | Libraries and Archives Copyright Alliance |
| MODIS | Moderate Resolution Imaging Spectroradiometer |
| NC | Non Commercial |
| ND | No Derivatives |
| NGISS | National Government Information Sharing Strategy |
| NZ | New Zealand |
| NZGOAL | New Zealand Open Access and Licensing Framework |
| OECD | Organisation for Economic Cooperation and Development |
| OSDM | Office of Spatial Data Management |
| PSA | Prices Surveillance Authority |
| PSI | Public Sector Information |
| QSIC | Queensland Spatial Information Council |
| SA | Share Alike |
| TPM | Technological protection measures |
| TRIPS | Agreement on Trade-Related Aspects of Intellectual Property Rights |
| UK | United Kingdom |
| UNECE | United Nations Economic Commission for Europe |

Scope of Project 4: Copyright and Intellectual Property

This report is the primary output of Project 4: Copyright and Intellectual Property, the aim of which was to produce a report considering how greater access to and use of government information could be achieved within the scope of the current copyright law.

In our submission for Project 4, we undertook to address:

- the policy rationales underlying copyright and how they apply in the context of materials owned, held and used by government;
- the recommendations of the Copyright Law Review Committee (CLRC) in its 2005 report on Crown copyright;
- the legislative and regulatory barriers to information sharing in key domains, including where legal impediments such as copyright have been relied upon (whether rightly or wrongly) to justify a refusal to provide access to government data;
- copyright licensing models appropriate to government materials and examples of licensing initiatives in Australia and other relevant jurisdictions; and
- issues specific to the galleries, libraries, archives and museums (“GLAM”) sector, including management of copyright in legacy materials and “orphan” works.

In addressing these areas, we analysed the submissions received in response to the Government 2.0 Taskforce Issues Paper, consulted with members of the Task Force as well as several key stakeholders (see **Appendix D**) and considered the comments posted on the Task Force’s blog.

This Project Report sets out our findings on the above issues. It puts forward recommendations for consideration by the Government 2.0 Task Force on steps that can be taken to ensure that copyright and intellectual property promote access to and use of government information.

Professor Anne Fitzgerald
Brisbane
17 December 2009

Executive Summary

1. CONSISTENCY WITH ACCESS AND REUSE POLICY

Recommendation 1 – Copyright law and management practices should give effect to the government’s established policy on open access to and reuse of PSI

Copyright law, and the management of copyright in PSI materials, should be consistent with and support the [government’s/department’s] policy position on open access to, and use and reuse of PSI.

Copyright law and management should not impede the use of information contained in copyright PSI materials, where that information should be available for access and reuse under the [government’s/department’s] open access policy.

Recommendation 2 – Exercise government (Crown) copyright to give effect to the government’s policy on open access to and reuse of PSI

Ownership of copyright in PSI materials gives the government an extensive set of exclusive rights to control copying, publication, electronic distribution, adaptation, etc. These exclusive rights should be exercised to give effect to the open access policy, rather than driving (or determining) policy and practice.

Recommendation 3- Government ownership of copyright should not be relied on to justify other restrictions on access to and reuse of PSI

Ownership of copyright in PSI materials (particularly the exclusive rights to control copying, publication and electronic distribution) should not be relied on by government to restrain access to or use of work for other purposes, such as protecting the privacy or confidentiality of information contained in a copyright document or concerns about the quality and integrity of the information. To ensure transparency, any restrictions on access and reuse should be justified on relevant legal grounds (eg privacy, confidentiality) or information management considerations (eg quality and integrity of PSI).

2. ENSURE COPYRIGHT LAW AND MANAGEMENT PRACTICES FACILITATE THE COMPLEX FLOW OF INFORMATION WITHIN GOVERNMENT AND TO THE PRIVATE SECTOR

Recommendation 4 - Copyright law and management practices should facilitate complex flows of information within the public sector, between the public sector and non-government parties; and between non-government parties

Identify the different kinds of copyright PSI materials (in terms of how they are created and by whom) and understand how PSI flows within the public sector, between the public sector and non-government parties and among non-government parties.

Review the operation of copyright law and management practices to ensure PSI can flow as seamlessly as possible, consistent with the [government's/department's] open access policy.

In particular, ensure that copyright law and practice does not impede/restrict the flow of materials such as:

- volunteer community contributions to government consultations, mashups, blogs, etc;
- works freely distributed (online) or in hard copy by government agencies;
- informational works produced by non-government parties and provided to government under statutory requirements (for example reports on environmental readings, water flows and CO2 emissions);
- informational works produced by non-government parties, subsidiary to activities carried out pursuant to the grant of rights/licence by government (for example, schedules of programs produced by holders of broadcasting licences).

Third party materials submitted to government for administrative purposes (for example, under statutory requirements) - particularly where entered into a public register - should be able to be copied by government and other third parties, subject to any restrictions that might be imposed under public records legislation, privacy, other legislation, contracts such as commercial in confidence obligations (subject to marginal cost recovery, and a presumption that open licensing would apply).

Review the operation of the statutory licence in s 183 to ensure that it does not have unintended consequences (eg including copyright science datasets produced and provided to government under international arrangements which require data to be freely and openly accessible for reuse in the scientific community).

Recommendation 5 – Adopt copyright management practices appropriate to the web 2.0 environment

As PSI is increasingly made available online in digital form (eg through websites where files in standard formats can be downloaded), licensing practices should be appropriate to how PSI is accessed, used and reused in the web 2.0 (and beyond) environment.

Statements of users' rights should be clearly provided (along with metadata) on or in association with individual digital objects (files) so that users are able, in most circumstances, to use and reuse PSI without having to specifically request permission to use/reuse.

Statements on government websites where PSI is made available should clearly state users' rights (rather than simply asserting copyright, stating what cannot be done and

requiring users to seek permission for many uses) and, as far as possible, be consistent with licensing permissions on individual digital objects (files).

Recommendation 6 – Use simple, standardised, automated licences covering use and reuse of PSI

Government agencies should manage their copyright PSI to enable access, use and reuse by adopting simple, standardised, unmediated, automated licences which provide clear statements of users' permissions.

To ensure licensed PSI can be reused, the licences used should be compatible with similar licences used by other public and private sector parties.

Recommendation 7 – Support and guidance for agencies using open content (public) licences

The use of open content (public) licences, such as the Creative Commons licences, has been recommended in numerous reviews of PSI access and reuse in Australia (*Venturous Australia*, NGISS, EDIC, AWRIS) and overseas (NZ, UK) and several Federal, State and local government agencies have announced an intention to, or have begun, implementing Creative Commons licences on their PSI.

A collaborative engagement should be entered into with Creative Commons Australia to: develop knowledge, and provide information to government agencies, about the operation of the licences; provide feedback about experience of Australian government agencies in applying the licences to PSI; provide input into future revisions of Creative Commons licences to ensure their appropriateness for PSI; participate in discussions with Creative Commons national organisations in other countries where the licences are being used for PSI; and further develop technologies and systems to enable automation of licensing.

3. REMOVE COPYRIGHT BARRIERS TO ARCHIVAL AND CULTURAL MATERIALS

Recommendation 8 – Include guidance on copyright law and practice in digitisation strategies

Strategies for digitisation of third party materials held by archives, museums, galleries and libraries should include guidance on management of legal rights, to ensure digitised materials can be made available for access, use and reuse without incurring liability or undue expense.

Recommendation 9 – Clarify the meaning of “publication” in ss 33 and 34 to give certainty to the duration of copyright and avoid impracticality and set statutory limits to copyright protection for unpublished works

Provide guidance on the meaning of “publication” in ss 33 and 34 of the *Copyright Act*, to assist archives, libraries and cultural institutions in determining the duration of copyright protection for the materials they hold. In light of recent judicial consideration of the meaning of “publication” in *Copyright Agency Ltd v New South Wales* [2007] FCAFC 80 clarification of the provisions of the *Copyright Act* 1968 is required.

Judicial statements in *CAL v NSW* support an interpretation of “publication” that includes deposit of materials into archives, libraries etc by persons with authority to deal with the material, such that the material is available for access by members of the public, without restrictions (eg for reasons of national security, privacy or confidentiality) that limit public access.

If a broader interpretation of “publish” is supported, for some materials that have not been published before the author’s death, “publication” may occur on deposit into an archive, library, etc and copyright would run from that point in time (ss 33(3), (5), 34, 180, 181). This interpretation may require review and clarification of sections of the *Copyright Act* which have been drafted on the basis of a much more restrictive meaning of “publication”.

The maximum duration of copyright protection should be defined for materials which have not been first published, publicly performed, etc during the life of the author, so that copyright does not run on indefinitely, potentially for an exceptionally long term. The *Copyright Act* 1968 should be amended to make it clear that copyright cannot endure perpetually in unpublished works. A model for statutory limits to unpublished works is provided by the provisions in the United Kingdom’s *Copyright, Designs and Patents Act* 1988 and the New Zealand *Copyright Act* 1994, for both existing and new works.

Recommendation 10 – Develop guidance on “special cases” and uses permitted under s 200AB

Section 200AB was enacted to provide archives, museums, galleries and libraries (sometimes referred to as the “GLAM” sector), as well as the education and disability services sectors, with room to operate, beyond the scope of existing exceptions.

However, there is insufficient certainty about the meaning of “special case” and the operation of s 200AB for cultural and collecting institutions to rely on it, largely defeating the purpose of including the flexible dealing exemption in the *Copyright Act* 1968. It is not possible to exhaustively define “special case” in s 200AB or to list the kinds of uses that will constitute a “special case”. Guidance on the operation of s 200AB is required for cultural and collecting institutions, including identification of categories of use that fall within the concept of a “special case”.

Establish projects, in collaboration with archives, museums, galleries and libraries, to develop practical guidance on how to identify third party copyright materials that can be used without infringing copyright because they fall within the “special case” exemption in s 200AB.

4. ACCESS TO INFORMATION ABOUT COPYRIGHT LAW AND PRACTICE

Recommendation 11 – Ensure access to legal advice and guidance about copyright law and practice

To ensure that copyright PSI can be managed to give effect to the [government's/department's] policy on access and reuse, government agencies require access to legal advice and practical guidance on the implementation of systems and procedures (including licensing practices and technologies) to enable access to and reuse of PSI (particularly in the online, web 2.0 environment).

Provide funding to develop the capacities of public sector organisations to deal with copyright law and management of PSI, including developing practical copyright and licensing toolkits (desktop applications where possible).

1. GOVERNMENT'S EXERCISE OF COPYRIGHT SHOULD BE CONSISTENT WITH POLICY ON ACCESS TO AND REUSE OF PSI

Under Australian law, copyright protects much of the creative, cultural, educational, scientific and informational material generated by government departments and agencies at the federal, State/Territory and local levels. Governments need to deal with their copyright interests in this vast range of materials in a manner consistent with their policies on information access and reuse.

Government copyright ownership

Ownership of copyright by government agencies is dealt with in Part VII of the *Copyright Act* 1968 (the "Crown copyright" provisions).¹ The principal provisions on which government copyright is based are ss 176 – 179 of the *Copyright Act* 1968. Sections 176 and 178 provide that the government owns copyright in literary, dramatic, musical and artistic works, sound recordings and films "made by, or under the direction or control of the Commonwealth or a State". Section 177 further provides that the government owns copyright in a literary, dramatic, musical or artistic work that is first published in Australia "by, or under the direction or control of, the Commonwealth or a State".² The operation of ss 176- 178 can be displaced by an agreement between the government and the person who created the copyright material that copyright is to belong to that person or some other party specified in the agreement.³

The meaning of the phrase "by, or under the direction or control of, [the Crown]" was considered by the Full Federal Court in *Copyright Agency Limited v State of New South Wales* [2007] FCAFC 80, which made it clear that governments will own copyright not only in works produced by their employees or agents but also works made by other parties under the direction or control of the government.⁴ Governments therefore own copyright in a vast range of materials in hard copy and digital form, including legislation, judgments, parliamentary materials, reports of government-commissioned review bodies, art works, computer programs, digital databases, photos and audiovisual works.⁵

Rights of governments as copyright owners

As the *Copyright Act* 1968 does not generally differentiate between the rights of government as copyright owner and the rights of private parties who own copyright, governments enjoy the same range of exclusive rights in their copyright materials as private

¹ See generally, Anne Fitzgerald and Neale Hooper, "Crown Copyright" in Brian Fitzgerald and Ben Atkinson (eds) (forthcoming, Sydney University Press, 2010).

² Sections 176-178 are subject to any agreement between the Crown and the maker of the work or subject matter under which it is agreed that copyright is to belong to the author or maker or some other specified person (s 179).

³ *Copyright Act* 1968, s 179

⁴ *Copyright Agency Limited v State of New South Wales* [2007] FCAFC 80, paras 122 – 125 (Emmett J, with Lindgren and Finkelstein JJ agreeing; see also Finkelstein J at paras 182-187).

⁵ For a listing of the various kinds of copyright materials produced by or for governments, see Copyright Law Review Committee, *Crown Copyright*, 2005 at pp 10-11.

sector copyright owners.⁶ One of the few points of difference between the rights of government and private sector copyright owners is that the duration of copyright for materials within the scope of ss 176 – 178 is 50 years from the end of the calendar year in which the copyright item is first published or is made.⁷

The primary rights of copyright are the rights to:

- reproduce;
- publish;
- publicly perform;
- make an adaptation; and
- communicate the copyright work to the public in electronic form (eg on a website or as a digital file).⁸

Other rights of copyright owners are the rights to ensure that electronic rights management information (ERMI) is not removed or altered and to prevent the circumvention of technological protection measures (TPM) they apply to their copyright materials to control access to or copying of it. ERMI is electronic information (including numbers or codes representing such information) which is either attached to or embodied in the copyright material, or appears in connection with a communication or the making available of the copyright material.⁹ It typically includes information identifying the copyright work, its author or copyright owner or indicating the terms and conditions on which the material can be used, or that the use of the material is subject to terms or conditions of use. It is an infringement of the copyright owner's rights to remove or alter ERMI relating to a copyright work or other subject matter without the permission of the copyright owner or exclusive licensee, if the person doing the act knows or ought reasonably to have known that the removal or alteration would induce, enable, facilitate or conceal an infringement of copyright.¹⁰ In certain circumstances the removal or altering ERMI relating to a copyright work may be a criminal offence under the *Copyright Act*.¹¹ The anti-circumvention provisions enable copyright owners to protect their materials by applying technical measures that control access to or copying of the work. It is an infringement to knowingly deal in devices designed to circumvent TPMs¹² and, where the TPM controls access to a copyright work, it is an infringement to knowingly circumvent the TPM.¹³

As well as the rights described above, individual authors of copyright works can exercise moral rights, which are personal to the author and cannot be transferred. Although government does not, itself, have moral rights, it may own copyright in materials in respect of which individual authors can continue to exercise their moral rights. This situation may arise where government obtains an assignment of copyright in materials that have been produced by an individual author who has not agreed to waive the exercise of their moral

⁶Section 182 specifically states that, apart from the provisions in Part VII of the *Copyright Act 1968* (in ss 176-181) relating to the subsistence, duration and ownership of copyright, the provisions of Part III and Part IV of the Act apply.

⁷ *Copyright Act 1968*, ss 180, 181

⁸ *Copyright Act 1968*, ss 31, 85-88

⁹ The main provisions dealing with ERMI are set out in Division 2A, Subdivision B of the *Copyright Act 1968*.

Section 116D sets out the legal remedies (including an injunction or damages) available for the removal of and interference with ERMI.

¹⁰ *Copyright Act 1968*, ss 116B-116D.

¹¹ *Copyright Act 1968*, ss 132AQ-132AS.

¹² *Copyright Act 1968*, s 116AO(1)

¹³ *Copyright Act 1968*, s 116AN(1)

rights. As moral rights cannot be assigned, if the author has not agreed to waive them, they will continue to be exercisable by the author. The moral rights that can be exercised by individual authors are the rights:

- of attribution, that is to be attributed (accredited) as the author of the work, where reasonable;
- to object to false attribution, that is to prevent someone else being wrongly identified as the author of the work; and
- of integrity, that is to prevent derogatory treatment of the work that would prejudice the author's reputation.¹⁴

Rationale for government copyright ownership

While government enjoys essentially the same exclusive economic rights as other copyright owners, it would be wrong to assume that the rationale for and origins of copyright in government materials are the same as for materials produced by individuals and private sector organisations. An obvious point of difference is that, since many government materials (eg reports, legislation, handbooks) are created in the ordinary course of activities by parliament, the courts and government agencies, the traditional justification of copyright as providing an incentive to produce and disseminate new information is much less relevant than for works produced by publishers with the expectation of a commercial return.¹⁵ As observed by the Copyright Law Review (CLRC) in its *Crown Copyright* report (2005), works such as legislation and judgments "will be produced regardless of financial incentives, and therefore the traditional justification for copyright ownership does not apply". Similarly the Prices Surveillance Authority in its report, *Inquiry into the Publications Pricing Policy of the Australian Government Publishing Service* (1992), observed that the traditional rationale behind copyright law does not apply to material produced by the government itself:

There appears to be less justification for the existence of Crown copyright than copyright in general... The information being copyrighted has been developed not by private individuals but by tax payer funded sources. Copyright monopoly rights are not necessary to ensure incentive for adequate developments of such information. It is information produced using public money to facilitate government. Such information should be freely available.¹⁶

Although the rights exercisable by governments as copyright owners under the provisions of the *Copyright Act* 1968 are for most purposes identical to those of private parties, there are differences between the government and private copyright that continue to be relevant in the current environment. Government (or Crown) copyright has its origins in the Crown prerogative.¹⁷ The scope of the Crown prerogatives in general is uncertain, and they may change over time. It is generally accepted that the prerogatives are not lost by disuse but must be expressly removed by statute.¹⁸

¹⁴ *Copyright Act* 1968, Part IX, ss 189-195AZR.

¹⁵ Copyright Law Review Committee (CLRC), *Crown Copyright*, 2005, para 4.23 at p38, available at <http://www.clrc.gov.au/www/agd/agd.nsf/Page/RWPBB79ED8E4858F514CA25735100827559> (accessed 9 November 2009).

¹⁶ Prices Surveillance Authority, *Inquiry into the Publications Pricing Policy of the Australian Government Publishing Service*, Report No. 47, 19 December 1992, at p 91.

¹⁷ For discussion of the Crown prerogative, see CLRC, *Crown Copyright*, 2005, Chapter 6. See also J Gilchrist, *Crown Copyright: An Analysis of rights vesting in the Crown under statute and common law and their interrelationship*, LLM thesis, Monash University, 1983; H V Evatt, *The Royal Prerogative*, Law Book Co, 1987 (publication of H V Evatt's doctoral thesis, *Certain aspects of the Royal Prerogative: a study in constitutional law*, 1924).

¹⁸ See CLRC, *Crown Copyright*, Chapter 6, at pp 90-91.

The Crown prerogative in the nature of copyright arose from the Crown's role in "ensur[ing] the integrity and authenticity of official government publications".¹⁹ As Monotti explains, from the late 18th century:

a consistent theme emerged, namely that the sovereign has a duty, based on the grounds of public utility and necessity, to superintend and ensure authentic and accurate publication of matters of national and public concern relating to the government, state and the Church of England. That duty carries with it a corresponding prerogative which is not specifically defined in any of the cases, but clearly extends to publishing and printing that material.²⁰

This understanding of the prerogative accords with the judgment of the Supreme Court of New South Wales in *Attorney-General (NSW) v Butterworth & Co (Australia) Ltd*²¹, where Long Innes CJ stated that the Crown prerogative stems from the historic duty of the monarch "to superintend the publication of acts of the legislature and acts of state of that description, carrying with it a corresponding prerogative".²² Over the years, the scope of the prerogative was cut back, such that, as explained in *Copyright Agency Limited v State of New South Wales*²³:

[b]y 1911 the Crown only claimed the exclusive right to publish the following works: the authorised version of the Bible (*The Universities of Oxford and Cambridge v Richardson* (1802) 6 Ves 689; (1802) 31 ER 1260); Acts of Parliament (*Basket v Cambridge University* (1758) 1 W Bl 105; (1758) 96 ER 59); proclamations (*Grierson v Jackson* (1794) Ridg. L. & S. 304); law books (*Roper v Streater* (1672) Skin 234; discussed in (1672) 90 ER 107); *Millar v Taylor* (1769) 4 Burr 2303; (1769) 98 ER 201); almanacs (*Gurney v Longman* (1806) 13 Ves 493; (1806) 33 ER 379); and what were compendiously described as government publications.

The Crown prerogative is preserved under s 8A of the *Copyright Act* 1968²⁴ and its operation is not affected by other provisions of the Act. The continuance of the prerogative means that the nature of government copyright differs in some important respects from copyright interests held by private parties. Taking into account the origins of the Crown prerogative with respect to official documents, it is not surprising that a dominant theme running through the commentary on Crown copyright in Australia and other jurisdictions is that central to the reasoning about the continued recognition of government copyright is the "need to ensure the integrity and authenticity of official government publications".²⁵ Academic commentators²⁶ and many submissions to the CLRC's review of Crown copyright

¹⁹ CLRC, *Crown Copyright*, 2005, para 4.66 at p 53.

²⁰ See A Monotti, *Nature and Basis of Crown Copyright in Official Publications* [1992] 9 EIPR 305, at pp 306-307. Note though that, in Australia, the Crown prerogative was never considered to apply to religious works, as there is no established state religion: CLRC, *Crown Copyright*, 2005 at para 6.07, p 88.

²¹ (1937) 38 SR (NSW) 195.

²² *Ibid* at 229.

²³ [2007] FCAFC 80 per Finkelstein J at para 179.

²⁴ Section 8A was inserted into the Act by the *Copyright Amendment Act* 1980. Previously, Crown prerogative was preserved by s 8(2) of the *Copyright Act* 1968.

²⁵ See Copyright Law Review Committee, *Crown Copyright*, 2005 para 4.66 at p 53, available at <http://www.clrc.gov.au/www/agd/agd.nsf/Page/RWPBB79ED8E4858F514CA25735100827559>

²⁶ See J Gilchrist, *The role of government as proprietor and disseminator of information*, (1996) vol. 7, no. 1, Australian Journal of Corporate Law pp 62-79, at p 79. On this point, see also J Bannister, *Open Access to Legal Sources in Australasia: Current Debate on Crown Copyright and the Case of the Anthropomorphic Postbox* (1996) 3 Journal of Information, Law and Technology (JILT), available at http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1996_3/bannister/ (accessed 9 November 2009). Bannister is commenting on *Baillieu and Poggioli (of and on behalf of the Liberal Party of Australia, Victorian Division) v Australian Electoral Commission and Commonwealth of Australia* [1996] FCA 1202.

supported the view that the integrity and authenticity of government copyright materials can be ensured by distribution under copyright licensing conditions which enable infringement actions to be brought for misuse or misrepresentation of the material.²⁷ For example, the Victorian Government's submission stated that:

[t]he State must ensure the continued integrity and authenticity of official government publications so that the public can be aware of the status of each publication. Continuing to maintain Crown copyright is essential to achieving [this] outcome.²⁸

The justification for Crown copyright as providing a safeguard for the "integrity and authenticity" of official works has consistently been raised in the United Kingdom (even if no further rights existed in such works).²⁹ In 1996, Gordon Robbie (then) Head of Copyright in Her Majesty's Stationery Office (HMSO), explained:

[C]opyright is ...a means by which copyright holders can ensure that their material is used properly and responsibly by third parties. This is of particular importance where that material is authoritative, and where the general public, in one way or the other, are placing reliance on its veracity and accuracy. The Copyright Unit [of HMSO] does come across cases of abuse and is able to pursue and prevent them.³⁰

The 1999 UK White Paper, *The future management of Crown copyright*, referred, without explanation, to the need to "preserve the integrity and official status of government material".³¹ It noted that there was a general perception among the public that Crown copyright "operates as a brand or kitemark of quality indicating the status and authority of much of the material produced by government".³² The justification of government copyright "as a means of retaining quality control over PSI and the way it is used" was raised more recently in the United Kingdom Office of Fair Trading's 2006 report, *The Commercial Use of Public Information* (CUPI), which found that improved availability of public sector information for commercial reuse was not incompatible with the continued recognition of Crown copyright.³³ The CUPI report made recommendations on improving the commercial use of PSI without abolishing Crown copyright and stated that:

[i]n fact, the existence of Crown copyright is a key part of the control mechanisms which we want to build on to ensure that [public sector information holders] act in a fair and transparent manner.³⁴

A similar approach to the justification for government copyright was taken in a study commissioned from KPMG by the Canadian Government in 2001. The report recommended

²⁷ See CLRC, *Crown Copyright*, 2005, footnote 93, para 4.66 at p 53

²⁸ See CLRC, *Crown Copyright*, 2005, para 4.68, at p 53, referring to Submission 64 at p 1.

²⁹ See S Picciotto, 'Towards Open Access to British Official Documents', 1996 (2) *Journal of Information Law and Technology* (JILT), available at http://www2.warwick.ac.uk/fac/soc/law/eli/jilt/1996_2/picciotto/ (accessed 9 November 2009).

³⁰ G Robbie, *Crown Copyright - Bête Noire or White Knight?*, 1996 (2) *The Journal of Information Law and Technology* (JILT), available at http://www2.warwick.ac.uk/fac/soc/law/eli/jilt/1996_2/special/robbie/ (accessed 9 November 2009).

³¹ United Kingdom government, Minister for the Cabinet Office, *The future management of Crown copyright*, Cm 4300, HMSO, 1999 at para 5.1. See also C Tullo, *Crown copyright: the way forward – access to public sector information*, *The Law Librarian*, Vol. 29, No. 4, 1998, 200-3, at p200.

³² *Ibid*, para 5.1

³³ United Kingdom government, Office of Fair Trading, *The Commercial Use of Public Information*, December 2006, at para 4.74, available at http://www.offt.gov.uk/advice_and_resources/publications/reports/consumer-protection/oft861 (accessed 9 November 2009)

³⁴ *Ibid* at para 4.76

that digital geospatial data should be licensed to users at no cost for use and redistribution, and that copyright and licensing should continue to be used to protect the quality of geospatial data originating from government agencies, rather than to prevent use.³⁵

Exercise of exclusive rights by governments

Just as the rationale for government copyright ownership differs from that for private sector copyright, it is clear that it was intended that government rights would be exercised primarily to ensure the distribution of authoritative government publications. When the first statutory Crown copyright provisions were enacted in the United Kingdom and Australia, it was stated that the Crown's rights would be exercised to permit the "full and free reproduction" and widespread dissemination of the great bulk of government copyright materials.³⁶

A United Kingdom Treasury Minute of 1912³⁷ described the practice to be followed to give effect to s 18 of the United Kingdom *Copyright Act* 1911.³⁸ The 1911 *Copyright Act* (UK) was adopted in Australia in 1912 (No 20 of 1912) and s 18 of that Act (the precursor to the current Crown copyright provisions in ss 176–179 of the *Copyright Act*) provided that:

Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work. [emphasis added]

An earlier Treasury Minute presented to the House of Commons on 31 August 1887³⁹ had identified seven classes of government publications in which the Crown claimed copyright: (1) reports of select committees of Parliament and of Royal Commissions; (2) papers required by statute to be laid before Parliament; (3) papers laid before Parliament by command; (4) Acts of Parliament; (5) official books; (6) literary and quasi-literary works; and (7) charts and ordnance maps. As noted by Finkelstein J in *Copyright Agency Limited v New South Wales* [2007] FCAFC 80 (at para 177):

According to the Minute, Crown copyright would not be enforced in the first five classes but copyright in the last two would be strictly enforced. The Minute is reproduced in L.C.F. Oldfield, *The Law of Copyright* (1912) at 111-113.

Publications in the first five categories described in the Minute, such as reports of Select Committees or Royal Commissions and Acts of Parliament, were regarded as having been produced for the "use and information of the public and it [was] desirable that the

³⁵ KPMG Consulting, Executive Summary: *Geospatial Data Policy Study - Project Report*, 2001, recommendation 5 at p 25, available at http://www.geoconnections.org/programsCommittees/proCom_policy/keyDocs/KPMG/KPMG_E.pdf (accessed 9 November 2009). An earlier report produced for Industry Canada in 1995 by the Information Highway Advisory Council, *The challenge of the information highway* had recommended the retention of Crown copyright. See also A A Keyes and C Brunet, *Copyright in Canada: Proposals for a Revision of the Law*, Department of Consumer and Corporate Affairs, Ottawa, 1977, at p 225.

³⁶ See B Atkinson, *The True History of Copyright: The Australian Experience 1905 – 2005*, Sydney University Press, 2007 at p 277; B Fitzgerald, A Fitzgerald et al, *Internet and E-Commerce Law: Technology, Law, and Policy*, Lawbook Co/Thomson, Sydney, 2007 at pp 267-268

³⁷ Dated 28 June 1912

³⁸ 1 & 2 Geo 5, Ch 46

³⁹ No 335 of 1887. This earlier Treasury Minute was referred to in the 1912 Treasury Minute.

knowledge of their contents should be diffused as widely as possible". A "general rule permitting full and free reproduction" of such works was to apply and, while the rights of the Crown would continue, no steps would ordinarily be taken to enforce the Crown's copyright. For works falling into the latter two categories – "often produced [by government] at considerable cost"⁴⁰ – the government objected to their reproduction, "by private enterprise for the benefit of individual publishers"⁴¹ and made it clear that unauthorised reproduction would incur liability as if "the copyright had been in private hands".⁴²

In December 1913, a copy of the 1912 UK Treasury Minute was brought to the notice of the Commonwealth Government by the Secretary of State for the Colonies, to provide information on UK practice regarding Crown copyright. In January 1914, Robert Garran, Secretary of the Commonwealth Attorney-General's Department, wrote to the Secretary of the Prime Minister's Department, attaching a Minute on Crown Copyright and requesting that the Prime Minister communicate with the respective State Premiers on the subject. Copies of the United Kingdom Treasury Minute of 1912 were circulated by the Prime Minister to the States, attached to a letter dated 27 January 1914, informing them that the Commonwealth Government intended to follow the practice adopted in the United Kingdom.

From the historical background to the Crown copyright provisions – which survive to the current day in much the same form as in 1912 – it is clear that they were enacted with the expectation that they would rarely be exercised to restrain reproduction and copying of government materials. Although there is no clear statement of the circumstances in which governments may rely on their exclusive rights to restrain the unauthorised reproduction and distribution of their copyright materials, such instances would be limited.

However, appreciation of the fact that Crown copyright is intended to encourage rather than deter the distribution and reuse of government materials seems to have diminished over the years. The UK's Power of Information Taskforce found that Crown copyright was often misunderstood by creators and reusers of data:

When the public sector publishes information people should understand that it is intended for re-use. ... Crown copyright, despite its historic name, is designed to encourage re-use in the majority of cases.⁴³

Consequently, the *Power of Information Taskforce Report* (February 2009) recommended that steps should be taken to improve understanding of the permissive aspects of Crown copyright.⁴⁴

Relevance of PSI access and reuse policy to exercise of copyright by government

⁴⁰ See G Robbie, *Crown Copyright - Bête Noire or White Knight?*, (1996) 2 *Journal of Information Law and Technology* (JILT) http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1996_2/special/robbie (accessed 9 November 2009).

⁴¹ *Ibid.*

⁴² *Ibid.* Robbie quotes from a Treasury notice published in the *London Gazette* of 23 November 1886: "Printers and Publishers are reminded that anyone reprinting without due authority matter which has appeared in any Government publication renders himself liable to the same penalties as those he might under like circumstances have incurred had the copyright been in private hands."

⁴³ *Ibid* at p25.

⁴⁴ R Allan, *Power of Information Taskforce Report*, February 2009, recommendation 12 at p 7, available at <http://poit.cabinetoffice.gov.uk/poit/category/final-introduction/>.

In the absence of provisions in the *Copyright Act 1968* that limit (or provide guidance on) the exercise of copyright by government, regard must be had to the clear intention behind the introduction of the provisions, as well as to established government policies relating to use of public sector materials. The fact that governments are able, by virtue of their exclusive rights as copyright owners, to restrict access to, and copying and distribution of, copyright materials does not mean that they should do so without clear justification and authority.⁴⁵ Copyright is not, in itself, the driver of policy and practice in relation to copying, distribution and use of government PSI materials.

The Organisation for Economic Cooperation and Development's (OECD) *Recommendation for Enhanced Access and More Effective Use of Public Sector Information* ("the OECD PSI Recommendation")⁴⁶ acknowledges that while intellectual property rights in PSI should be respected, governments should exercise their copyright in ways that facilitate its reuse. While there are circumstances where copyright materials required by the public are developed by government with public funds and it is necessary to recoup costs, the decision to impose charges for use of the materials should be made in accordance with the pricing/charging principle of the open access policy.⁴⁷ Government ownership of copyright does not, in itself, justify entering into a commercial arrangement to obtain a financial return if doing so would restrict the free and widespread distribution of government materials. Further, copyright should not, as a general practice, be relied upon by governments for secondary purposes not directly related to the exercise of Crown copyright (such as to restrict access to government documents which contain confidential or otherwise sensitive information).⁴⁸

Recommendation 1 – Copyright law and management practices should give effect to the government's established policy on open access to and reuse of PSI

Copyright law, and the management of copyright in PSI materials, should be consistent with and support the [government's/department's] policy position on open access to, and use and reuse of PSI.

Copyright law and management should not impede the use of information contained in copyright PSI materials, where that information should be available for access and reuse under the [government's/department's] open access policy.

⁴⁵ Note that in carrying out its inquiry into Crown copyright, the Copyright Law Review Committee's Terms of Reference required it to consider "the extent and appropriateness of reliance by government on copyright to control access to and/or use of, information": CLRC, *Crown Copyright*, 2005 at p xii

⁴⁶ OECD, *Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information*, C(2008)36, OECD, Paris, 2008, available at C(2008)36, available at <http://www.oecd.org/dataoecd/0/27/40826024.pdf>.

⁴⁷ For example, there may be circumstances where only the government possesses the expertise or resources required to produce a copyright work which is not required for purposes of public administration but is required by the general public. Unless the government is able to recoup the costs involved in producing the work it may not have the incentive or authority to expend public monies to do so.

⁴⁸ See CLRC, *Crown Copyright*, 2005 at p 39. Note that in *Commonwealth v Fairfax* (1980) 147 CLR 39, the High Court of Australia (Mason J) granted an interim injunction to restrain the publication of certain documents produced by the Department of Defence and the Department of Foreign Affairs on the basis that publication would infringe copyright. However, the case has been criticised as a "poor exercise of government copyright...because it was essentially used for an ulterior purpose, that of preserving the confidentiality of documents. In the governmental sphere this is more appropriately dealt with by specific laws dealing with disclosure...: J Gilchrist, *The role of government as proprietor and disseminator of information*, (1996) vol. 7, no. 1, Australian Journal of Corporate Law pp 62-79, at p 62.

Recommendation 2 – Exercise government (Crown) copyright to give effect to the government’s policy on open access to and reuse of PSI

Ownership of copyright in PSI materials gives the government an extensive set of exclusive rights to control copying, publication, electronic distribution, adaptation, etc. These exclusive rights should be exercised to give effect to the open access policy, rather than driving (or determining) policy and practice.

Recommendation 3- Government ownership of copyright should not be relied on to justify other restrictions on access to and reuse of PSI

Ownership of copyright in PSI materials (particularly the exclusive rights to control copying, publication and electronic distribution) should not be relied on by government to restrain access to or use of work for other purposes, such as protecting the privacy or confidentiality of information contained in a copyright document or concerns about the quality and integrity of the information. To ensure transparency, any restrictions on access and reuse should be justified on relevant legal grounds (eg privacy, confidentiality) or information management considerations (eg quality and integrity of PSI).

2. ENSURE COPYRIGHT LAW AND MANAGEMENT PRACTICES FACILITATE THE COMPLEX FLOW OF INFORMATION WITHIN GOVERNMENT AND TO THE PRIVATE SECTOR

Any model for managing copyright PSI materials must be based on an understanding of how PSI is produced and how it flows, both within government and between government and the private sector. In a recent report for the UK Joint Information Systems Committee (JISC), *Case Studies Mapping the Flows of Content, Value and Rights across the Public Sector*, Dr Prodromos Tsiavos identified different models of content flows and permissions across a range of public sector agencies and observed:

The closer we get to a model of unrestricted sharing and repurposing of content, the greater the need for attribution, quality assurance, source tracing and provenance.⁴⁹

Identifying and removing legal impediments to information flows

If the flow of PSI is to be improved it is essential to understand the kind of materials produced, how they have been created, and by whom. As these issues all bear upon the existence, ownership and exercise of copyright, they will need to be addressed in any strategy for managing copyright PSI materials to enable PSI to flow among government agencies and between government and the private sector.

Governments at all levels develop, manage and distribute an array of PSI in the form of documents, reports, websites, datasets and databases on CD or DVD and files that can be downloaded from a website. PSI materials come into existence by various means. A large amount of PSI material is created within government, through the efforts of government employees and other persons who are not employed by government but produce copyright materials while working as volunteers (for example, interns, students on work experience placements and members of emergency services teams⁵⁰).

A significant amount of material held and used by government is produced externally, for example, by persons who make submissions to inquiries, reviews and online consultations, recipients of government funding or grants and parties who are obliged to produce documents and lodge them with government agencies. Governments commonly commission independent contractors to produce materials and enter into arrangements to fund work in universities and research institutes that results in output in the form of reports, academic publications and data. An important category of PSI is materials prepared by non-government parties which are lodged with government pursuant to a statutory or regulatory direction to provide information or a report (for example, environmental impact

⁴⁹ Prodromos Tsiavos, *Case Studies Mapping the Flows of Content, Value and Rights across the Public Sector*, Joint Information Systems Committee (JISC), March 2009, at p 6, available at <http://www.jisc.ac.uk/media/documents/publications/scaiprcasestudiesv2.pdf>.

⁵⁰ For example, emergency services volunteers typically vastly outnumber departmental employees (by as much as a factor of 10) and produce risk management plans, incident reports, news updates and other copyright materials.

assessments and information about water use, greenhouse gas emissions and results of mineral or petroleum exploration activities).⁵¹

In developing systems to facilitate PSI access and reuse, it is necessary to ensure that government-produced materials can flow to other government agencies as well as to non-government users. Materials provided to government by private sector parties will need to be usable not only by the government agency that commissioned them or with which they are lodged, but also by other government bodies. The flow of PSI does not only involve government-generated materials flowing to other government agencies and the private sector. Government will often need to be able to pass on materials produced by private sector parties (whether commissioned or produced under statutory requirements) to other private sector parties. The OECD PSI Recommendation requires governments to encourage “institutions and government agencies that fund works from outside sources to find ways to make these works widely accessible to the public”.

Public administration exceptions and operation of statutory licences

To ensure that PSI can flow as intended, in accordance with the government’s policy on access and reuse, consideration should be given to the approach taken in the United Kingdom and New Zealand. The Crown copyright provisions in UK and NZ copyright legislation were reformed in the *Copyright, Designs and Patents Act 1988* (UK)⁵² and the *Copyright Act 1994* (NZ) respectively. These Acts repealed the earlier Crown copyright provisions which, like ss 176-179 of the *Copyright Act 1968* (Cth), vested ownership in the Crown of works produced or first published “by, or under the direction or control” of the Crown.⁵³ These provisions were replaced with a scheme of provisions dealing with Crown ownership of copyright, together with statutory exceptions permitting use by government and third parties of documents produced for purposes of public administration and government business. The re-structuring of the Crown ownership provisions overcame the problem of the potentially overly broad reach of Crown copyright under the old formula. However, in both the UK and NZ, the narrowing of the range of materials in which the Crown could assert copyright was balanced by the enactment of “public administration” exceptions to ensure that PSI and copyright materials provided to government by third parties for administrative purposes could continue to be used without infringing copyright or requiring payment of compensation.

The public administration requirements in the UK *Copyright, Designs and Patents Act 1988* (ss 45-50)⁵⁴ (and the corresponding provisions in the NZ *Copyright Act* (ss 60-62, 66)⁵⁵) make

⁵¹ There are numerous examples of documents of this kind, including mining and petroleum exploration reports, flood studies, soil surveys, traffic analysis reports, noise studies, cultural heritage assessments, environmental impact statements, licence applications (eg for liquor licences, certified traders, etc).

⁵² The changes implemented recommendations of the Whitford Committee on Copyright, (1977) Cmnd 6732, paras 592-600. The Committee considered that the term “direction or control” was too broad and recommended that the Crown’s position be assimilated to that of any employer. Nevertheless, the phrase “made by or under the control or direction” of either House is retained in the definition of parliamentary copyright in s 165 of the *Copyright, Designs and Patent Act 1988*.

⁵³ Crown copyright provisions in these terms first appeared in the *Copyright Act 1911* (UK) and were expanded in the *Copyright Act 1956* (UK). For comment on these Acts, see J A L (Adrian) Sterling, *Crown Copyright in the United Kingdom and Other Commonwealth Countries*, Montreal conference n Crown Copyright in Cyberspace, May 1995, available at <http://www.lexum.umontreal.ca/conf/dac/en/sterling/sterling.html> (accessed 9 November 2009)

⁵⁴ These provisions are set out in Appendix A to this report.

⁵⁵ These provisions are set out in Appendix A to this report.

it clear that copyright is not infringed when copyright materials produced by non-government parties is used, by government or other parties, in the following circumstances:

- where the material is used for purposes of parliamentary or judicial proceedings, or for the proceedings of royal commission or statutory inquiry;⁵⁶
- where factual information contained in materials that are open to public inspection (eg a statutory register) is copied;⁵⁷
- copying or distributing copies of material that is open to public inspection (under a statutory requirement) to enable it to be inspected at a more convenient time or place;⁵⁸
- copying or distributing copies of material that is open to public inspection (under a statutory requirement) or is on a statutory register and contains information about scientific, technical, commercial or economic interest, when done for the purpose of disseminating that information;⁵⁹
- copying or supplying copies to others of material held in public records in the meaning of the various Public Records Acts;⁶⁰ or
- doing an act that is specifically authorised by an Act of Parliament.⁶¹

A further exception applies to the government, clarifying what it can do with copyright works provided to it by other parties in the course of “public business”, that is, any activity carried on by the government.⁶² Where a literary, dramatic, musical or artistic work has in the course of public business been communicated to the government for any purpose, by or with the licence of the copyright owner and a document or object embodying the work is held by the government, the government may, without infringing copyright, copy the work and distribute copies of it to the public, for the purpose for which the work was

⁵⁶ *Copyright, Designs and Patents Act 1988*, ss 45 and 46

⁵⁷ *Copyright, Designs and Patents Act 1988* (UK), s 47(1) provides that “[w]here material is open to public inspection pursuant to a statutory requirement or is on a statutory register, any copyright in the material as a literary work is not infringed by the copying of so much of the material as contains factual information of any description, by or with the authority of an appropriate person, for a purpose which does not involve the issuing of copies to the public”.

⁵⁸ *Copyright, Designs and Patents Act 1988* (UK), s 47(2) provides that “[w]here material which is open to public inspection pursuant to a statutory requirement, copyright is not infringed by the copying or issuing to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of enabling the material to be inspected at a more convenient time or place or otherwise facilitating the exercise of any right for the purpose of which the requirement is imposed”.

⁵⁹ *Copyright, Designs and Patents Act 1988* (UK), s 47(3) provides that “where material which is open to public inspection pursuant to a statutory requirement, or which is on a statutory register, contains information about matters of general scientific, technical, commercial or economic interest, copyright is not infringed by the copying or issuing to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of disseminating that information”.

⁶⁰ *Copyright, Designs and Patents Act 1988* (UK), s 49 provides that material comprised in public records within the meaning of the relevant Public Records Acts which are open to public inspection under the provisions of those Acts, “may be copied and a copy may be supplied to any person, by or with the authority of any officer appointed under that Act, without infringement of copyright”. See also Schedule 2, Rights in Performances: Permitted Acts, s 10.

⁶¹ *Copyright, Designs and Patents Act 1988* (UK), s 50 provides that “where the doing of a particular act is specifically authorised by an Act of Parliament, whenever passed, then, unless the Act provides otherwise, the doing of that act does not infringe copyright.”

⁶² *Copyright, Designs and Patents Act 1988* (UK), s 48(4)

communicated to it, or any related purpose which could reasonably have been anticipated by the copyright owner.⁶³

There are various existing exceptions that permit copying or use of specific categories of material for public purposes, under the *Copyright Act 1968* and other Commonwealth legislation. Examples include a general exception that permits a single copy⁶⁴ to be made of part or all of a statutory instrument or court judgment;⁶⁵ the exclusion of the National Archives from liability for copyright infringement through providing or authorising access to archival records available for public access;⁶⁶ and the exemption of Commonwealth government officers administering the offshore petroleum regime from liability for copyright infringement when using copyright documents required to be submitted by third parties under the *Petroleum (Submerged Lands) Act 1967 (Cth)*.⁶⁷

However, such public administration exceptions as are currently recognized under Australian law do not extend as broadly or apply as generally as those recognized under the UK or NZ copyright legislation. There is support for the adoption of “public administration” exceptions in Australia, to permit use of copyright materials by government and private parties in circumstances where:

- the copyright work is open to public inspection (under a statutory requirement), is on a statutory register or forms part of a public record;
- the acts are specifically authorised by legislation enacted by the Commonwealth or a State/Territory parliament;
- the acts are done for purposes such as commissions of inquiry (including royal commissions), ministerial and statutory inquiries and law reform bodies; or
- the work has been provided to the Crown by the copyright owner (or authorised agent) in the course of public business and the acts are for the purpose for which the work was provided or any related purpose which could reasonably have been anticipated by the copyright owner.⁶⁸

⁶³ *Copyright, Designs and Patents Act 1988 (UK)*, s 48(1), (2).

⁶⁴ The provision uses the term “reprographic reproduction”, the meaning of which is explained in *Copyright Act 1968*, s 10(3)(g).

⁶⁵ *Copyright Act 1968*, s 182A. The exception applies to all Acts, whether Commonwealth or State; enactments of the legislature of a Territory; instruments (including Ordinances, rules, regulations or by-laws) made under an Act or enactment; judgments, orders or awards of a Federal court, court of a State or Territory, or a Tribunal established by or under an Act or enactment; and reasons for a decision of a court or Tribunal, including reasons given by a Justice, Judge or other member of a court or Tribunal for a decision given by him or her either as the sole member or as one of the members of the court or Tribunal.

⁶⁶ *Archives Act 1983 (Cth)*, s 57

⁶⁷ See *Petroleum (Submerged Lands) Act 1967 (Cth)*, s 150K (inserted by *Petroleum (Submerged Lands) Legislation Amendment Cat (No. 1) 2000 (Cth)*, Schedule 1), which provides: The copyright in a literary or artistic work contained in an applicable document is not infringed by anything done by, or with the authority of, the Designated Authority or the Commonwealth Minister for the purpose of the exercise of any of the powers of that Authority or Minister under this Part.” The Explanatory Memorandum to the *Petroleum (Submerged Lands) Legislation Amendment Bill 1999* states that “[t]his section is intended to put beyond doubt the fact that the Designated Authority, or the Commonwealth Minister has a non-exclusive right to copy those data”.

⁶⁸ See the Copyright Law Review Committee’s *Crown Copyright* report, 2005, at para 5.33, p 72, referring to submissions by the Queensland Department of Natural Resources, Mines and Energy (submission 65 at p11) and the Queensland Government (submission 71 at p 10), available at <http://www.clrc.gov.au/www/agd/agd.nsf/Page/RWPBB79ED8E4858F514CA25735100827559> (accessed 9 November 2009).

Exceptions such as these would enable governments to effectively carry out their public duties and to ensure that third parties can use administrative materials prepared by other non-government parties. To ensure that any “public administration” exceptions are effective in excluding the relevant acts from any liability whatsoever, it should be expressly stated that exempted acts not only do not infringe copyright but are not subject to payment of equitable remuneration under the statutory licences. It should be made clear that copyright materials which are within the scope of public administration exceptions are not to be included in the category of materials for which remuneration is payable by other government agencies and educational institutions under the s 183 and educational copying statutory licences.

The question of whether similar exceptions to the public administration exceptions found in the UK and NZ copyright legislation should be introduced in Australia was considered only glancingly by the Copyright Law Review Committee in its *Crown Copyright* report (2005)⁶⁹ and was not addressed in its recommendations. However, in additional comments, one member of the CLRC (John Gilchrist) stated that “there is a compelling public interest for a provision to be inserted in the *Copyright Act*, similar to s 48 of the United Kingdom *Copyright, Designs and Patents Act*, to expressly enable Government to effectively carry out its public duties.”⁷⁰

The importance of ensuring that the exercise of copyright does not impede the ability to use copyright PSI for public administration purposes is strengthened by international comparisons. In the United States, much of the material provided to governments by private parties pursuant to statutory requirements would not attract copyright protection, either because it does not meet the higher US originality threshold or because of the operation of the merger doctrine (copyright protection does not apply if there is essentially only one way of expressing an idea). Further, where material is protected by copyright, much use by government or private parties would be non-infringing and non-remunerable because it would fall within the broad “fair use” exception.

During the *Crown Copyright* review, the CLRC stated that it was anticipated that there would be a further review, focusing on government use (as opposed to ownership) of copyright materials in 2006.

Licence logjams impede information flows and reuse

To enable PSI to effectively flow to those who want to use it, the adoption of simple, clear and standardised licences and the transparency of the conditions on which the PSI can be accessed and reused is of crucial importance. The complexities of PSI creation and use mean that licensing is likely to constrain information flows, unless the conditions of use are stated in clear and easily understood terms. A significant impediment to the efficient sharing and reuse of PSI is the diversity of licensing practices and the lack of consistency or compatibility of the rights granted to users. Incompatibility of licence terms creates a legal logjam and presents a major obstacle to the ready flow of PSI.⁷¹

⁶⁹ CLRC, *Crown Copyright*, 2005, at para 5.75, pp 83-84.

⁷⁰ *Ibid* at p 187.

⁷¹ See also M Heller, *The Gridlock Economy – How Too Much Ownership Wrecks Markets, Stops Innovation, and Cost Lives*, 2008, Basic Books, New York.

The use of numerous different licences, often with inconsistent or incompatible terms of use, has been identified as a cause of problems in various reviews. The Government Information Licensing Framework (GILF) project was instigated by the Queensland Spatial Information Council (QSIC) in order to develop strategies for overcoming the recurring problems encountered in accessing and sharing spatial information during and after natural disasters⁷², due to fragmented, inefficient and confusing arrangements for information access and reuse.⁷³ For the Australian Bureau of Statistics the recognition that, even after making much of its data freely available online, the potential remained for its licensing practices to form “an undesirable barrier to those wishing to reuse significant amounts of data” led to the decision to go a step further and adopt Creative Commons licensing for its online data.⁷⁴ Although, technologically, it may be possible to obtain access to, and to mix and match (mash up or remix) various information inputs or products, this does not mean that such remixing or reuse of the information inputs or products is lawful.

In the United Kingdom, the Power of Information Taskforce identified inconsistency of licensing of government information (particularly geospatial data) as a persistent problem which inhibited innovation, reuse of information and economic activity.⁷⁵ Even where government information was available, it was often subject to licences that prevented access and reuse.⁷⁶ It is acknowledged that standardizing and freeing up permissions is “vital to encourage sharing and experimentation with information.”⁷⁷ In *The Power of Information Taskforce Report* (February 2009) the Taskforce recommended that licensing conditions for geospatial data should be “simplified and standardized across the board and, for all but the heaviest levels of use, should be on standard terms and conditions”.⁷⁸ More generally, the Taskforce recommended the adoption of a uniform system of information release and licensing to apply across all public sector bodies and that individual agencies should refrain from varying the standard terms for their sector.⁷⁹

Flexible licensing favoured over a no-copyright approach

⁷² In Queensland, the problems of accessing and sharing spatial information were highlighted by Cyclone Larry which devastated large areas of northern Queensland in 2005; in Victoria, the 2009 bushfires poignantly demonstrated the criticality of real time, spatially-related information to enable effective emergency response management.

⁷³ Queensland Government, Queensland Spatial Information Council, *Government Information and Open Content Licensing: An access and use strategy* (Government Information Licensing Framework Project Stage 2 Report), October 2006, available at

<http://www.qsic.qld.gov.au/qsic/QSIC.nsf/CPByUNID/BFDC06236FADB6814A25727B0013C7EE>. Note that author of the current report undertook research for and contributed to the authorship of the GILF Stage 2 report, along with Queensland Government officers including Dr John Cook, Neale Hooper and Tim Barker.

⁷⁴ Siu-Ming Tam, Australian Bureau of Statistics, *Informing the Nation – Open Access to Statistical Information in Australia*, paper presented to the United Nations Economic Commission for Europe (UNECE) Work Session on the Communication and Dissemination of Statistics, Poland, May 2009, at para 32, available at <http://www.unece.org/stats/documents/ece/ces/ge.45/2009/wp.11.e.pdf>.

⁷⁵ R Allan, *Power of Information Taskforce Report*, February 2009, at p 22, available at <http://poit.cabinetoffice.gov.uk/poit/category/final-introduction/>.

⁷⁶ See HM Government, *Putting the Frontline First: Smarter Government*, December 2009, at p 27, available at <http://www.hmg.gov.uk/media/52788/smarter-government-final.pdf>.

⁷⁷ UK Government, The National Archives, *Information Matters: building government’s capability in managing knowledge and information*, November 2008, at p 7, available at <http://www.nationalarchives.gov.uk/services/publications/default.htm>.

⁷⁸ Ibid, recommendation 7 at p 20. <http://www.hmg.gov.uk/media/52788/smarter-government-final.pdf>.

⁷⁹ Ibid, recommendation 8 at p 24.

Although there have been calls for a no-copyright approach to PSI (or parts of it, such as legislation, judgments, official records etc),⁸⁰ the only jurisdiction worldwide that does not recognize copyright in any government-produced materials is the federal level of government in the United States.⁸¹ Like Australia, many governments worldwide adopt a position with respect to copyright ownership that is at the opposite end of the spectrum to the United States federal government, continuing to recognize government ownership of copyright in all or most works produced or commissioned by the government.⁸² Others, such as New Zealand, have excluded a range of public materials from the scope of government copyright, but retain copyright in other materials.⁸³ Even within the United States, the majority of States continue to recognize government copyright in a large proportion of their materials.⁸⁴ As Bradley Mitchell observes:

The [US federal government's] prohibition on [copyright] in federal government works is fairly unique. Other countries have different policies, but none as extreme as that of the United States. The U.S. policy also applies only to the federal government; most states protect their government works through copyright law. And the policy applies only to copyrights, with the federal government able – and quite willing – to patent the results of federal research.⁸⁵

The CLRC's *Crown Copyright* report (2005) recommended the abolition of copyright in certain judicial, legislative and executive materials, namely:

- bills, statutes, regulations, ordinances, by-laws and proclamations, and explanatory memoranda or explanatory statements relating to those materials;
- judgments, orders and awards of any court or tribunal;
- official records of parliamentary debates and reports of parliament, including reports of parliamentary committees;
- reports of commissions of inquiry, including royal commissions and ministerial and statutory inquiries; and
- other categories of material prescribed by regulation.⁸⁶

The abolition of copyright in these (or other) government materials was strongly opposed by the States and Territories as well as by a number of Commonwealth government agencies. The States and Territories were firmly of the view that copyright ownership was not incompatible with free and open access to primary legal materials. Instead, they favoured

⁸⁰ See C Oppenheim, *Crown Copyright and HSMO* (1996) 2 Journal of Information, Law and Technology (JILT), available at http://www2.warwick.ac.uk/fac/soc/law/eli/jilt/1996_2/special/oppenheim (accessed 9 November 2009).

⁸¹ See *Copyright Act 1976*, s 105 states: "Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise." A "work of the United States Government" is defined in s 101 as "a work prepared by an officer or employee of the United States Government as part of that person's official duties".

⁸² For a comprehensive survey of the copyright position in different countries and in each of the states of the United States, see Appendix A and Appendix B in B W Mitchell, *Works of the United States Government: Time to Consider Copyright Protection?*, LLM Thesis, George Washington University School of Law, Washington DC, 2002, available at linkinghub.elsevier.com/retrieve/pii/S1352023704000279.

⁸³ Under the *Copyright Act 1994* (NZ), there is no copyright in Bills, Acts, regulations, bylaws, Parliamentary Debates, reports of select committees tables before the House of Representatives, judgments of any court or tribunal, reports of Royal commissions, commissions of inquiry, ministerial inquiries or statutory inquiries.

⁸⁴ See Appendix B in B W Mitchell, *Works of the United States Government: Time to Consider Copyright Protection?*, LLM Thesis, George Washington University School of Law, Washington DC, 2002, available at linkinghub.elsevier.com/retrieve/pii/S1352023704000279.

⁸⁵ See B W Mitchell at p 17 and Table 1 at pp 20-21.

⁸⁶ CLRC, *Crown Copyright*, 2005, para 9.38 at p 138.

approaches based on the adoption of principles for reuse of PSI or standard general licences to the public which would facilitate greater public access to PSI while allowing governments to retain some control over the materials and ensure their integrity.

That subsistence of copyright is not incompatible with promoting access to and reuse of PSI is explicitly acknowledged in the OECD PSI Recommendation which accepts that “[t]here is a wide range of ways to deal with copyrights on public sector information, ranging from governments or private entities holding copyrights, to public sector information being copyright-free”.⁸⁷

Submissions to the CLRC’s Crown copyright review stated that the question of how government copyright is best managed to enable dissemination and reuse of PSI should not simply revolve around the question of whether or not copyright should be retained. Professor Brian Fitzgerald’s submission stated:

Ten years ago the question would simply have been whether the Crown should or should not have copyright. Many advocating for no copyright would have been seeking open access to information. However, today we know more about the intricacies of open content licensing. It is arguable that a broader and more robust information commons can be developed by leveraging off copyright rather than merely “giving away” material.⁸⁸

The Commonwealth Government’s submission stated that, rather than changing the copyright legislation, the Commonwealth should first develop best practice policy guidelines for Crown copyright ownership.⁸⁹ This approach was supported in the submission of the Commonwealth government’s Bureau of Meteorology which emphasized the importance of ensuring that a “proper policy is in place for access to Crown Copyright”.⁹⁰

It is the view of the Commonwealth Bureau of Meteorology that there is no reason to abolish Crown Copyright or to change the law in this area. ...[T]he Bureau of Meteorology supports the retention of Crown Copyright in pretty much its present form coupled with a policy framework that maximises the data, information and know-how that is placed in the public domain.

On the specific issue of copyright in judgments, Judge McGill of the District Court of Queensland commented that while abolishing copyright would bring “no obvious practical advantage” (since judgments are already widely disseminated), it could result in unforeseen disadvantages:

Having ownership of judicial materials ... does not have to be inconsistent with having them readily available, but would be useful in discouraging inappropriate use of them.⁹¹

Judge McGill pointed out that abolishing copyright in judgments “may well be a huge incentive to plagiarism”, noting:

⁸⁷ The “Copyright” principle, OECD, *Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information*, C(2008)36, OECD, Paris, 2008, available at <http://www.oecd.org/dataoecd/0/27/40826024.pdf>.

⁸⁸ See further B Fitzgerald, *The Australian Creative Commons Project*, (2005) 22(4) Copyright Reporter 138 at p 143. Professor Brian Fitzgerald’s submission to the Copyright Law Review Committee’s review of Crown Copyright (2004) is reproduced in Chapter 18. It is also available at http://www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Present_Inquiries_Crown_copyright_submissions_2004_Sub_No_17_-_Professor_Brian_Fitzgerald.

⁸⁹ CLRC, *Crown Copyright*, 2005, para 4.06, at p 32.

⁹⁰ *Ibid*, referring to submission no. 18 at p 1.

⁹¹ Submission 70, p2, referred to in CLRC, *Crown Copyright*, 2005, para 4.50, at p 42.

Any judge would be pleased to see his exposition of any particular legal point or principle cited by others, but would I think be less pleased to see it claimed by others as their own.⁹²

It has occasionally been suggested that if copyright in government materials were to be abolished, other means could be substituted to enable governments to exercise an appropriate degree of control over PSI, such as contractual obligations, technological mechanisms and jurisdiction-specific laws governing the use of official government insignia (such as crests and shields) displayed on government materials. These arguments were considered, but rejected, by the Victorian Parliament's Economic Development and Infrastructure Committee (EDIC) in its *Inquiry into Improving Access to Victorian Public Sector Information and Data*.⁹³ The Committee concluded:

The removal of copyright from Victorian Government public sector information (PSI) is unlikely to simplify access to and re-use of PSI. Access to and re-use of PSI will be best facilitated by issuing licences in accordance with existing copyright provisions.⁹⁴ [emphasis added]

While permitting a broad range of dealings by users of the materials, government may justifiably seek to retain some rights over the material. For much PSI, it is important that information about the origin, currency and meaning of the work continues to be displayed on or in association with it (such as via a hyperlink). Where government PSI takes the form of documents which have status as official or authoritative versions, it will be important to ensure that altered or inaccurate versions are not circulated, particularly if they misleadingly appear to be the correct, original versions produced by government.

Although superficially attractive, a “no copyright” approach towards the structuring of the public domain is not without problems or disadvantages. Where, as is the case with the US federal government, there is no copyright in works produced by government employees, there is nothing to prevent a recipient of PSI from incorporating it into a new copyright work and asserting their copyright in the new work against other parties (including the government).⁹⁵ The consequences were highlighted in the submissions of federal and State

⁹² Ibid, referred to in CLRC, *Crown Copyright*, 2005, para 4.71 at p 54.

⁹³ Victorian Parliament, Economic Development and Infrastructure Committee, *Inquiry into Improving Access to Victorian Public Sector Information and Data (Final Report)*, June 2009, available at http://www.parliament.vic.gov.au/edic/inquiries/access_to_PSI/final_report.html accessed on 30 June 2009. See para 6.1.2 at p 66 and para 6.1.2.2 at p 67.

⁹⁴ Ibid.

⁹⁵ David Bollier explains: “[A]s Anne Fitzgerald, Brian Fitzgerald, and Jessica Coates of Australia have pointed out, “putting all such material into the public domain runs the risk that material which is essentially a public and national asset will be appropriated by the private sector, without any benefit to either the government or the taxpayers.” For example, the private sector may incorporate the public-domain material into a value-added proprietary model and find other means to take the information private. The classic instance of this is West Publishing’s dominance in the republishing of U.S. federal court decisions. Open-content licenses offer a solution by ensuring that taxpayer financed works will be available to and benefit the general public”: David Bollier, *Viral Spiral: How the Commoners Built a Digital Republic of Their Own*, The New Press, New York, 2008 at pp 192-193, available at <http://www.viralspiral.cc/download-book>. The problems that emerge when a private sector party republishes government materials with the addition of sufficient input to create a new copyright work were vividly demonstrated in a series of copyright disputes in the United States in the 1980s and 1990s in which commercial publishers sought to prevent their competitors from including simple formatting features (for example, added page numbers) in their own works. Ironically, the relatively trivial additions which sufficed to establish the publisher’s copyright in their republished collection of non-copyright government materials (such as legislation and judgments) could be relied upon to strengthen the publisher’s dominance in the market and hinder efficient and competitive distribution of PSI. Although the substantive contents of the publishers’ legal databases of federal legislation and judgments were not protected by copyright, the publishers relied on the

governments to the CLRC review of Crown copyright in 2004-05. The New South Wales Attorney General's Department observed that the absence of Crown copyright may result in governments paying more than once for the production of intellectual property:

[T]he absence of Crown copyright could lead to the public paying for the production of information by government and then its secondary sale by private vendors.⁹⁶

The United States' experience has led to reappraisal of the appropriateness of the blanket "no copyright" rule that applies to works produced by federal government employees, particularly where such works are subsequently included in proprietary products, often without any indication of the source, currency or accuracy of the PSI and absent its accompanying metadata or an explanation of what the material represents.⁹⁷ Even if there is no copyright in PSI and the government's policy favours open access and reuse, barriers such as the expense of obtaining the material, making copies of it and converting it into reusable formats may mean that only a small proportion of potential reusers will have the capital or expertise to convert the raw (non-copyright) material obtained from the government into new, value-added copyright works. Increasingly, it is apparent that restrictions on access to and reuse of PSI are due less to the subsistence of copyright in government materials than to the failure to adopt a clear policy position on access and reuse and the lack of mechanisms (ranging from licensing to use of interoperable file formats) to enable open access and reuse.

Waiver of copyright in legislation and judgments

It is widely acknowledged by Australian governments that open access to legal materials is fundamental in a democracy and most jurisdictions aim to ensure that they can be freely and readily accessed.⁹⁸ As observed in 1981 by the (then) Chief Justice of New South Wales, Sir Lawrence Street:

In a free and democratic society, the law and all its documentation, both statutory and interpretive, that is to say both in Acts of Parliament and in judgments, must be *publici juris* – available to all to be studied, to be used and to be quoted as a matter of public entitlement.⁹⁹

To ensure rights to access and use legal materials are recognized, governments in Australia, the United Kingdom and Canada have declared general licences to reproduce legislation and judgments (generally referred to as waivers of copyright).

page numbers they included when formatting the material to exercise exclusive rights and prevent other users from publishing versions of the material that included those page numbers.

⁹⁶ See Copyright Law Review Committee, *Crown Copyright*, 2005 at p 81, para 5.66. A similar concern was expressed by the federal government's Department of Finance and Administration.

⁹⁷ See B W Mitchell, *Works of the United States Government: Time to Consider Copyright Protection?*, LLM Thesis, George Washington University School of Law, Washington DC, 2002, available at linkinghub.elsevier.com/retrieve/pii/S1352023704000279.

⁹⁸ See Australian Prices Surveillance Authority, *Inquiry into the publications pricing policy of the Australian Government Publishing Service (AGPS)*, December 1992, at p 92: "The Authority is committed to unhindered public access to any legislation passed by Parliament. Legislation establishes rights and obligations of citizens.... There should be no restriction on the dissemination of such information."

⁹⁹ *Reg. v Grecium-King*, unrep., 1 October 1981, quoted in the Australian Law Journal's editorial, *The Crown and copyright in publicly delivered judgments*, (1982) 56 ALJ 326, 327, cited in J Bannister, *Open access to legal sources in Australasia: Current Debate on Crown Copyright and the Case of the Anthropomorphic Postbox*, (1996) 3, *Journal of Information, Law and Technology (JILT)*, available at http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1996_3/bannister/; see also CLRC, *Crown Copyright*, 2005, para 4.44 at pp 45-46.

The Northern Territory and New South Wales governments, acting on the basis of their prerogative rights, have expressly declared, in notices published in the Government Gazette, that they will not enforce their copyright in legislative materials and judgments (see **Appendix C**). By waiving their copyright interests these governments seek to clarify and strengthen the public's rights, while reserving residual control over the use of the materials.¹⁰⁰

NSW first waived copyright in legislation in 1993,¹⁰¹ followed by a corresponding waiver of copyright in decisions of NSW courts and tribunals in 1995.¹⁰² The Gazette notices recognize the desirability of open access to legislation and judgments and authorise any publisher to "publish and otherwise deal with" any legislative material,¹⁰³ subject to certain conditions including that any publication must not indicate directly or indirectly that it is an official version of the material and that material should be accurately reproduced in proper context and be of an appropriate standard.¹⁰⁴ The notice states that NSW will not enforce copyright in legislative material to the extent that it is published or otherwise dealt with in accordance with the authorisation. For this purpose, the authorisation has effect as a licence binding on the State.

In Canada, under the *Reproduction of Federal Law Order* (1997),¹⁰⁵ Canadian federal legislation and judgments can be freely reproduced, provided that "due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as the official version".¹⁰⁶

The position in the United Kingdom was explained in 1996 by Gordon Robbie (then) Head of Copyright in Her Majesty's Stationery Office (HMSO):

Crown copyright has for years been waived in respect of printed reproduction of statutory material in any value added context, which effectively gives law publishers free and unrestricted access to Acts and [Statutory Instruments] SIs for use in their wide range of textbooks and reference material, thus enabling them to keep the prices of their excellent publications at a readily affordable level, for the benefit of students, the law profession and

¹⁰⁰ See CLRC, *Crown Copyright*, 2005 at pp 58-59

¹⁰¹ NSW Government Gazette, 27 August 1993, No. 94 of 1993, at p 5115; this was replaced by another Notice in 1996: The Hon JW Shaw QC, MLC, Attorney-General, 'Notice: Copyright in legislation and other material' *NSW Government Gazette* No. 110 (27 September 1996) p. 6611, which was in turn varied in 2001 (Gazette No 20 of 19 January 2001), available at http://www.legislation.nsw.gov.au/copyleg_2001.pdf.

¹⁰² The Hon John Hannaford MLC, Attorney General, 'Notice: Copyright in judicial decisions' *NSW Government Gazette* No.23 (3 March 1995) p. 1087

¹⁰³ "Legislative material" is defined in the instrument to mean Acts of the Parliament of New South Wales and Bills introduced into Parliament, statutory rules, environmental planning instruments, proclamations or orders made under an Act of the Parliament of New South Wales and published in the Government Gazette, admission rules made under the *Legal Profession Act* 1987, any other instruments that are required under any law to be made, approved or confirmed by the Governor or a Minister of State for New South Wales and that are published in the Government Gazette, and official explanatory notes and memoranda published in connection with any of these.

¹⁰⁴ The Honourable J.W. Shaw QC, MLC, Attorney-General for New South Wales on behalf of the State of New South Wales, Notice: Copyright in legislation and other materials, published in Gazette No 110 of 27 September 1996 and varied in Gazette No 20 of 19 January 2001 (to replace the instrument published in Government Gazette No 94 of 27 August 1993 in relation to copyright) http://www.legislation.nsw.gov.au/copyleg_2001.pdf.

¹⁰⁵ SI/97-5, 131 Can. Gaz. (PT II) 444 (8 January 1997); See <http://www.publications.gc.ca/helpAndInfo/cc-dac/reproduction-e.html>.

¹⁰⁶ See CLRC, *Crown Copyright*, 2005, at para 3.49 at p 29.

the general public; ... this waiver has been extended in the same terms to reproduction of Acts and SIs in all other formats.¹⁰⁷

Use of standardized open content licensing by Australian government agencies

Where – as in Australia – governments own copyright in a very extensive range of materials, they are in the position of being able to manage their copyright interests through open content licensing strategies (such as Creative Commons licences), to create what amounts to a “commons” of PSI that can be readily accessed, used and reused by individuals, not-for-profit organisations and businesses. As government materials are increasingly distributed online in digital form, governments can contribute to the public domain by applying simple, automated, computer-readable licences which grant extensive rights to users to access, use, reuse and share the licensed materials. By adopting a copyright-based open content licensing approach to build the public domain of PSI, government can ensure that its open access policy objectives are achieved.

To ensure that diverse items of PSI can be used and remixed, key Australian government departments – Geoscience Australia (GA), the Australian Bureau of Statistics (ABS) and the Bureau of Meteorology (BoM) – have introduced Creative Commons licensing for their information products, whether distributed in hard copy (in print form), on DVD or by direct download from a website.

The approach of making PSI available under CC or other open content licences which enable government copyright material to be freely licensed, without the need for further permissions or compensation is also being implemented in the United Kingdom¹⁰⁸ and New Zealand.¹⁰⁹ As leading Canadian commentator Professor Michael Geist of the University of Ottawa comments,

This approach provides an efficient means of freeing up government works without the need for legislative change.¹¹⁰

Creative Commons (CC) licences¹¹¹

¹⁰⁷ G Robbie, *Crown Copyright - Bête Noire or White Knight?*, (1996) 2 *Journal of Information Law and Technology* (JILT) http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1996_2/special/robbie (accessed 9 November 2009).

¹⁰⁸ R Allan, *Power of Information Taskforce Report*, February 2009, at <http://poit.cabinetoffice.gov.uk/poit/category/final-introduction/>

¹⁰⁹ On 1 July 2009, the Ministry for the Environment (Manatū Mō Te Taiao) announced that it was making two important environmental databases - the Land Cover Database (LCD) and Land Environments New Zealand (LENZ) classification - available online, for free and licensed under an unrestricted Creative Commons licence (CC-BY). See Land Information New Zealand in consultation with the State Services Commission and others, *Understanding our Geographic Information Landscape: A New Zealand Geospatial Strategy*, (January 2007) available at www.geospatial.govt.nz/assets/Geospatial-Strategy/nz-geospatial-strategy-2007.pdf. The draft *New Zealand Open Access and Licensing Framework* (NZGOAL) observed that there are at least three broad categories of licensing in place across New Zealand government departments and that these “various and inconsistent licensing practices” were a cause of “confusion, uncertainty and criticism” by members of the public: (New Zealand Government, State Services Commission, *Draft New Zealand Government Open Access and Licensing Framework* (NZGOAL), August 2009, see especially p7, available at <http://www.e.govt.nz/policy/information-data/nzgoalframework.html>).

¹¹⁰ Canada Dragging its Feet on Open Data Initiatives, Michael Geist, 14 December 2009 at <http://www.michaelgeist.ca/content/view/4617/135/>.

The Creative Commons (CC) project was established in the United States in 2001 with the aim of using open licensing to create a commons of copyright material that could be readily used by others without fear of infringement. It developed a suite of open content licences based on a “some rights reserved” copyright model rather than the traditional “all rights reserved” model. The Creative Commons Australia (CCau) office has translated (“ported”) the CC suite of licences to operate under Australian copyright law.

CC licences are standardized copyright licences which grant permission to use copyright works, in accordance with the particular standard set of conditions selected by the licensor. Under the CC approach, the copyright owner retains ownership of their work but grants permission to users to reproduce the work, distribute it, display or perform it publicly, make digital public performances of it (e.g. webcasting), and make verbatim copies of the work in a different format.

A recipient of a CC-licensed work is not at liberty to use it completely without restriction, but must respect the rights that have been reserved (or kept) by the copyright owner. In practice, the user of a CC-licensed work will be required to observe conditions that range from simply acknowledging the author of the work to not using it for commercial purposes and not making any derivative works. Each of the CC licences has an attribution condition (BY) which requires that the author or any other named party is attributed in the form specified in the licence, that the work is not falsely attributed to another author and that the work is not altered so as to prejudice the author’s reputation. The licensor may, in addition, choose to license the work under one or more of the following conditions:

- Non Commercial (NC) – the work may only be used for non commercial purposes;
- No Derivatives (ND) – only exact copies of the work can be copied, shared or used; derivative works based on the original work (e.g. adaptations or mash-ups) are not permitted;
- Share Alike (SA) – users may create and distribute derivative works, but derivative works should only be distributed under licence terms identical to those that apply to the original work (this term ensures that the material remains ‘open’).

The standard sets of licensing conditions can be combined to offer a range of six licences.¹¹² The only conditions which cannot be used in the same licence are No Derivatives (ND) and Share Alike (SA) terms as they are incompatible with each other.

Each of the CC licences is expressed in three ways: (1) easy-to-recognise CC symbols and icons, (2) the “lawyer-readable” CC Legal Code and (3) machine readable RDF code.

The Creative Commons Attribution licence (CC-BY) is the most “open” of the CC licences and will often be the licence selected by government agencies that are seeking to make their PSI openly available for access and use by the Australian public with minimal restrictions. Although, theoretically, any of the CC licences could be applied to PSI, in practice the CC-BY licence is the licence that has been most commonly used by government agencies. It was the licence adopted by GA, the ABS and the BoM (see descriptions below).

¹¹¹ See generally, Anne Fitzgerald, Neale Hooper and Brian Fitzgerald, “Creative Commons and Government” in BF Fitzgerald (ed) *Access to Public Sector Information: Law, Technology & Policy* (forthcoming, Sydney University Press, 2009).

¹¹² These are: Creative Commons Attribution licence (CC-BY); Creative Commons Attribution Non Commercial licence (CC-BY-NC); Creative Commons Attribution Share Alike licence (CC-BY-SA); Creative Commons Attribution Non Commercial Share Alike licence (CC-BY-NC-SA); Creative Commons Attribution No Derivatives licence (CC-BY-ND); and Creative Commons Attribution Non Commercial No Derivatives licence (CC-BY-NC-ND).

If more restrictive CC licences are applied to PSI, the terms included will usually comprise the Non Commercial term (CC-BY-NC) and/or the No Derivatives term (CC-BY-ND or CC-BY-NC-ND). The No Derivatives term, in particular, may be used to ensure that the material released under CC is distributed only in its original and complete form. The Share Alike term is less likely to be relevant for PSI because it imposes an additional obligation on citizen-users that any works incorporating the PSI must be licensed under the same terms, which is not ideal in promoting diverse use of PSI and spontaneity in innovation.

Creative Commons and Government¹¹³

Queensland: Government Information Licensing Framework (GILF) Project

Perhaps the single most important initiative in leading the way towards the adoption of CC licensing in the government sector in Australia has been the Government Information Licensing Framework Project (GILF project).¹¹⁴ It grew out of a project initiated in 2004 by the Queensland Spatial Information Council (QSIC)¹¹⁵ to address problems caused by the prevailing legal arrangements and practices for data access and sharing, both within government and between government and the private sector. Since 2007, GILF has continued under the umbrella of the Cooperative Research Centre for Spatial Information (CRC-SI), as a collaboration between QUT's Law Faculty and Queensland Government's Office of Economic and Statistical Research and the Department of Natural Resources and Water (now Department of Environment and Resource Management).¹¹⁶

The project set out with the objective of developing a licensing model for PSI, with standardised information licensing arrangements which could be recommended for use with all kinds of government copyright materials to enable enhanced, seamless, on-demand access to PSI.¹¹⁷ Importantly, the GILF project did not directly address information policy.

¹¹³ See generally, Anne Fitzgerald, Neale Hooper and Brian Fitzgerald, "Creative Commons and Government" in BF Fitzgerald (ed) *Access to Public Sector Information: Law, Technology & Policy* (forthcoming, Sydney University Press, 2009).

¹¹⁴ Initial consideration by the authors, Anne Fitzgerald and Neale Hooper (then lawyers in the Crown Law Office, Queensland Department of Justice and Attorney General), of the applicability of CC licences to government copyright materials was in response to a 2004 request from Tim Barker, (then) Assistant Government Statistician and Director, Queensland Spatial Information Office, Office of Economic and Statistical Research (OESR), Queensland Treasury, Graham McColm, Principal Advisor, Natural Resources and Water, Queensland and Rob Bischoff. For some time, these officers had been investigating ways of improving the flow of spatial information within the Queensland Government, and between the State and other levels of government and the private sector. They had recently viewed a video presentation by Professor Lawrence Lessig delivered at an event at QUT in 2004 to mark the launch of Creative Commons in Australia and immediately grasped the potential for CC licences to be applied towards achieving their objective of reducing impediments to the flow of spatial information. Other members of the team in the OESR that progressed the Government Information Licensing Framework (GILF) project from 2005 included Jenny Bopp, Brendan Cosman, Cathy McGreevy, and Trish Santin-Dore. For a chronological account of developments, see the GILF project website at <http://www.gilf.gov.au>

¹¹⁵ Government Information Licensing Framework (GILF) Project website, <http://www.gilf.gov.au>; see also the Queensland Spatial Information Office (QSIC) website for further background information about GILF, <http://www.qsic.qld.gov.au/QSIC/QSIC.nsf/CPByUNID/6C31063F945CD93B4A257096000CBA1A> accessed on 14 November 2009.

¹¹⁶ See A Fitzgerald, *Open Access Policies, Practices and Licensing: A review of the literature in Australia and selected jurisdictions*, QUT, July 2009, available at <http://www.aupsi.org/news/CompiledLiteratureReviewnowavailableinhardcopy.jsp> accessed 14 November 2009.

¹¹⁷ Queensland Government, Queensland Spatial Information Council, *Government Information and Open Content Licensing: An access and use strategy* (Government Information Licensing Framework Project Stage 2 Report), October 2006, available at

However, by focusing attention on removing impediments to accessing PSI caused by inadequate or inappropriate licensing practices, GILF's findings and recommendations about the use of CC licences on PSI directly influenced the reviews of information access policies by the federal government,¹¹⁸ other State governments,¹¹⁹ and the New Zealand Government.¹²⁰ At the federal government level, the GILF project served as a catalyst for renewed effort on the development of a national information framework. It was reviewed and supported by the Cross-Jurisdictional Chief Information Officers Committee (CJCIOC) and was endorsed by the Ministerial Online and Communications Council (OCC) in 2007.

The report, *Government Information and Open Content Licensing: An Access and Use Strategy*¹²¹ ("the Stage 2 report"), published in October 2006, described the work undertaken during Stage 2 of the GILF project and set out its findings and recommendations.¹²² Research during Stage 2 confirmed the Stage 1 findings that the regime regulating the collection and release of government information had developed in an ad hoc manner, resulting in a fragmented, inefficient and confusing system of contractual and statutory regulation of information access and reuse.¹²³ A review of licensing practices and models in several Queensland Government agencies found there were significant problems with the current approach, including a lack of uniformity and clarity in licensing practices.¹²⁴

Stage 2 of the GILF project identified a need for clear and succinct guiding principles for access, reuse and pricing and concluded that CC licences were the most appropriate for

<http://www.qsic.qld.gov.au/qsic/QSIC.nsf/CPByUNID/BFDC06236FADB6814A25727B0013C7EE> accessed 14 November 2009. See also <http://www.gilf.gov.au>

¹¹⁸ See Siu-Ming Tam, Australian Bureau of Statistics, *Informing the Nation – Open Access to Statistical Information in Australia*, Siu-Ming Tam, paper presented to the United Nations Economic Commission for Europe Work Session on the Communication and Dissemination of Statistics, Poland, May 2009, at para 37, available at <http://www.unece.org/stats/documents/ece/ces/ge.45/2009/wp.11.e.pdf>; and Venturous Australia – *Building Strength in Innovation, Review of the National Innovation System*, 2008, available at <http://www.innovation.gov.au/innovationreview/Pages/home.aspx> accessed on 11 June 2009.

¹¹⁹ Victorian Parliament, Economic Development and Infrastructure Committee, *Inquiry into Improving Access to Victorian Public Sector Information and Data*, June 2009, available at http://www.parliament.vic.gov.au/edic/inquiries/access_to_PSI/final_report.html. In December 2008 the South Australian Cabinet decided to endorse implementation of the GILF at an across-government level to its public sector information.

¹²⁰ On 1 July 2009, the Ministry for the Environment (Manatū Mō Te Taiao) announced that it was making two important environmental databases - the Land Cover Database (LCD) and Land Environments New Zealand (LENZ) classification - available online, for free and licensed under an unrestricted Creative Commons licence (CC BY). See Land Information New Zealand in consultation with the State Services Commission and others, *Understanding our Geographic Information Landscape: A New Zealand Geospatial Strategy*, (January 2007) available at www.geospatial.govt.nz/assets/Geospatial-Strategy/nz-geospatial-strategy-2007.pdf.

¹²¹ Queensland Government, Queensland Spatial Information Council, *Government Information and Open Content Licensing: An access and use strategy* (Government Information Licensing Framework Project Stage 2 Report), October 2006, available at <http://www.qsic.qld.gov.au/qsic/QSIC.nsf/CPByUNID/BFDC06236FADB6814A25727B0013C7EE> accessed 22 May 2009. See also <http://www.gilf.gov.au>

¹²² Queensland Spatial Information Office, Office of Economic and Statistical Research, Queensland Treasury, *Government Information and Open Content Licensing: An Access and Use Strategy* (Government Information Licensing Framework Project Stage 2 Report), October 2006, available at <http://www.qsic.qld.gov.au/qsic/QSIC.nsf/CPByUNID/BFDC06236FADB6814A25727B0013C7EE>. See also <http://www.gilf.gov.au>

¹²³ *Ibid*, p 36.

¹²⁴ *Government Information and Open Content Licensing: An Access and Use Strategy* (Government Information Licensing Framework Project Stage 2 Report), paras 3.11 and 12 at pp 3 and 4, available at <http://www.qsic.qld.gov.au/qsic/QSIC.nsf/CPByUNID/BFDC06236FADB6814A25727B0013C7EE>. See also <http://www.gilf.gov.au>

government information. The Stage 2 report supported the introduction of a simplified system of open content licensing for the majority of the information made publicly available by the Queensland government. It recommended:

- 2.1 That the Queensland Government establish a policy position that, while ensuring that confidential, security classified and private information collected and held by government continues to be appropriately protected, enables greater use and re use of other publicly available government data and facilitates data sharing arrangements.
- 2.2 That the Creative Commons open content licensing model be adopted by the Queensland Government to enable greater use of publicly available government data and to support data sharing arrangements.
- 2.3 That QSIC and the Office of Economic and Statistical Research continue to work closely with the Department of Justice and Attorney-General to ensure that any privacy provisions developed also support new data use, re-use and sharing policies.
- 2.4 That the Whole-of-Government Information Licensing Project Stage 3: Draft Project Plan for the next phase of this project be endorsed.
- 2.5 That the Draft Government Information Licensing Framework toolkit, which incorporates the six iCommons (Creative Commons Australia) licences, be endorsed for use in pilot projects proposed for Stage 3, which involves Information Queensland, the Department of Natural Resources and Water, the Environmental Protection Agency, the Department of Primary Industries and Fisheries, the Office of Economic and Statistical Research of Queensland Treasury and the Queensland Spatial Information Council, enabling testing of the CC licences for multi-agency and whole of-Government arrangements.
- 2.6 That an application be made through the ICT Innovation Fund and Microsoft Program Committee in the Department of Public Works for further funding, to enable the technical development of a Government Information Licensing Management System, consistent with the Draft Government Information Licensing Framework toolkit.
- 2.7 That a limited number of standard templates be developed to support information licensing transactions relating to confidential or private information or information with commercial value and for which the CC model is not appropriate.¹²⁵

Government agencies, in performing their portfolio responsibilities, are subject to various statutory obligations and duties which may extend to their information management and licensing practices. Any licensing practices or arrangements implemented by an agency must comply with all such statutory duties and obligations, as well as any policy considerations. The GILF project methodology draws attention to the need to identify and comply with applicable legislative duties and government policy constraints. Where statutory obligations must be satisfied, a government agency may still be able to release PSI

¹²⁵ Ibid, pp 1-2.

for access and reuse, but on a more limited basis than provided for in any of the CC licences. So that agencies are able to make their PSI available for access and use, while still complying with their statutory obligations, the GILF project proceeded (in accordance with recommendation 2.7) to develop a Restrictive Licence template containing standardised clauses intended for use where the CC licences are not appropriate (such as where access and use of PSI is restricted on grounds of privacy, confidentiality or statutory constraints).¹²⁶ The GILF project envisaged that the six CC licences and the clauses of the Restrictive Licence would cover the vast majority of PSI. An interactive, web-based licensing options tool has been developed to assist government agency officers and others identify which of the six Creative Commons licences or Restrictive Licence template clauses should be used for a particular information product or materials.¹²⁷

Australian Government

In the last 2 years there have been significant developments and initiatives, especially at the federal government level, which point strongly to increasing government policy support for enhanced access to and reuse of PSI. Four of these developments will be outlined before considering several specific federal government agency initiatives involving the operational implementation of the CC licences to facilitate the outcome of enhanced access to and reuse of PSI.

- (1) The 2008 report on the National Innovation System, *Venturous Australia. Building strength in innovation* (“the Cutler Report”) contains a strong recommendation on the use of Creative Commons (CC) licences for public sector information. Recommendation 7.8 states that: “Australian governments should adopt international standards of open publishing as far as possible. Material released for public information by Australian governments should be released under a creative commons licence.”¹²⁸ The Cutler Report itself is released under a CC licence.
- (2) On 12 May 2009, the federal government, as part of its Budget process, released a White Paper entitled “*Powering Ideas: An Innovation Agenda for the 21st Century*”¹²⁹ in response to the *Venturous Australia Green Paper*.¹³⁰ On the specific issues of access and reuse of PSI the White paper indicates broad agreement with the Green Paper’s recommendations and highlights the federal government’s intention to build on the work already being undertaken by three of its key federal agencies:¹³¹

¹²⁶ The New Zealand Government’s draft New Zealand Government Open Access and Licensing Framework (NZGOAL) is taking a similar approach, with a combination of six CC licences and a Restrictive Licence template. See: New Zealand Government, State Services Commission, *Draft New Zealand Government Open Access and Licensing Framework (NZGOAL)*, August 2009, at pp 11, 22, available at <http://www.e.govt.nz/policy/information-data/nzgoalframework.html>.

¹²⁷ See <http://www.gilf.gov.au>.

¹²⁸ See www.innovation.gov.au/innovationreview/Documents/NIS-review-web.pdf, Recommendation 7.8 at pg 95.

¹²⁹ Australian Government, Department of Innovation, Industry, Science and Research, *Powering Ideas: An Innovation Agenda for the 21st Century*, 12 May 2009, <http://www.innovation.gov.au/innovationreview/Pages/home.aspx> accessed on 11 June 2009.

¹³⁰ Cutler & Company, *Venturous Australia – Building Strength in Innovation*, Review of the National Innovation System, Report for the Australian Government Department of Innovation, Industry, Science and Research, September 2008, licensed under a Creative Commons Attribution-Non Commercial-No Derivative Works 2.5 Australia Licence, available at <http://www.innovation.gov.au/innovationreview/Pages/home.aspx> accessed on 11 June 2009.

¹³¹ *Ibid*, Chapter 6, “Public Sector Innovation”, at p 53, available at <http://www.innovation.gov.au/innovationreview/Pages/home.aspx>.

“Commonwealth agencies such as the Australian Bureau of Statistics, the Bureau of Meteorology, and Geosciences Australia already gather, analyse, and disseminate information in the public interest. The Australian Government wants to build on this foundation.”

- (3) On 14 July 2009, the Department of Broadband, Communications and the Digital Economy released the report, *Australia’s Digital Economy: Future Directions* (the Digital Economy report).¹³² The Digital Economy report expressly recognised “the digital economy and innovation benefits generated by open access to PSI, subject to issues such as privacy, national security and confidentiality”.¹³³ Enabling open access to PSI is seen not only as a way of promoting public sector innovation but also as a means by which government can facilitate private sector innovation.¹³⁴ Consistent with the policy framework set out in the Digital Economy report, the report itself is published under a Creative Commons Attribution-Non-Commercial-No Derivative Works (CC BY-NC-ND) 2.5 licence.

In this environment of increasing federal government support for enhanced access to and reuse of PSI it is appropriate, to consider, in turn, the operational steps taken by three agencies: Geoscience Australia (GA), the Australian Bureau of Statistics (ABS) and the Bureau of Meteorology (BoM).

(a) Geoscience Australia (GA)

GA has been an early adopter of CC licensing, being the first Australian government agency to implement CC licences on its datasets in October 2008.¹³⁵ Earlier that year, in response to requests from clients for easier access GA’s information products and clearer statements of the terms of use and reuse, GA undertook an analysis and internal trial of CC licences on a representative sample of its datasets to ascertain whether open content licensing would meet the organisation’s desired operational outcomes.¹³⁶ Following successful completion of the CC licensing trial, GA announced that it would use CC licences on its Moderate Resolution Imaging Spectroradiometer (MODIS),¹³⁷ the Australian Atlas of Mineral Resources,¹³⁸ the

¹³² See <http://www.dbcde.gov.au/?a=117295>.

¹³³ *Australia’s Digital Economy: Future Directions*, Department of Broadband, Communications and the Digital Economy, July 2009 at p 12, available at <http://www.dbcde.gov.au/?a=117295>.

¹³⁴ *Ibid*, p 11.

¹³⁵ See entry “New product licence improves customer access” at <http://www.ga.gov.au/news/archive/2008/dec>. GA’s adoption of CC licensing pre-dated the implementation of CC licences by the Australian Bureau of Statistics by two months.

¹³⁶ Outlined in the presentation by Jeff Kingwell, Head, Project Management Office, Information Services Branch, Geoscience Australia at the Open Access and Research Conference, hosted by the Open Access to Knowledge Project (OAK Law), in Brisbane in September 2008. See <http://www.oaklaw.qut.edu.au/node/61> for the powerpoint slides. The analysis included obtaining legal advice on application of CC licences.

¹³⁷ The GA website explains the strategic importance of the satellite-based MODIS to global change modelling: Moderate Resolution Imaging Spectroradiometer (MODIS) is the key instrument aboard the satellites Terra (EOS AM-1), launched on 18 December 1999, and Aqua (EOS PM-1), launched on 4 May 2002. MODIS views almost the entire surface of the Earth every day, acquiring data in 36 spectral bands over a 2330 km swath. MODIS data will improve the understanding of global dynamics and processes occurring on the land, in the oceans, and in the lower atmosphere. MODIS is playing a vital role in the development of validated, global, interactive Earth system models able to predict global change accurately enough to assist policy makers in making sound decisions concerning the protection of our environment.

¹³⁸ See the Atlas of Mineral Resources, Mines and Processing Centres (the “Australian Mines Atlas”) at <http://www.australianminesatlas.gov.au>.

GeoMAP 250K dataset, digitised Bureau of Mineral Resources records and educational material about tsunami. In announcing its decision to apply CC licences to key mapping and other information products, GA emphasised that the use of the “easy to understand, royalty-free, modular, off the shelf [CC] licences” would make it easier for visitors to GA’s website to use and access information. Further, adoption of CC licences by other organisations would make it easier for users to merge spatial and geoscientific data from different sources. From 17 November 2009, GA began licensing all the material on its website, and the OzCoasts website¹³⁹ which it hosts, under the Creative Commons Attribution 2.5 Australia licence.¹⁴⁰

(b) Australian Bureau of Statistics (ABS)

In November 2005, the ABS abandoned the restrictive licensing practices it had previously applied in licensing its datasets, which had involved charging fees for access to data and the restriction or prohibition of commercial downstream use by the licensee and/or others. Since then the ABS has eliminated virtually all charges for data and restrictions on downstream use of their data (that is, both access and reuse), whether commercial or otherwise. Following the lifting of fees, the number of hits and downloads of ABS publications increased dramatically; downloads of electronic publications increased from 91,000 in 2000/01 to more than 650,000 in 2005/06, while the number of page views doubled from the end of 2005 to the end of 2007.¹⁴¹

However, even after the relaxation of licensing practices in 2005, any significant redistribution of information obtained from the ABS website still had to be licensed by the ABS. Although the ABS allowed broad use of its website content, often at no cost, the licensing process itself (the requirement to ask permission first) was seen as potentially acting as a barrier to those wishing to reuse significant amounts of data. Consequently, after discussions with the open access community and relevant government departments, in mid 2008 ABS decided to make information on its website freely and openly available for access and reuse. This decision was consistent with ABS’s philosophy of access to information, as well as Recommendation 7.8 of the *Venturous Australia* Green Paper.¹⁴² On 18-19 December 2008, the ABS implemented CC licensing on its website and began making an extensive range of its statistical information products available online under a Creative Commons Attribution 2.5 Australia licence. Implementation involved adding to the footer on every page of the ABS website an updated Copyright Statement, Disclaimer notice, CC symbols, information on how to attribute material sourced from the ABS website and a hyperlink to the CC licence. In effect, ABS makes its website material openly available, on condition that users acknowledge ABS as the source of the data.¹⁴³

¹³⁹ See <http://www.ozcoasts.org.au/>.

¹⁴⁰ Note that some datasets such as MapConnect and GADDS could not be made available immediately under CC licences because the OSDM registration is embedded in these products.

¹⁴¹ Siu-Ming Tam, Australian Bureau of Statistics, *Informing the Nation – Open Access to Statistical Information in Australia*, paper presented to the United Nations Economic Commission for Europe (UNECE) Work Session on the Communication and Dissemination of Statistics, Poland, May 2009, at paras 27 – 29 and 31, available at <http://www.unece.org/stats/documents/ece/ces/ge.45/2009/wp.11.e.pdf>.

¹⁴² *Venturous Australia - Building Strength in Innovation*, report on the Review of the National Innovation System, Cutler & Company for the Australian Government Department of Innovation, Industry, Science and Research, 29 August 2008, available at <http://www.innovation.gov.au/innovationreview/Pages/home.aspx>.

¹⁴³ Note that the ABS does not use CC licences on jointly authored publications for which it does not own copyright. Such publications carry their own copyright statement.

(c) Bureau of Meteorology (BoM)

The *Water Act 2007* (Cth) expanded the role of BoM to include management of water information, with the establishment of the Australian Water Resources Information System (AWRIS).¹⁴⁴ BoM is empowered to collect water information from a range of sources in order to publish a National Water Account and periodic reports on water resource use and availability. The National Water Account will be an integrated, national water monitoring and data collection service that will aggregate hundreds of other government departments' and agencies' information into the one source.¹⁴⁵ It is a requirement under the *Water Act 2007* that BoM collect and disseminate water information to the public in easily accessed ways.¹⁴⁶ A major outcome of BoM's work will be increased transparency, confidence and understanding of water information on a national level. In seeking to establish enhanced access to and reuse of water information, BoM is currently working through a variety of issues with the numerous parties required to provide water information to it under the *Water Act 2007*.¹⁴⁷

BoM, in carrying out its new role of water information management, supports the use of the CC licences, and the CC BY licence in particular, to promote the flow of information within the new Australian Water Resource Information System (AWRIS).¹⁴⁸ BoM has expressly recommended use of the CC BY licence with the following statement on its website:

The Bureau's policy is to make this information available for everyone's benefit so that it can be widely reused. To ensure wide reuse of water information — and that the data suppliers copyright is protected — the Bureau of Meteorology recommends that data suppliers use the Creative Commons Attribution Australia 2.5 Licence (the 'Creative Commons Licence') to cover all data that they provide under the Water Regulations 2008.

The Creative Commons Licence gives the community permission in advance to use water information, without having to contact the supplier directly. The Creative Commons Licence allows anyone to use the water information in a manner convenient to them, provided that they acknowledge the original data supplier. The original data supplier will generally be the person or organisation that gave the water information to the Bureau.¹⁴⁹

As part of its strategy to ensure the smooth provision of water information within AWRIS, BoM has actively sought the support of the States and Territories for adoption of a CC licensing framework for copyright protected water datasets and

¹⁴⁴ See: <http://www.bom.gov.au/waterjobs/awris.htm>.

¹⁴⁵ See: <http://www.creativecommons.org.au/node/269>.

¹⁴⁶ See, for example, *Water Act 2007* (Cth) s122 and s123; see further the Bureau of Meteorology website under the heading "Publishing Water Information" at <http://www.bom.gov.au/water/regulations/cc/dissemination.shtml>.

¹⁴⁷ The *Water Regulations 2008* specifically name approximately 260 parties who are required to give BoM specified water information that is in their possession, custody or control.

¹⁴⁸ See: <http://www.bom.gov.au/waterjobs/awris.htm>.

¹⁴⁹ See: <http://www.bom.gov.au/water/regulations/cc/dissemination.shtml>; see further:

<http://www.bom.gov.au/water/regulations/cc/ccllicence.shtml>,

<http://www.bom.gov.au/water/regulations/cc/faq.shtml>, <http://www.creativecommons.org.au/node/269>. The BoM Water Program also endorses the Queensland Government Department of Environment and Resource Management's Government Information licensing Framework (GILF) for Water Recommended Practice standard, which recommends CC as an information management tool in the publishing of water data: see <http://www.creativecommons.org.au/node/269>.

databases.¹⁵⁰ BoM's water data endeavour will be the largest single licensing of government data in Australia since the ABS released its census data under a CC BY licence.¹⁵¹ Moreover, AWRIS will make the process of releasing and marking data under the relevant CC licence an automated process.¹⁵²

Advising users about permitted uses of material

An attraction of open content licences such as the CC licences is that they enable users to be clearly informed – upon first obtaining access to the licensed material - about what they are permitted to do with it. Unlike the static websites of the web 1.0 era, CC licences can be included not only on the individual pages of a website but also on each of the digital objects or files that are downloaded from the website. This is an important advance on prevailing practice which is for short copyright notices to be displayed, if at all, on government websites but lacking sufficient detail or clarity for users to understand what they are permitted to do with the material accessed on the site.¹⁵³ A survey of 130 New South Wales government websites in mid-2006 found a diversity of licensing approaches and no uniform whole-of-government policy on copyright notices.¹⁵⁴ There was no copyright notice at all on 11% of websites, 8% had a basic one¹⁵⁵ and a further 8% displayed “All rights reserved” statements or stated that there was to be “no reproduction without express permission”, requiring users to obtain written permission to reproduce the content on the website for any purpose.¹⁵⁶ A total of 52% of websites conveyed “either no or few explicit permissions” other than those provided for in the *Copyright Act*.¹⁵⁷

Where a copyright notice is displayed on government websites and other materials, the statement typically addresses what the user cannot do and requires them to seek express permission (sometimes, in writing) to do anything beyond the very circumscribed range of activities which they are permitted to do. A very real advantage of using open content licences drafted along the model found in the CC licence suite is that they expressly tell users what they can do with the licensed material. This advantage of using open content licensing has been noted by the Australian Bureau of Statistics (ABS):

An open licensing framework clarifies the responsibilities and obligations of ABS users in using, sharing and reusing ABS data. This will in turn create an environment which will optimise the flow of ideas and information of social and economic benefit.¹⁵⁸

¹⁵⁰ See

http://www.parliament.vic.gov.au/edic/inquiries/access_to_PSI/submissions/PSI_Sub_17_Bureau_Meteorology.pdf.

¹⁵¹ See: <http://www.creativecommons.org.au/node/269>.

¹⁵² See: <http://www.creativecommons.org.au/node/269>.

¹⁵³ As discussed above where the rights of reuse are clearly indicated, such as through the use of CC licences, the electronic rights management information (ERMI) provisions set out in Division 2A, Subdivision B of the *Copyright Act* 1968 provide legal protection against removal of or interference with the relevant ERMI.

¹⁵⁴ In 2005, the NSW Premier's Department published *Intellectual Property Management Framework for the NSW Public Sector*, which recommends that copyright notices “should also make clear any automatic copyright permission the agency wishes to provide, any restrictions on use of the material, and how to obtain any further copyright permissions”, available at <http://www.premiers.nsw.gov.au/TrainingAndResources/Publications/publications.htm>.

¹⁵⁵ For example, © Copyright – AHO 2002

¹⁵⁶ Catherine Bond, *The State of Licensing: Towards Reuse of NSW Government Information*, Unlocking IP Working Paper, [2006] AIPLRes 43, at <http://www.austlii.edu.au/au/other/AIPLRes/2006/43.html>.

¹⁵⁷ *Ibid*, at para 2.4.2

¹⁵⁸ Siu-Ming Tam, Australian Bureau of Statistics, *Informing the Nation – Open Access to Statistical Information in Australia*, paper presented to the United Nations Economic Commission for Europe (UNECE) Work Session on the

In keeping with the nature and purpose of government copyright, typically, the only restrictions imposed on users (where a CC BY licence is applied to PSI) will be a requirement to maintain the licensing information, to properly attribute the licensor, to not falsely attribute another party as licensor and to distribute accurate copies of the material. The attribution clause can be worded to make it clear that users do not have authority to copy the government's or department's crest or logo and that attribution of the provider of the material is not to be taken as an endorsement by the government agency of the user's activities.

Work is ongoing in the Australian Bureau of Statistics to develop "injector" software to enable CC licences to be added to downloadable files so that users will be alerted to the licensing conditions attaching to files they download and store in their own database.¹⁵⁹

Recommendation 4 - Copyright law and management practices should facilitate complex flows of information within the public sector, between the public sector and non-government parties; and between non-government parties

Identify the different kinds of copyright PSI materials (in terms of how they are created and by whom) and understand how PSI flows within the public sector, between the public sector and non-government parties and among non-government parties.

Review the operation of copyright law and management practices to ensure PSI can flow as seamlessly as possible, consistent with the [government's/department's] open access policy.

In particular, ensure that copyright law and practice does not impede/restrict the flow of materials such as:

- **volunteer community contributions to government consultations, mashups, blogs, etc;**
- **works freely distributed (online) or in hard copy by government agencies;**
- **informational works produced by non-government parties and provided to government under statutory requirements (for example reports on environmental readings, water flows and CO2 emissions);**
- **informational works produced by non-government parties, subsidiary to activities carried out pursuant to the grant of rights/licence by government (for example, schedules of programs produced by holders of broadcasting licences).**

Third party materials submitted to government for administrative purposes (for example, under statutory requirements) - particularly where entered into a public register - should be able to be copied by government and other third parties,

Communication and Dissemination of Statistics, Poland, May 2009, at para 34, available

<http://www.unece.org/stats/documents/ece/ces/ge.45/2009/wp.11.e.pdf>.

¹⁵⁹ Ibid, at para 48.

subject to any restrictions that might be imposed under public records legislation, privacy, other legislation, contracts such as commercial in confidence obligations (subject to marginal cost recovery, and a presumption that open licensing would apply).

Review the operation of the statutory licence in s 183 to ensure that it does not have unintended consequences (eg including copyright science datasets produced and provided to government under international arrangements which require data to be freely and openly accessible for reuse in the scientific community).

Recommendation 5 – Adopt copyright management practices appropriate to the web 2.0 environment

As PSI is increasingly made available online in digital form (eg through websites where files in standard formats can be downloaded), licensing practices should be appropriate to how PSI is accessed, used and reused in the web 2.0 (and beyond) environment.

Statements of users' rights should be clearly provided (along with metadata) on or in association with individual digital objects (files) so that users are able, in most circumstances, to use and reuse PSI without having to specifically request permission to use/reuse.

Statements on government websites where PSI is made available should clearly state users' rights (rather than simply asserting copyright, stating what cannot be done and requiring users to seek permission for many uses) and, as far as possible, be consistent with licensing permissions on individual digital objects (files).

Recommendation 6 – Use simple, standardised, automated licences covering use and reuse of PSI

Government agencies should manage their copyright PSI to enable access, use and reuse by adopting simple, standardised, unmediated, automated licences which provide clear statements of users' permissions.

To ensure licensed PSI can be reused, the licences used should be compatible with similar licences used by other public and private sector parties.

Recommendation 7 – Support and guidance for agencies using open content (public) licences

The use of open content (public) licences, such as the Creative Commons licences, has been recommended in numerous reviews of PSI access and reuse in Australia (*Venturous Australia*, NGISS, EDIC, AWRIS) and overseas (NZ, UK) and several Federal, State and local government agencies have announced an intention to, or have begun, implementing Creative Commons licences on their PSI.

A collaborative engagement should be entered into with Creative Commons Australia to: develop knowledge, and provide information to government agencies, about the operation of the licences; provide feedback about experience of Australian government agencies in applying the licences to PSI; provide input

into future revisions of Creative Commons licences to ensure their appropriateness for PSI; participate in discussions with Creative Commons national organisations in other countries where the licences are being used for PSI; and further develop technologies and systems to enable automation of licensing.

3. REMOVE COPYRIGHT BARRIERS TO ARCHIVAL AND CULTURAL MATERIALS

Guidance on copyright law and practice in digitization strategies

Practical guidance on copyright law and practice should be included in digitization strategies developed by cultural and archival institutions, particularly when materials are to be distributed in digital form and on the internet, so that obstacles to dissemination can be identified and dealt with so as not to have a continuing affect on access and reuse.

To avoid ongoing problems arising from issues such as inability to identify or locate rights owners and uncertainty about what (if any) rights cultural and archival institutions have to digitize and make materials available for distribution, strategies and practices should be developed to ensure that information and permissions are obtained when materials are deposited or acquired. Use of standardized deposit documents (using terms and wording common to the sector) should be supported and facilitated.

“Unpublished” materials, “perpetual” copyright and orphan works

From submissions to the Government 2.0 Task Force and consultations with cultural and archival institutions (galleries, libraries, archives and museums – often referred to as the “GLAM” sector), it is apparent that concern is caused by the difficulty of identifying who is entitled to particular rights (and who can authorise use of a copyright work) and the potential for copyright to endure perpetually in unpublished materials.¹⁶⁰ While it may be difficult to identify who is entitled to exercise rights in published works, the problems are compounded in the case of unpublished materials where the institution holds the physical material (such as letters and diaries) but cannot practicably identify who would be entitled to exercise copyright. Much of this unpublished material is of significant cultural and historic value and the institutions holding it need to be able to use it for purposes including developing, maintaining, exhibiting and promoting their collections. Developments in digital technology and the internet have vastly expanded the avenues available to cultural and archival institutions for making their collections accessible to the community.

Problems arise particularly in relation to the institutions’ rights to digitize and publish historical materials that have not previously been published (in the sense that copies of the items have not been distributed to the public). For most unpublished works – whether they take the form of literary, dramatic or musical works, sound recordings or cinematograph films - copyright endures and the countdown to expiry does not begin until publication or another relevant act occurs. Where the copyright materials have been deposited into or acquired by a cultural or archival institution, unaccompanied by an assignment of copyright or an express licence, and the copyright owner is unknown or untraceable, the works are “orphaned”. Without an assignment of copyright or a licence from the copyright owner, the institution has physical custody of the object/s but lacks explicit authorisation to publish the unpublished work (or to publicly perform, broadcast or market records). The consequence is a conundrum: a quarantined copyright interest, which cannot be exercised by the custodian

¹⁶⁰ See generally, S Ricketson and C Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, Thomson Reuters, at para 6.35

of the tangible object, but without any identifiable person authorised to perform one of the acts which triggers the countdown to expiration of the copyright term.

The problems associated with unpublished materials and orphan works have caused difficulties for custodians of public collections and need to be actively addressed to remove obstacles to the distribution of collection material in digital form online.

Meaning of “publish”

Since publication is an act that triggers the countdown to expiration of the copyright term, it is important to carefully consider the kinds of acts that will amount to first publication.¹⁶¹ Recent judicial consideration of the meaning of “publish” under the *Copyright Act 1968* provides grounds for revisiting the question of when a copyright work can be said to have been “published”.

In *Copyright Agency Ltd v New South Wales* [2007] FCAFC 80 members of the Full Court of the Federal Court (Emmett J, with whom Lindgren and Finkelstein JJ agreed) considered when survey plans could be regarded as being first published. It had been contended for New South Wales that survey plans were first published by the State when, immediately after they were registered, the Registrar-General of Land Titles made copies of the plan available to members of the public, government authorities, local councils and other parties. The Court said that, while those acts did constitute publication of survey plans, they were not the first publication. On the facts of the case, the Court held that the survey plans were published prior to the point of registration by the Land Titles Office. Each plan was held to have been first published when it was provided by the surveyor to the owner of the land for signature, or when it was provided to the local municipal council for a subdivision certificate.¹⁶²

Applying the reasoning of the Full Federal Court in *CAL v NSW*, it is arguable that at least some of the materials held in cultural and collecting institutions may have been published, even though multiple copies of the material have not been distributed to the general public. *CAL v NSW* indicates that the concept of publication – making public that which has not previously been made public in that jurisdiction¹⁶³ – may extend to the handing over of materials to a public authority (including archives, museums etc.) by persons with authority to do so, such that the material is available for inspection or viewing by members of the public. If this is the case, it would go some way to reducing the problem of “perpetual copyright” orphan works for which copyright potentially endures for centuries because there has never been an act of publication.¹⁶⁴

Overcoming the problem of “perpetual” copyright

The problem of “perpetual” copyright in Australia stems largely from the codification and extension of copyright protection in the early 20th century. During the second half of the 19th century, most of the Australian colonies¹⁶⁵ enacted copyright statutes that incorporated definitions and concepts from the British *Copyright Act 1842*. These colonial enactments afforded copyright protection to books, dramatic and musical works, lectures, and works of

¹⁶¹ See the approach taken in the *Copyright Act 1994* (NZ), s 22(3), (4) which uses the concept of “first made available to the public by an authorised act”.

¹⁶² *Copyright Agency Ltd v New South Wales* [2007] FCAFC 80 at [148] per Emmett J.

¹⁶³ See *Avel Pty Ltd v Multicoil Amusements Pty Ltd* (1990) 171 CLR 88 at p 93.

¹⁶⁴ *Copyright Act 1968*, ss 33(3), (5), 34, 180, 181.

¹⁶⁵ Other than Tasmania.

fine art (paintings, drawings, sculpture, engravings and photographs).¹⁶⁶ Under headings that included the word “literary”, these statutes provided copyright protection to “books”, which were defined as meaning “every volume, part or division of a volume, newspaper, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan, separately published”.¹⁶⁷ From the definition of “books” and other provisions in these Acts it seems that statutory copyright protection applied to materials of the kind typically printed and distributed by a publisher or printer. The colonial Acts also required copies of published books to be delivered to the State Library and established a Register of copyright in books; failure to register a book did not affect copyright although proceedings to enforce copyright could not be commenced until the book was entered on the Register.¹⁶⁸

The term of copyright in books under these colonial Acts was seven years from the death of the author or 42 years from the date of first publication of the book, whichever was the longer period. Where a book had not been published at the death of the author, copyright would endure for 42 years from the date of first publication. In the case of posthumous publication, copyright belonged to the owner of the author’s manuscript from which the book was published and the author’s assigns.¹⁶⁹

While the colonial copyright statutes did not expressly afford copyright protection to materials such as letters, diaries and household or business records which would not ordinarily be printed by publishers, it appears to have been accepted by the mid-19th century that, where such materials were collected into volumes printed by publishers, they would also attract copyright: see *Folsom v Marsh* (1841).¹⁷⁰ The nature of rights that existed in unpublished materials is not clear¹⁷¹, although as Ricketson and Creswell explain, as a consequence of cases decided in the 18th century¹⁷²:

¹⁶⁶ See B Atkinson, *The True History of Copyright: The Australian Experience 1905-2005*, Sydney University Press, p 14.

¹⁶⁷ See: South Australia: *Copyright Act 1878*, ss 2 and 13; Victoria: *Copyright Act 1890*, ss 3 and 15; Western Australia: *Copyright Act 1895*, ss 4 and 5.

¹⁶⁸ South Australia: *Copyright Act 1878*, ss 15 – 19, 27; Victoria: *Copyright Act 1890*, ss 17 - 20 and 29; Western Australia: *Copyright Act 1895*, ss 7 – 13.

¹⁶⁹ South Australia: *Copyright Act 1878*, s 13; Victoria: *Copyright Act 1890*, s 15; Western Australia: *Copyright Act 1895*, s 5.

¹⁷⁰ *Folsom v. Marsh*, 9 F.Cas. 342, 6 Hunt Mer. Mag. 175, 2 Story 100, No. 4901, Case No.4,901, 2 Story, 100; 6 Hunt, Mer. Mag. 175 (Circuit Court, D. Massachusetts, Circuit Justice Story, Oct. Term, 1841).

¹⁷¹ For comment on this debate, see B Atkinson, *The True History of Copyright: The Australian Experience 1905-2005*, at pp 31-41, and B F Fitzgerald and B Atkinson, (2008) *Third Party Copyright and Public Information Infrastructure/Registries: How much copyright tax must the public pay?*, in Fitzgerald, Brian F. and Perry, M., Eds. *Knowledge Policy for the 21st Century* (2008), Irwin Law, pp 21 – 22, at footnote 75 (available at <http://eprints.gut.edu.au/13627/>):

In the last 15 years, numerous scholars, including Rose, Feather, Bently and Sherman and recently Deazley, have examined the long-running debate in the United Kingdom over perpetual or common law copyright: J. Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain*(1994) Mansell, London, R. Deazley, *On The Origin of The Right to Copy* (2004) Hart Publishing, Oxford; M. Rose, *Authors and Owners* (1993) Harvard University Press, Cambridge MA; B. Sherman and L Bently, *The Making of Modern Intellectual Property Law* (1999) Cambridge University Press, Cambridge. See also C. Seville, *Literary Copyright Reform in Early Victorian England: the Framing of the 1842 Copyright Act* (1999) Cambridge University Press, Cambridge, and the recent précis of the issues by Atkinson, *The True History of Copyright*, 31-37. In *Donaldson v Beckett* (1774) 98 Eng Rep 257, the House of Lords declared that *Statute of Anne 1709* extinguished so-called common law copyright seemingly putting an end (in law) to the argument for perpetual copyright (at least in relation to published material; unpublished material being dealt with exclusively by statute since the British *Copyright Act 1911* and the Australian *Copyright Act 1912*): for a recent and detailed analysis of the different readings of the judgements, see R. Deazley, *On The Origin of The Right to Copy* (2004) Hart Publishing, Oxford. The famous satiric speech of Lord Macaulay in the House of Commons in debate over the 1842 Copyright Bill destroyed forever (or so it seemed) the continuing campaign for perpetual copyright. In 1905 in

It soon became firmly established that there was a clear jurisdiction for a court of equity to restrain the unauthorised use or publication of unpublished works and this remained extant until abolished in the *Copyright Act 1911* (UK). Although generally referred to as a “common law right of property in unpublished works”, there was nothing “common law” about it, as the relief sought was purely equitable.¹⁷³

The first Australian *Copyright Act* post-federation, enacted in 1905, carried forward the practice of affording copyright protection to books, rather than literary works. Like the colonial Acts, it required registration of books before an action for copyright infringement could be instituted.¹⁷⁴

However, significant changes were enacted in the UK *Copyright Act 1911*, which was adopted in Australia by the *Copyright Act 1912*. This Act codified the law of copyright in relation to all published and unpublished literary, dramatic, artistic and musical works and in sound recordings¹⁷⁵ and abolished the so-called “common law” copyright in unpublished works.¹⁷⁶ Protection for “books” was replaced with protection for “literary works”, defined to include “maps, charts, plans, tables and compilations”¹⁷⁷ and, while copies of books had to be deposited with the British Museum, the requirement to register and consequences for failure to do so no longer applied. Importantly, the 1911 Act extended copyright protection for unpublished literary, dramatic and musical works and engravings. If, at the death of the author, a literary work had not been published, a dramatic or musical work had not been performed in public, or a lecture had not been delivered to the public, copyright continued for a term of 50 years from the time of publication, performance or delivery in public.¹⁷⁸

The approach of allowing copyright to run until the occurrence of a catalyzing event (eg publication, public performance or broadcast) was carried through into the *Copyright Act 1968* (Cth) which also further extended the categories of protected materials. Where, at the time of the author’s death (or the death of the last surviving author), literary works (except computer programs), dramatic and musical works have not been published, performed in public or broadcast, or records of which have not been offered for sale to the public, copyright continues to subsist until 70 years after the end of the calendar year in which the first of those events occurs.¹⁷⁹ In the case of an anonymous or pseudonymous work, copyright continues until 70 years from the end of the calendar year in which the work is first published (unless the identity of the author is ascertained before the end of that

debate over the Australian Copyright Bill, Sir Josiah Symon, a leading Senator, strongly endorsed Macaulay’s arguments. See also *Jefferys v. Boosey* (1854) 4 HLC 815 (10 ER 681); *Grain Pool of WA v Commonwealth* [2000] HCA 14 per Kirby J at [133] f/n 218.

¹⁷² *Webb v Rose* (1732), cited in *Macklin v Richardson* (1770) Amb 695; 27 ER 451; *Pope v Curl* (1741) 2 Ack 341; 26 ER 608. See S Ricketson and C Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, at para 3.155,

¹⁷³ Ricketson and Creswell, *ibid*.

¹⁷⁴ *Copyright Act 1905* (Cth), s 74(1).

¹⁷⁵ *Copyright Act 1911* (UK), s 1(1)

¹⁷⁶ *Copyright Act 1911* (UK), s 31 stated:

“No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force...” See S Ricketson and M Richardson, *Intellectual Property: Cases, Materials and Commentary*, 3rd ed, LexisNexis Butterworths, 2005 at pp 60-66.

¹⁷⁷ *Copyright Act 1911* (UK), s 35.

¹⁷⁸ *Copyright Act 1911* (UK), s 17(1).

¹⁷⁹ See *Copyright Act 1968*, ss 33(3), 78, 80 and 81. Section s 33(5) relates to engravings: if engravings are unpublished at the time of the author’s death, copyright lasts until 70 years after first publication.

period).¹⁸⁰ However, the *Copyright Act* 1968 also introduced extended copyright terms that are related not to the life of the author, but to the time of publication. Copyright in sound recordings and cinematograph films lasts for 70 years from the end of the year in which they were first published;¹⁸¹ if unpublished, copyright continues indefinitely.

For Crown copyright literary, dramatic and musical works, engravings, photographs, sound recordings and cinematograph films, copyright continues until 50 years from the end of the year in which the work is first published;¹⁸² copyright in an unpublished literary, dramatic or musical work continues for as long as the work is unpublished.¹⁸³ Crown copyright in artistic works (other than engravings and photographs) lasts for 50 years from the end of the year in which the work was made.¹⁸⁴

There are numerous provisions in the *Copyright Act* 1968 that create royalty-free exceptions permitting specific dealings with cultural materials by archives, galleries, museums, libraries and other institutions.¹⁸⁵ Exceptions authorising the copying of literary, dramatic, musical and artistic works are set out in ss 49-53; copying and communicating sound recordings and films are in ss 110A-110BA; and making of preservation copies of significant published editions by key cultural institutions in s 112AA. While these provisions have been reviewed¹⁸⁶ and amended from time to time, problems such as the potentially unlimited duration of copyright in unpublished works and the inability of cultural and collecting institutions to deal with orphan works have persisted.

Solutions in other jurisdictions

The problems that have been raised in the context of the Government 2.0 Task Force's inquiry have been recognised and addressed in other jurisdictions, where copyright statutes now establish finite limits to the duration of copyright for most works.

United Kingdom

The need to ensure that copyright in unpublished works does not extend indefinitely was recognized and addressed in the *Copyright, Designs and Patents Act* 1988 (CDPA). The disparity between the period of protection for published and unpublished works in existence at the date the CDPA came into force (1 August 1989) will be removed, over a 50 year transition period. For works produced after 1 August 1989, it is no longer possible for copyright to potentially last perpetually. As well as phasing out the potential for copyright to last perpetually in unpublished works, the CDPA lessens the problem of orphan works by providing that it is only for works of unknown authorship that copyright does not begin to expire until the work is made available to the public. Schedule 1 of the CDPA 1988 contains

¹⁸⁰ *Copyright Act* 1968, ss 34, 78 and 79.

¹⁸¹ *Copyright Act* 1968, ss 93, 94 and 221.

¹⁸² *Copyright Act* 1968, ss 180(1)b) and (3), 181.

¹⁸³ *Copyright Act* 1968, s 180(1) (a).

¹⁸⁴ *Copyright Act* 1968, s 180(2).

¹⁸⁵ See *Copyright Act* 1968, s 10(10 and (4) for the definition of "archives".

¹⁸⁶ See CLRC, *Crown Copyright*, 2005 at paras 4.60-4.65 at pp 51-52, and CLRC, *Simplification of the Copyright Act 1968: Part 1 - Exceptions to the Exclusive Rights of Copyright Owners*, 1999, Chapter 7, "Copying by Libraries and Archives" at pp 87-128, available at

http://www.clrc.gov.au/www/agd/agd.nsf/Page/Copyright_CopyrightLawReviewCommittee_CLRCReports_SimplificationoftheCopyrightAct1968

transitional provisions¹⁸⁷ relating to the duration of copyright in “existing works” made before the commencement of the CDPA (1 August 1989).¹⁸⁸ [see **Appendix B**].

From the enactment of the 1911 *Copyright Act*, UK law had permitted the term of copyright in unpublished literary, dramatic and musical works and engravings to continue to run while the works remained unpublished, had not been publicly performed or, (in the case of a lecture) had not been delivered. Once one of these acts occurred, the term of copyright (50 years) began to expire.¹⁸⁹ The 1911 Act expressly stated that “copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter”.¹⁹⁰ The approach adopted in the 1911 Act was followed in the *Copyright Act 1956* (UK).¹⁹¹

Under the CDPA, copyright in existing anonymous or pseudonymous literary, dramatic, musical and artistic works (other than photographs) which are unpublished continues until 50 years from the end of the year in which the provisions of the CDPA came into force (that is, 31 December 2039).¹⁹² Similarly, copyright continues until 31 December 2039 for unpublished works, the author of which has died, including unpublished literary, dramatic and musical works and engravings¹⁹³, and unpublished photographs taken on or after 1 June 1957. Perpetual copyright conferred on universities and colleges by the *Copyright Act 1775* will also expire at the end of 2039.¹⁹⁴

For new works, made after the CDPA came into effect, the possibility of copyright continuing indefinitely can now only arise where the identity of the author of the work is unknown, and not where the author’s identity is known but the work has not been published, publicly performed etc. The basic rule on duration is that copyright in literary, dramatic, musical and artistic works expires after 50 years from the end of the calendar year in which the author dies.¹⁹⁵ For computer-generated works, sound recordings, films, broadcasts and cable programs, copyright expires 50 years from the end of the calendar year in which the work is made.¹⁹⁶ Provided the identity of the author is known, it is irrelevant whether or not the work has been published (or, in the terms of the CDPA, “made available to the public”). If the author is unknown, copyright continues until 50 years from the end of the calendar year

¹⁸⁷ These transitional provisions in Schedule 1 are made in accordance with s 170 of the *Copyright, Designs and Patents Act 1988*.

¹⁸⁸ “Existing work” is defined in s 1(3) of Schedule 1 as meaning: “works made before commencement; and for this purpose a work of which the making extended over a period shall be taken to have been made when its making was completed”. Section 1(2) of the Schedule states that references “in this Schedule to “commencement”, without more, are to the date on which the new copyright provisions come into force”.

¹⁸⁹ See *Copyright Act 1911*, s 17 (“Posthumous”).

¹⁹⁰ *Copyright Act 1911*, s 17(1)

¹⁹¹ See *Copyright Act 1956*, s 2(3) which provided that copyright continued until 50 years from the end of the calendar year in which the work was published, publicly performed, records of the work were offered for sale to the public, or it was broadcast, if none of those acts had occurred at the time of the author’s death.

¹⁹² Schedule 1, s 12(3). Note that this is subject to the proviso that if, during that period, the work is “first made available to the public” within the meaning of s 12(2) of the CDPA (duration of copyright in works of known authorship), copyright expires in accordance with that provision, or the identity of the author becomes known before that date, in which case s 12(1) of the CDPA applies.

¹⁹³ Note that this section applies where, at the time of the author’s death none of the following acts has occurred: publication; public performance; offer for sale to the public of records of the work; broadcasting of the work: Schedule 1, s 12(4). See also Schedule 1, s 12(5) which relates to unpublished sound recordings made on or after 1 June 1957 and certain films.

¹⁹⁴ Schedule 1, s 13.

¹⁹⁵ *Copyright, Designs and Patents Act 1988* (UK), s 12(1).

¹⁹⁶ *Copyright, Designs and Patents Act 1988* (UK), ss 12(3), 13, 14.

in which the work is first made available to the public, unless the author's identity is ascertained earlier.¹⁹⁷

The basic rule for duration of Crown copyright literary, dramatic, musical and artistic works is that it will last for 125 years from the end of the calendar year in which the work was made.¹⁹⁸ However, for unpublished Crown copyright literary, dramatic, musical and artistic works in existence at the time the CDPA came into force,¹⁹⁹ copyright expires on 31 December 2039 or 125 years after the work was made, whichever is the later.²⁰⁰ If a Crown copyright work is published commercially within 75 years after it was made, copyright lasts for 50 years from the end of the year in which it was published.²⁰¹ Copyright in Acts of Parliament expires 50 years from the end of the calendar year in which Royal Assent was given²⁰² and Parliamentary copyright materials are protected for 50 years from the end of the calendar year in which they were made.²⁰³

New Zealand

Like the *Copyright, Designs and Patents Act 1988* (UK), the *Copyright Act 1994* (NZ) contains sunset provisions for copyright in unpublished works. As with the UK legislation, the NZ Act removes the possibility of potentially perpetual copyright in new works on the basis that they have not been published. Instead, the only ground on which copyright can continue to run is that the identity of the author is unknown.

For literary, dramatic, musical and artistic works, copyright expires 50 years from the end of the calendar year of the author's death²⁰⁴ Where the work is of unknown authorship, copyright expires 50 years from the end of the calendar year in which the work is first made available to the public by an authorised act, such as by performance in public or communication to the public in the case of a literary, dramatic or musical work, or exhibition in public in the case of an artistic work.²⁰⁵ A literary, dramatic, musical or artistic work (other than a photograph) of unknown authorship which was unpublished at the commencement of the Act will expire after 50 years, unless the work is made available to the public during that period, in which case the usual rule applies.²⁰⁶

For sound recordings and films, copyright lasts for 50 years from the end of the calendar year in which the work is made or, if it is made available to the public before the end of that period, 50 years from when it was made available, whichever is the later.²⁰⁷ For Crown copyright works, copyright expires 100 years from the end of the calendar year in which the work was made, or, for the typographical arrangement of a published edition, 25 years after it was made.²⁰⁸

¹⁹⁷ *Copyright, Designs and Patents Act 1988* (UK), s 12(2).

¹⁹⁸ *Copyright, Designs and Patents Act 1988* (UK), s 163(3)(a). A "Crown copyright" work is one made by the Crown, or an officer or servant of the Crown in the course of their employment: s 163(1).

¹⁹⁹ 1 August 1989.

²⁰⁰ *Copyright, Designs and Patents Act 1988* (UK), Schedule 1, s 40(3). This rule also applies to unpublished engravings, unpublished photographs and films: Schedule 40, s 40(4), (5).

²⁰¹ *Copyright, Designs and Patents Act 1988* (UK), s 163(3)(b).

²⁰² *Copyright, Designs and Patents Act 1988* (UK), s 164.

²⁰³ *Copyright, Designs and Patents Act 1988* (UK), s 165.

²⁰⁴ *Copyright Act 1994* (NZ), s 22(1). Note that copyright in computer-generated works expires 50 years from the end of the calendar year in which the work is made: s 22(2).

²⁰⁵ *Copyright Act 1994* (NZ), s 22(3), (4).

²⁰⁶ *Copyright Act 1994* (NZ), Schedule 1, s 17(2); and s 22(3), (4).

²⁰⁷ *Copyright Act 1994* (NZ), s 23.

²⁰⁸ *Copyright Act 1994* (NZ), s 26(3).

United States

Before the *Copyright Act 1976* came into force on 1 January 1978, publication was the key to obtaining copyright protection. Under the *Copyright Act 1909*, copyright was generally secured by the act of publication²⁰⁹ with notice of copyright, providing all the other relevant statutory conditions were satisfied. The *Copyright Act 1976* extended federal copyright protection to unpublished works for the first time. The duration of protection for unpublished works created before 1 January 1978 is calculated in the same way as for works created after the *Copyright Act 1976* took effect, for example, the life of the author plus 70 years.

“Special cases” of permitted flexible dealing – the dilemma of s 200AB

Section 200AB was inserted into the *Copyright Act 1968* by the *Copyright Amendment Act 2006*. It was intended to be a flexible exception to enable copyright material to be used for certain socially useful purposes and to provide some of the flexibility afforded by the fair use doctrine in US copyright law.²¹⁰ While it is clear from the Explanatory Memoranda for the *Copyright Amendment Bill 2006* (which inserted s 200AB into the *Copyright Act 1968*) that the provision was meant to provide room to operate for bodies including libraries, archives, galleries and museums²¹¹, in practice its operation is regarded as uncertain²¹², with the consequence that there has been little reliance on it.

Section 200AB allows for copyright works and subject matter other than works to be used in certain circumstances, provided the use amounts to a special case, does not conflict with a normal exploitation of the work or other subject matter, and does not unreasonably prejudice the legitimate interests of the copyright owner.²¹³ A body administering a library or archives may make use of a copyright work or other subject matter for the purpose of

²⁰⁹ *Copyright Act 1976* defines publication as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending...”

²¹⁰ Explanatory Memorandum for the *Copyright Amendment Bill 2006*, p109, available at http://www.austlii.edu.au/au/legis/cth/bill_em/cab2006223/memo_0.html; Mr. Ruddock, Second Reading Speech for the *Copyright Amendment Bill 2006*, House of Representatives, Thursday 19 October 2006, Hansard records p2.

²¹¹ The definition of “archives” in s 10(1) of the *Copyright Act* is extended by s 10(4) to include not-for-profit museums and galleries.

²¹² The uncertainty stems from the incorporation of the three-step from Article 9(2) of the *Berne Convention for the Protection of Literary and Artistic Works* and Article 13 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) into s 200AB itself. The three-step test is generally understood to provide legislative guidance in drafting exceptions, not as a restriction to be directly adopted into legislation: see Nicolas Suzor, Paul Harpur and Dilan Thampapillai, ‘Digital copyright and disability discrimination: From braille books to bookshare’ (2008) 13 *Media and Arts Law Review* 1 at 8. It has been argued that the incorporation of the three-step test into s 200AB creates confusion and uncertainty in practice, because each particular application of s 200AB will require an assessment of whether that application is a “special case”. This is difficult where there is no guidance about what is likely to constitute a “special case”. It has been further argued that this creates a “chilling effect” – that where the law is uncertain, risk-averse bodies tend to act conservatively and not rely on the exception, rather than expose themselves to potential legal suit. This undermines the objectives of s 200AB to create a flexible dealing exception within copyright law. See The Australian Labor Party in their Supplementary Report to the Senate Standing Committee on Legal and Constitutional Affairs, as reported in the Senate Standing Committee on Legal and Constitutional Affairs, *Copyright Amendment Bill 2006 [Provisions]*, November 2006, p 47 [1.13]; see also the Australian Broadcasting Corporation (ABC), Submission to the Standing Committee on Legal and Constitutional Affairs, *Copyright Amendment Bill 2006: Exceptions and Other Digital Agenda Review Measures* (October 2006).

²¹³ *Copyright Act 1968* (Cth), 200AB (1).

maintaining or operating the library or archives, including to provide services of a kind usually provided by a library or archives.²¹⁴ The use must not be made partly for the purpose of the body obtaining a commercial advantage or profit.²¹⁵ The operation of s 200AB is excluded if, because of another provision of the *Copyright Act*, the use does not infringe copyright or would not be an infringement if the conditions or requirements of that other provision were met.²¹⁶

The Explanatory Memorandum for the *Copyright Amendment Bill 2006* states that, in considering whether a use conflicts with the normal exploitation of a work, regard should be had to whether the use “closes off ways that copyright holders normally extract economic value from copyright in the Australian market or enters into economic competition with those ways, thereby depriving the copyright holder of significant or tangible commercial gains”.²¹⁷

It is arguable that use by a cultural institution in digitizing and making a copyright work available to its patrons would fall within the scope of s 200AB for certain materials, provided the institution is not deriving a profit or commercial advantage from that use. In particular, this would cover old materials which have been donated to the institution, have lingered in the institution’s collections for years and for which it is unclear whether the material is in fact protected by copyright and if so, who owns copyright and how the copyright owner can be contacted. Where the copyright owner is unknown, cannot be found, or is seemingly uninterested in the copyright material, it is unlikely that a non-profit use by a cultural institution would conflict with normal exploitation of the work such that it would deprive the copyright holder of tangible commercial gains. The making available in digital form of an archive’s collection is an important service that can be provided by an archive, though one that is unlikely to reap commercial returns for a copyright holder. In these circumstances, and taking into account the intended broad ambit of s 200AB, it would seem that use by a cultural institution in making its collection (especially old works) electronically available would be likely to constitute a “special case” under s 200AB.

The scope of application of s 200AB has been viewed narrowly by cultural institutions, collecting societies, users and commentators. This is largely due to the limitation expressed in s 200AB(6) that the section will not apply if, because of another provision of the *Copyright Act*, the use is not an infringement of copyright or the use would not be an infringement of copyright if the conditions or requirements of that other provision were met. The examples provided to illustrate the operation of s 200AB(6)²¹⁸ indicate that the section cannot be relied upon if the act in question would be authorised by the operation of an exception that provides a complete defence (eg s 200(1)) or a statutory licence which permits the act, subject to payment of remuneration to a collecting society (eg s 135ZP(2)). Example 2

²¹⁴ *Copyright Act 1968* (Cth), 200AB (2). “Use” includes any act that would infringe copyright: *Copyright Act 1968* (Cth), 200AB (7). “Archives” is defined in s10 (4) to include where a collection of documents or other material of historical significance or public interest that is in the custody of a body, whether incorporated or unincorporated, is being maintained by the body for the purpose of conserving and preserving those documents or other material and the body does not maintain and operate the collection for the purpose of deriving a profit. Thus, the term “archives” as used in the *Copyright Act* is likely to cover a broad range of cultural institutions, including not for profit galleries and museums.

²¹⁵ *Copyright Act 1968* (Cth), 200AB (2). Cost recovery is deemed not to be a commercial advantage or profit: *Copyright Act 1968* (Cth), 200AB (6A).

²¹⁶ *Copyright Act 1968* (Cth), 200AB (6).

²¹⁷ Explanatory Memorandum for the *Copyright Amendment Bill 2006*, p 109-110, available at http://www.austlii.edu.au/au/legis/cth/bill_em/cab2006223/memo_0.html

²¹⁸ S 200AB(6) is prefaced by the statement: “This section does not apply if under another provision the use does not, or might not, infringe copyright.”

indicates that s 200AB does not apply if a statutory licence would cover the use of the copyright work:

A body administering an institution assisting persons with a print disability makes a Braille version of a published literary work. Under s 135ZP(2), making such a version does not infringe copyright in the work if certain conditions (relating to remuneration etc.) are met, so this section does not apply.

(Note that statutory licences and an obligation to pay equitable remuneration are not engaged if, under other provisions of the *Copyright Act 1968*, the acts would not constitute an infringement because of the operation of a free use exception (eg fair dealing, ss 40 – 42)).²¹⁹

In the light of the interpretation of “publication” by the Full Federal Court in *CAL v NSW*, consideration should be given to legislatively clarifying what acts constitute publication and the duration of copyright for works held in cultural and archival institutions. Additionally, the position of cultural and archival institutions could be made more certain by the enactment of public administration exceptions similar to those applying in the United Kingdom and New Zealand.

Nevertheless, there are circumstances where acts will not be covered by specific exceptions in the *Copyright Act 1968* and will fall outside the operation of the s 183 statutory licence or other statutory licences. While the operation of s 200AB is subject to many restrictions, there is an important – albeit confined – area of activity towards which it was targeted. The Supplementary Explanatory Memorandum to the *Copyright Amendment Bill 2006* suggested that s 200AB could be relied upon to free up access to “orphan” works in cases where the copyright owner is unknown or cannot be contacted:

The intention is that s 200AB provide a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia’s obligations under international copyright treaties. This provision might be determined by a court, for example, to allow a library or archive to make a use of a work where the copyright owner’s permission cannot be obtained because he or she cannot be identified or contacted.²²⁰

Indeed, in the United Kingdom, the Libraries and Archives Copyright Alliance (LACA) in its response to the European Commission’s Green Paper on Copyright in the Knowledge Economy²²¹ suggested, as a possible solution to the orphan works problem, an exception to copyright infringement that allows libraries and archives to put their materials on publicly accessible online networks, including the internet, provided that the use falls within the parameters of the Three Step Test.²²² The LACA argued that most publishers have no commercial interest in digitising orphan works and unpublished potential archival material

²¹⁹ *Copyright Agency Limited v State of New South Wales* [2008] HCA 35 at para [11]

²²⁰ Supplementary Explanatory Memorandum, *Copyright Amendment Bill 2006*, para [52]. See also: Australian Government Attorney General’s Department, “Use of copyright material for certain ‘special’ purposes” (factsheet), available at

<http://www.ag.gov.au/www/agd/agd.nsf/AllDocs/74D4B30A63F5EDD3CA2572830080A60E?OpenDocument>.

²²¹ Green Paper, ‘Copyright in the Knowledge Economy’ (COM (2008) 466/3, 16 July 2009), see further Stephen Saxby, ‘National archives and records – the legal and policy considerations for the UK’ *Int. J. Private Law*, Vol. 3, Nos. ½, 2010, 49-54.

²²² European Commission Green Paper on ‘Copyright in the Knowledge Economy’ COM (2008) 466/3 – Response by LACA: the Libraries and Archives Copyright Alliance; see further Stephen Saxby, ‘National archives and records – the legal and policy considerations for the UK’ *Int. J. Private Law*, Vol. 3, Nos. ½, 2010, 52-54.

and that libraries and archives cannot safely rely on publishers and producers to deliver this material to the public.²²³ The LACA pointed out that publishers do not continue forever – they may go out of business, rendering orphan any works in which they have rights, or they may be taken over by companies with little idea of what rights they have acquired through mergers.²²⁴ For these reasons, the LACA argued that there was a need for an exception that went beyond the present EU law²²⁵ (which permits Member States to enact exceptions or limitations to the reproduction right in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage).²²⁶ What the LACA essentially described was an exception similar to that provided by s 200AB. The UK Government did not seem adverse to this suggestion, stating in its response to the Green Paper:

In other cases, such as unpublished, or out-of-print (but still in copyright) works, which are no longer commercially available, and for which no commercial exploitation seems likely, there may be a case for exploring whether and how libraries and archives could best develop online access to their collections, taking into account the requirements of the Berne 3-step test.²²⁷

Cultural institutions in Australia appear to have refrained from relying on s 200AB for these or similar activities because of uncertainties about the meaning of the terms “special case”, “normal exploitation” and “unreasonably prejudice the legitimate interests of the copyright owner” and concerns about fees payable under a statutory licence. Submissions to the Government 2.0 Taskforce and consultations indicate that cultural institutions require clear guidelines about the kinds of use of materials would amount to a “special case” for the purposes of s 200AB.

To provide the GLAM sector with legal certainty to function effectively in the digital environment, it is necessary to fully implement s 200AB through the development of guidelines and case studies about “special cases” as envisaged by s 200AB. The case studies should identify the categories of materials and circumstances that fall within the scope of s 200AB, for example, old (“unpublished”) letters and diaries could be dealt with as a special case under s 200AB. Most archival works produced by government do not have any economic value and in the absence of a legitimate economic interest to be respected, there is no reason why the materials should not be freely available.²²⁸

Recommendation 8 – Include guidance on copyright law and practice in digitisation strategies

Strategies for digitisation of third party materials held by archives, museums, galleries and libraries should include guidance on management of legal rights, to

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Article 5(2)(c) of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

²²⁶ See further Stephen Saxby, ‘National archives and records – the legal and policy considerations for the UK’ *Int. J. Private Law*, Vol. 3, Nos. ½, 2010, 50. (forthcoming).

²²⁷ UK Government response to the European Commission’s Green Paper – ‘Copyright in the Knowledge Economy’; see further Stephen Saxby, ‘National archives and records – the legal and policy considerations for the UK’ *Int. J. Private Law*, Vol. 3, Nos. ½, 2010, 53-54.

²²⁸ See CLRC, *Crown Copyright*, 2005 at paras 4.63, 4.64 at p 52.

ensure digitised materials can be made available for access, use and reuse without incurring liability or undue expense.

Recommendation 9 – Clarify the meaning of “publication” in ss 33 and 34 to give certainty to the duration of copyright and avoid impracticality and set statutory limits to copyright protection for unpublished works

Provide guidance on the meaning of “publication” in ss 33 and 34 of the *Copyright Act*, to assist archives, libraries and cultural institutions in determining the duration of copyright protection for the materials they hold. In light of recent judicial consideration of the meaning of “publication” in *Copyright Agency Ltd v New South Wales* [2007] FCAFC 80 clarification of the provisions of the *Copyright Act* 1968 is required.

Judicial statements in *CAL v NSW* support an interpretation of “publication” that includes deposit of materials into archives, libraries etc by persons with authority to deal with the material, such that the material is available for access by members of the public, without restrictions (eg for reasons of national security, privacy or confidentiality) that limit public access.

If a broader interpretation of “publish” is supported, for some materials that have not been published before the author’s death, “publication” may occur on deposit into an archive, library, etc and copyright would run from that point in time (ss 33(3), (5), 34, 180, 181). This interpretation may require review and clarification of sections of the *Copyright Act* which have been drafted on the basis of a much more restrictive meaning of “publication”.

The maximum duration of copyright protection should be defined for materials which have not been first published, publicly performed, etc during the life of the author, so that copyright does not run on indefinitely, potentially for an exceptionally long term. The *Copyright Act* 1968 should be amended to make it clear that copyright cannot endure perpetually in unpublished works. A model for statutory limits to unpublished works is provided by the provisions in the United Kingdom’s *Copyright, Designs and Patents Act* 1988 and the New Zealand *Copyright Act* 1994, for both existing and new works.

Recommendation 10 – Develop guidance on “special cases” and uses permitted under s 200AB

Section 200AB was enacted to provide archives, museums, galleries and libraries (sometimes referred to as the “GLAM” sector), as well as the education and disability services sectors, with room to operate, beyond the scope of existing exceptions.

However, there is insufficient certainty about the meaning of “special case” and the operation of s 200AB for cultural and collecting institutions to rely on it, largely defeating the purpose of including the flexible dealing exemption in the *Copyright Act* 1968. It is not possible to exhaustively define “special case” in s 200AB or to list the kinds of uses that will constitute a “special case”. Guidance on the operation of s 200AB is required for cultural and collecting institutions, including identification of categories of use that fall within the concept of a “special case”.

Establish projects, in collaboration with archives, museums, galleries and libraries, to develop practical guidance on how to identify third party copyright materials that can be used without infringing copyright because they fall within the “special case” exemption in s 200AB.

4. ACCESS TO INFORMATION ABOUT COPYRIGHT LAW AND PRACTICE

If open access to government owned (and held) material is to be encouraged, copyright in these materials must be managed accordingly. The Australian public should have easy access to information about copyright law generally and, more specifically, the copyright conditions governing particular government materials. It is important that government agencies are accountable for the material they own and that they implement measures to ensure that members of the public are fully informed about the copyright conditions applying to the agency's materials.

The Commonwealth Copyright Administration (CCA) is the federal government body (currently situated within the Commonwealth Attorney General's Department) responsible for the management of copyright in published materials on behalf of Commonwealth agencies.²²⁹ The CCA has two core functions – responding to requests from the public to reproduce Commonwealth copyright material and providing administrative advice on the management of copyright materials to Commonwealth agencies.

The CLRC noted in its review of Crown copyright that, in practice, the CCA provides little guidance to copyright users, particularly when compared with the equivalent body in the United Kingdom. The CLRC recommended that the CCA be more proactive in providing advice and guidance to copyright users, including by disseminating more material on its website and providing a clearer and more consistent approach to copyright management.²³⁰ As a related matter, the CLRC recommended that the Commonwealth Government develop and implement comprehensive intellectual property management guidelines to promote best practice and assist agencies to meet their responsibilities. Education and training of government employees was considered to be a priority.²³¹

The Australian Government Attorney-General's Department has formulated a Statement of IP Principles to provide a broad policy framework for IP management by Australian Government agencies.²³² All Australian Government agencies which are subject to the *Financial Management and Accountability Act 1997* were required to comply with the requirements on the Statement of IP Principles by 1 July 2008. The general principles comprising the Statement of IP Principles include:

1. Australian Government agencies are responsible for managing IP in their control or custody in an effective, efficient and ethical manner;
2. Each agency should have an IP management policy which reflects its objectives and these IP Principles [and the IP policy should be supported by a management plan, strategy and/or guidelines];
- ...
4. Implementation of the IP management policy should be supported by appropriate training and resources, including access to expert advice;

²²⁹ <http://www.ag.gov.au/cca>.

²³⁰ See CLRC, *Crown Copyright*, 2005, Recommendation 15.

²³¹ See CLRC, *Crown Copyright*, 2005, Recommendation 16.

²³²

http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_CommonwealthCopyrightAdministration_StatementofIPPrinciplesforAustralianGovernmentAgencies.

5. Agencies should maintain appropriate systems and processes to identify and record IP;
- ...
8. Agencies should maintain a flexible approach in considering options for ownership, management and use of IP;
- ...
11. Agencies should encourage public use and easy access to copyright material that has been published for the purpose of:
 - informing and advising the public of government policy and activities;
 - providing information that will enable the public and organizations to understand their own obligations and responsibilities to Government;
 - enabling the public and organizations to understand their entitlements to government assistance;
 - facilitating access to government services; or
 - complying with public accountability requirements; and
12. Australian Government agencies should be mindful of opportunities to share IP for which they are responsible with other agencies.²³³

The Australian Government also committed to provide guidance and advice to agencies in the form of an IP Manual for Australian Government Agencies.²³⁴ However, while the proposed IP Manual was distributed in draft form for comment to some government agencies a final version has not yet been made publicly available.

The most efficient means of managing government copyright is unlikely to be via a central authority such as the CCA. Rather, copyright is better managed at the source – by the individual government agencies that have responsibility for the material in question. This proposition was considered in 1992 by the Prices Surveillance Authority (PSA) in its report on the pricing policy of the Australian Government Publishing Service in relation to its publications.²³⁵ The PSA recommended that the government charge author departments with the responsibility of administering copyright associated with their publications. It was the PSA's view that the department which produces the material is better equipped to judge the circumstances in which permission should be given for free and when it is appropriate to charge.²³⁶ By extension, it can be argued that the department will also be best positioned to determine the scope of the reuse rights that should be permitted in relation to particular materials. This was, in essence, the position adopted by the Australian Bureau of Statistics, the Bureau of Meteorology and Geosciences Australia when they chose to apply Creative Commons licences to their material. The decision to implement CC licensing is completely consistent with the Statement of IP Principles, particularly principles 1, 2, 8 and 11. It is evidence of effective and efficient management of IP that reflects a flexible approach.

Copyright in materials owned and held by government agencies should be managed by the responsible government agency. Dealing with copyright at its source ensures that the most informed persons are making decisions about how the material should be made available to the Australian public. Creative Commons licensing offers a broad approach that manages copyright up front, without the need to invest resources in case-by-case, negotiated licensing transactions.

Nevertheless, there still remains a role for a central, specialized body in relation to copyright policy. However, this role is different to role currently assigned to the CCA – it is not concerned with the micro-management of copyright materials, but with high-level issues of

²³³ Ibid.

²³⁴ <http://www.ag.gov.au/cca>.

²³⁵ Inquiry into the Publications Pricing Policy of the Australian Government Publishing Service (PSA 1992).

²³⁶ Inquiry into the Publications Pricing Policy of the Australian Government Publishing Service (PSA 1992) p105.

copyright policy and practice. For example, a central body could provide specialized assistance to government agencies in determining whether to apply open content licences to their materials. It could be tasked with providing guidance on specific issues of copyright law, such as the scope of “special case” under s 200AB of the Copyright Act. Where the agency is unable to provide definitive advice on these questions, it could take a lead role in seeking further clarification on the issue.

There is a strong need for greater access to materials that provide guidance about copyright law and practice. This aligns with Principle 4 from the Statement of IP Principles, which states that “[i]mplementation of the IP management policy should be supported by appropriate training and resources, including access to expert advice”.²³⁷ Developing an IP Manual for Australian Government Agencies would certainly assist, as would the development of other resources such as practical copyright and licensing toolkits (desktop applications where possible). However, the task of developing these resources should not be assigned to only one Government department or body; it should not be assumed that all the relevant expertise will be situated within the one department. Instead, public and private sector copyright experts around Australia could be commissioned to contribute to the development of practical, diverse and comprehensive guidance materials and tools.

Recommendation 11 – Ensure access to legal advice and guidance about copyright law and practice

To ensure that copyright PSI can be managed to give effect to the [government’s/department’s] policy on access and reuse, government agencies require access to legal advice and practical guidance on the implementation of systems and procedures (including licensing practices and technologies) to enable access to and reuse of PSI (particularly in the online, web 2.0 environment).

Provide funding to develop the capacities of public sector organisations to deal with copyright law and management of PSI, including developing practical copyright and licensing toolkits (desktop applications where possible).

²³⁷

http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_CommonwealthCopyrightAdministration_StatementofIPPrinciplesforAustralianGovernmentAgencies.

APPENDIX A

Copyright, Designs and Patents Act 1988 (UK)

1988 CHAPTER 48

http://www.bailii.org/uk/legis/num_act/1998/ukpga_19880048_en_1.html

Chapter III

Public administration

45 Parliamentary and judicial proceedings

(1) Copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings.

(2) Copyright is not infringed by anything done for the purposes of reporting such proceedings; but this shall not be construed as authorising the copying of a work which is itself a published report of the proceedings.

46 Royal Commissions and statutory inquiries

(1) Copyright is not infringed by anything done for the purposes of the proceedings of a Royal Commission or statutory inquiry.

(2) Copyright is not infringed by anything done for the purpose of reporting any such proceedings held in public; but this shall not be construed as authorising the copying of a work which is itself a published report of the proceedings.

(3) Copyright in a work is not infringed by the issue to the public of copies of the report of a Royal Commission or statutory inquiry containing the work or material from it.

(4) In this section—

- "Royal Commission" includes a Commission appointed for Northern Ireland by the Secretary of State in pursuance of the prerogative powers of Her Majesty delegated to him under section 7(2) of the [1973 c. 36.] Northern Ireland Constitution Act 1973; and
- "statutory inquiry" means an inquiry held or investigation conducted in pursuance of a duty imposed or power conferred by or under an enactment.

47 Material open to public inspection or on official register

(1) Where material is open to public inspection pursuant to a statutory requirement, or is on a statutory register, any copyright in the material as a literary work is not infringed by the copying of so much of the material as contains factual information of any description, by or with the authority of the appropriate person, for a purpose which does not involve the issuing of copies to the public.

(2) Where material is open to public inspection pursuant to a statutory requirement, copyright is not infringed by the copying or issuing to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of enabling the material to be inspected at a more convenient time or place or otherwise facilitating the exercise of any right for the purpose of which the requirement is imposed.

(3) Where material which is open to public inspection pursuant to a statutory requirement, or which is on a statutory register, contains information about matters of general scientific, technical, commercial or economic interest, copyright is not infringed by the copying or issuing to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of disseminating that information.

(4) The Secretary of State may by order provide that subsection (1), (2) or (3) shall, in such cases as may be specified in the order, apply only to copies marked in such manner as may be so specified.

(5) The Secretary of State may by order provide that subsections (1) to (3) apply, to such extent and with such modifications as may be specified in the order—

(a) to material made open to public inspection by—

(i) an international organisation specified in the order, or

(ii) a person so specified who has functions in the United Kingdom under an international agreement to which the United Kingdom is party, or

(b) to a register maintained by an international organisation specified in the order, as they apply in relation to material open to public inspection pursuant to a statutory requirement or to a statutory register.

(6) In this section—

- "appropriate person" means the person required to make the material open to public inspection or, as the case may be, the person maintaining the register;
- "statutory register" means a register maintained in pursuance of a statutory requirement; and
- "statutory requirement" means a requirement imposed by provision made by or under an enactment.

(7) An order under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

48 Material communicated to the Crown in the course of public business

(1) This section applies where a literary, dramatic, musical or artistic work has in the course of public business been communicated to the Crown for any purpose, by or with the licence of the copyright owner and a document or other material thing recording or embodying the work is owned by or in the custody or control of the Crown.

(2) The Crown may, for the purpose for which the work was communicated to it, or any related purpose which could reasonably have been anticipated by the copyright owner, copy the work and issue copies of the work to the public without infringing any copyright in the work.

(3) The Crown may not copy a work, or issue copies of a work to the public, by virtue of this section if the work has previously been published otherwise than by virtue of this section.

(4) In subsection (1) "public business" includes any activity carried on by the Crown.

(5) This section has effect subject to any agreement to the contrary between the Crown and the copyright owner.

49 Public records

Material which is comprised in public records within the meaning of the [1958 c. 51.] Public Records Act 1958, the [1937 c. 43.] Public Records (Scotland) Act 1937 or the [1923 c. 20 (N.I.).] Public Records Act (Northern Ireland) 1923 which are open to public inspection in pursuance of that Act, may be copied, and a copy may be supplied to any person, by or with the authority of any officer appointed under that Act, without infringement of copyright.

50 Acts done under statutory authority

(1) Where the doing of a particular act is specifically authorised by an Act of Parliament, whenever passed, then, unless the Act provides otherwise, the doing of that act does not infringe copyright.

(2) Subsection (1) applies in relation to an enactment contained in Northern Ireland legislation as it applies in relation to an Act of Parliament.

(3) Nothing in this section shall be construed as excluding any defence of statutory authority otherwise available under or by virtue of any enactment.

Copyright Act 1994 (NZ)

Public Act 1994 No 143

Date of assent 15 December 1994

http://www.nzlii.org/nz/legis/consol_act/ca1994133/

27 No copyright in certain works

- (1) No copyright exists in any of the following works, whenever those works were made:
- (a) Any Bill introduced into the House of Representatives:
 - (b) Any Act as defined in section 4 of the Acts Interpretation Act 1924:
 - (c) Any regulations:
 - (d) Any bylaw as defined in section 2 of the Bylaws Act 1910:
 - (e) The New Zealand Parliamentary Debates:
 - (f) Reports of select committees laid before the House of Representatives:
 - (g) Judgments of any court or tribunal:
 - (h) Reports of Royal commissions, commissions of inquiry, ministerial inquiries, or statutory inquiries.

- (1A) No Crown copyright exists in any work, whenever that work was made,—
- (a) in which the Crown copyright has not been assigned to another person; and
 - (b) that is incorporated by reference in a work referred to in subsection (1).

(1B) Except as specified in subsection (1A), nothing in subsection (1) affects copyright in any work that is incorporated by reference in a work referred to in subsection (1).

(2) Subsection (1) of this section shall come into force on a date to be appointed by the Governor-General by Order in Council; and one or more Orders in Council may be made appointing different dates for different paragraphs of that subsection.

Subsections (1A) and (1B) were inserted, as from 14 April 2003 Copyright Amendment Act 2005 (2005 No 33).

59 Parliamentary and judicial proceedings

(1) Copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings.

(2) Copyright is not infringed by anything done for the purposes of reporting parliamentary or judicial proceedings.

Compare: Copyright, Designs and Patents Act 1988, s 45 (UK); 1962 No 33 ss 19(4), 20(7)

60 Royal commissions and statutory inquiries

(1) Copyright is not infringed by anything done for the purposes of the proceedings of a Royal commission, commission of inquiry, ministerial inquiry, or statutory inquiry.

(2) Copyright is not infringed by anything done for the purposes of reporting any

proceedings of a Royal commission, commission of inquiry, ministerial inquiry, or statutory inquiry that are held in public.

(3) Copyright in a work is not infringed by the issue to the public of copies of the report of a Royal commission, commission of inquiry, ministerial inquiry, or statutory inquiry containing the work or material from it.

Compare: Copyright, Designs and Patents Act 1988, s 46 (UK)

61 Material open to public inspection or on official register

(1) Subject to any Order in Council made under subsection (4) of this section, where material is open to public inspection or public reference pursuant to a statutory requirement, or is on a statutory register, copyright in the material is not infringed by the copying of the material, by or with the authority of the appropriate person, for a purpose that does not involve the issuing of copies to the public.

(2) Subject to any Order in Council made under subsection (4) of this section, where material is open to public inspection or public reference pursuant to a statutory requirement, copyright is not infringed by the copying or issuing to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of enabling the material to be inspected at a more convenient time or place or otherwise facilitating the exercise of any right for the purpose of which the requirement is imposed.

(3) Subject to any Order in Council made under subsection (4) of this section, where material that is open to public inspection or public reference pursuant to a statutory requirement, or that is on a statutory register, contains information about matters of general scientific, technical, commercial, or economic interest, copyright is not infringed by the copying or issuing to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of disseminating that information.

(4) The Governor-General may from time to time, by Order in Council, provide that all or any of subsections (1) to (3) of this section shall, in such cases as may be specified in the order, apply only to copies marked in such manner as may be so specified.

(5) The Governor-General may from time to time, by Order in Council, provide that all or any of subsections (1) to (3) of this section apply, to such extent and with such modifications as may be specified in the order, in relation to—

- (a) Material made open to public inspection or public reference by—
 - (i) An international organisation specified in the order; or
 - (ii) A person specified in the order who has functions in New Zealand under an international agreement to which New Zealand is a party; or
- (b) A register maintained by an international organisation specified in the order,—

as those provisions apply in relation to material open to public inspection or public reference pursuant to a statutory requirement or by virtue of being on a statutory register.

(6) In this section,—

Appropriate person means the person required to make the material open to public

inspection or public reference or, as the case may be, the person maintaining the register
Statutory register means a register maintained pursuant to a statutory requirement
Statutory requirement means a requirement imposed by a provision of an enactment.

Compare: Copyright, Designs and Patents Act 1988, ss 47, 49 (UK); 1962 No 33 s 61

62 Material communicated to the Crown in course of public business

(1) This section applies where—

- (a) A literary, dramatic, musical, or artistic work has, in the course of public business, been communicated to the Crown for any purpose, by or with the licence of the copyright owner; and
- (b) A document (within the meaning of section 2 of the Official Information Act 1982) recording or embodying the work is owned by, or is in the custody or control of, the Crown.

(2) The Crown may, for—

- (a) The purpose for which the work was communicated to the Crown; or
- (b) Any related purpose that could reasonably have been anticipated by the copyright owner,—

copy the work, and issue copies of the work to the public, without infringing copyright in the work.

(3) The Crown may not copy a work, or issue copies of a work to the public, under this section if the work has previously been published otherwise than under this section.

(4) In subsection (1) of this section, the term public business includes any activity carried on by the Crown.

(5) This section has effect subject to any agreement to the contrary between the Crown and the copyright owner.

Compare: Copyright, Designs and Patents Act 1988, s 48 (UK)

63 Use of copyright material for services of the Crown

(1) Copyright in a work is not infringed by anything done in relation to the work, by or on behalf of the Crown or any person authorised in writing by a government department,—

- (a) For the purpose of national security or during a period of emergency; or
- (b) In the interests of the safety or health of the public or any members of the public.

(2) Where any act is done under subsection (1) of this section, the Crown shall be liable to pay, out of money appropriated by Parliament for the purpose, equitable remuneration to the copyright owner upon such terms as may be agreed upon between the Crown and the copyright owner or, in the absence of agreement, upon such terms as shall be determined by the Tribunal.

(3) No act to which subsection (1) of this section applies shall—

- (a) Constitute publication of a work; or
- (b) Affect the term of copyright in a work.

Compare: 1962 No 33 s 53(1), (3), (4)

67 Acts permitted on assumptions as to expiry of copyright or death of author in relation to anonymous or pseudonymous works

(1) Copyright in a literary, dramatic, musical, or artistic work is not infringed by any act done at a time when, or in pursuance of arrangements made at a time when,—

- (a) It is not possible for a person who wishes to do so to as-certain the identity of the author by reasonable inquiry; and
- (b) It is reasonable to assume—
 - (i) That copyright has expired; or
 - (ii) That the author died 50 years or more before the beginning of the calendar year in which the act is done or the arrangements are made.

(2) Subsection (1)(b)(ii) of this section does not apply in relation to—

- (a) A work in which Crown copyright exists under section 26 of this Act; or
- (b) A work—
 - (i) In which copyright originally vested in an international organisation under section 28 of this Act; and
 - (ii) In respect of which an order made under that section specifies a copyright period longer than 50 years.

(3) In relation to a work of joint authorship,—

- (a) The reference in subsection (1)(a) of this section to its being possible to ascertain the identity of the author shall be construed as a reference to its being possible to ascertain the identity of any of the authors; and
- (b) The reference in subsection (1)(b)(ii) of this section to the author having died shall be construed as a reference to all the authors having died.

Compare: Copyright, Designs and Patents Act 1988, s 57 (UK)

APPENDIX B

Copyright, Designs and Patents Act 1988 (UK)

1988 CHAPTER 48

http://www.bailii.org/uk/legis/num_act/1988/ukpga_19880048_en_1.html

170 Transitional provisions and savings

Schedule 1 contains transitional provisions and savings relating to works made, and acts or events occurring, before the commencement of this Part, and otherwise with respect to the operation of the provisions of this Part.

....

SCHEDULE 1

Copyright: transitional provisions and savings

Introductory

1.

...

(2) References in this Schedule to "commencement", without more, are to the date on which the new copyright provisions come into force.

(3) References in this Schedule to "existing works" are to works made before commencement; and for this purpose a work of which the making extended over a period shall be taken to have been made when its making was completed.

General principles: continuity of the law

3.

The new copyright provisions apply in relation to things existing at commencement as they apply in relation to things coming into existence after commencement, subject to any express provision to the contrary.

...

Duration of copyright in existing works

12.

(1) The following provisions have effect with respect to the duration of copyright in existing works.

The question which provision applies to a work shall be determined by reference to the facts immediately before commencement; and expressions used in this paragraph which were defined for the purposes of the [*Copyright Act 1956*, 1956 c. 74] (1956 Act) have the same meaning as in that Act.

(2) Copyright in the following descriptions of work continues to subsist until the date on which it would have expired under the 1956 Act—

- (a) literary, dramatic or musical works in relation to which the period of 50 years mentioned in the proviso to section 2(3) of the 1956 Act (duration of copyright in works made available to the public after the death of the author) has begun to run;
- (b) engravings in relation to which the period of 50 years mentioned in the proviso to section 3(4) of the 1956 Act (duration of copyright in works published after the death of the author) has begun to run;
- (c) published photographs and photographs taken before 1st June 1957;
- (d) published sound recordings and sound recordings made before 1st June 1957;
- (e) published films and films falling within section 13(3)(a) of the 1956 Act (films registered under former enactments relating to registration of films).

(3) Copyright in anonymous or pseudonymous literary, dramatic, musical or artistic works (other than photographs) continues to subsist—

- (a) if the work is published, until the date on which it would have expired in accordance with the 1956 Act, and
- (b) if the work is unpublished, until the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force or, if during that period the work is first made available to the public within the meaning of section 12(2) (duration of copyright in works of unknown authorship), the date on which copyright expires in accordance with that provision;

unless, in any case, the identity of the author becomes known before that date, in which case section 12(1) applies (general rule: life of the author plus 50 years).

(4) Copyright in the following descriptions of work continues to subsist until the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force—

- (a) literary, dramatic and musical works of which the author has died and in relation to which none of the acts mentioned in paragraphs (a) to (e) of the proviso to section 2(3) of the 1956 Act has been done;
- (b) unpublished engravings of which the author has died;
- (c) unpublished photographs taken on or after 1st June 1957.

(5) Copyright in the following descriptions of work continues to subsist until the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force—

(a) unpublished sound recordings made on or after 1st June 1957;

(b) films not falling within sub-paragraph (2)(e) above,

(d) unless the recording or film is published before the end of that period in which case copyright in it shall continue until the end of the period of 50 years from the end of the calendar year in which the recording or film is published.

(6) Copyright in any other description of existing work continues to subsist until the date on which copyright in that description of work expires in accordance with sections 12 to 15 of this Act.

(7) The above provisions do not apply to works subject to Crown or Parliamentary copyright (see paragraphs 41 to 43 below).

...

Copyright Act 1994 (NZ)

Public Act 1994 No 143

Date of assent 15 December 1994

http://www.nzlii.org/nz/legis/consol_act/ca1994133/

Section 2- Interpretation

...

communicate means to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system

...

Material time, -

- (a) In relation to a literary, dramatic, musical, or artistic work, means, -
 - (i) In the case of an unpublished work, when the work is made or, if the making of the work extends over a period, a substantial part of that period; and
 - (ii) In the case of a published work, when the work is first published or, if the author has died before that time, immediately before his or her death; ...

Section 7 - Meaning of unknown authorship

- (1) For the purposes of this Act, a work is of unknown authorship if the identity of the author is unknown or, in the case of a work of joint authorship, if the identity of none of the authors is known.
- (2) For the purposes of this Act, the identity of an author shall be regarded as unknown if it is not possible for a person who wishes to ascertain the identity of the author to do so by reasonable inquiry; but if that identity is once known it shall not be subsequently regarded as unknown.

Section 22 - Duration of copyright in literary, dramatic, musical, or artistic works

- (1) Subject to the following provisions of this section, copyright in a literary, dramatic, musical or artistic work expires at the end of the period of 50 years from the end of the calendar year in which the author dies.
- (2) If the work is computer-generated, copyright expires at the end of the period of 50 years from the end of the calendar year in which the work is made.
- (3) If the work is of unknown authorship, copyright expires at the end of the period of 50 years from the end of the calendar year in which it is first made available to the public by an authorised act.
- (4) For the purposes of subsection (3), the circumstances in which a work may be made available to the public include, -
 - (a) in the case of a literary, dramatic or musical work, -
 - (i) performance in public;
 - (ii) communication to the public;
 - (b) in the case of an artistic work, -

- (i) exhibition in public;
 - (ii) the playing or showing in public of a film that includes the work;
 - (iii) communication to the public.
- (5) If –
- (a) A work is of unknown authorship; and
 - (b) Copyright in the work has expired pursuant to subsection (3) of this section; and
 - (c) The identity of the author becomes known after the copyright has expired, - subsection (1) of this section does not apply to revive copyright in the work.
- (6) In relation to a work of joint authorship, -
- (a) The reference in subsection (1) of this section to the death of the author shall be construed, -
 - (i) If the identity of all the authors is known, as a reference to the last of them to die;
 - (ii) If the identify of one or more, but not all, of the authors is known, as a reference to the death of the last of the authors whose identity is known; and
 - (b) The reference in subsection (5) of this section to the identity of the author becoming known shall be construed as a reference to the identity of any of the authors becoming known.
- (7) This section does not apply to copyright in a work to which section 26 or section 28 of this Act applies.

Compare: Copyright, Designs and Patents Act 1988, s 12 (UK); 1962 No 33 s 8(1)
 [Section 26 = Crown Copyright; Section 28 = Copyright vesting in certain international organisations]

Section 67 - Acts permitted on assumptions as to expiry of copyright or death of author in relation to anonymous or pseudonymous works

- (1) Copyright in a literary, dramatic, musical, or artistic work is not infringed by any act done at a time when, or in pursuance of arrangements made at a time when,—
- (a) It is not possible for a person who wishes to do so to as-certain the identity of the author by reasonable inquiry; and
 - (b) It is reasonable to assume—
 - (i) That copyright has expired; or
 - (ii) That the author died 50 years or more before the beginning of the calendar year in which the act is done or the arrangements are made.
- (2) Subsection (1)(b)(ii) of this section does not apply in relation to—
- (a) A work in which Crown copyright exists under section 26 of this Act; or
 - (b) A work—
 - (i) In which copyright originally vested in an international organisation under section 28 of this Act; and
 - (ii) In respect of which an order made under that section specifies a copyright period longer than 50 years.
- (3) In relation to a work of joint authorship,—
- (a) The reference in subsection (1)(a) of this section to its being possible to ascertain the identity of the author shall be construed as a reference to its being possible to

- ascertain the identity of any of the authors; and
(b) The reference in subsection (1)(b)(ii) of this section to the author having died shall be construed as a reference to all the authors having died.

Compare: Copyright, Designs and Patents Act 1988, s 57 (UK)

Section 115 - Copyright to pass under will with unpublished works

Where under a bequest (whether specific or general) a person is entitled, beneficially or otherwise, to –

- (a) An original document or other material thing recording or embodying a literary, dramatic, musical or artistic work that was not published before the death of the testator; or
- (b) An original material thing containing a sound recording or film that was not published before the death of the testator, -
the bequest shall, unless a contrary intention is indicated in the testator's will or codicil to that will, be construed as including the copyright in the work in so far as the testator was the copyright owner immediately before his or her death.

Section 117 - Right to make conditions in respect of certain unpublished works

- (1) This section applies where the owner of the copyright in an unpublished literary, dramatic, or musical work, or an unpublished artistic work other than a photograph, has, whether before or after the commencement of this Act, transferred or bequeathed to an institution –
 - (a) The property in or possession of the manuscript of a literary, dramatic or musical work or a copy of the manuscript; or
 - (b) The property in or possession of the artistic work, -
subject to any conditions prohibiting, restricting, or regulating publication of the work for a specified period or without any limit on the period.
- (2) While the manuscript, copy, or work is in the possession of the institution, any publication of the work is breach of such a condition by –
 - (a) The institution owning the manuscript, copy, or work; or
 - (b) The institution having possession of the manuscript, copy or work; or
 - (c) Any other person –
shall, notwithstanding that the copyright in the work may have expired, be actionable as if copyright continued to exist in the work and the publication were an infringement of copyright.
- (3) Nothing in this section applies to any publication with the consent of the person who would be the owner of the copyright in the work if the copyright had not expired.
- (4) In this section, the term **institution** means the Crown, a local body, a prescribed library or archive within the meaning of section 50 of this Act, an institution within the meaning of section 159 of the Education Act 1989, or any other institution prescribed by regulations made under this Act.

Section 50 Interpretation

- (1) In sections 51 to 56C, unless the context otherwise requires –

Archive

- (a) Means –
- (i) Archives New Zealand (Te Rua Mahara o te Kawanatanga); or
 - (ii) The National Library; or
 - (iii) The sound archive maintained by Radio New Zealand Limited; or
 - (iv) The film archive maintained by Television New Zealand Limited; or
 - (v) The film archive maintained by the New Zealand Film Archive Incorporation;
or
 - (vi) Any collection of documents (within the meaning of section 2 of the Official Information Act 1982) of historical signification or public interest that is in the custody of and being maintained by a body, whether incorporated or unincorporated, that does not keep and maintain the collection for the purpose of deriving a profit; and
- (b) includes, in relation only to its holding of public archives (within the meaning of section 4 of the Public Records Act 2005), an approved repository within the meaning of that section of that Act

Prescribed library means –

- (a) The National Library; or
- (b) The Parliamentary Library; or
- (c) Every law library provided and maintained under section 375(1) of the Lawyers and Conveyancers Act 2006; or
- (d) A library maintained by an educational establishment, government department, or local authority; or
- (e) A library or any other class of library prescribed by regulations made under this Act, not being a library conducted for profit.

Schedule 1

17 – Duration of copyright in works generally

...

- (2) In relation to –

...

- (c) A literary, dramatic, musical, or artistic work (other than a photograph) of joint authorship made before commencement but not published before the 1st day of April 1963, section 22(6) of this Act applies; and
- (d) A work of unknown authorship, being a literary, dramatic, musical, or artistic work (other than a photograph) –
 - (i) If the work was published before commencement, subsections (3) to (5) of section 22 of this Act apply; and
 - (ii) If the work was unpublished before commencement, copyright exists until the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force or, if during that period the work is first made available to the public within the meaning of subsection (4) of section 22 of this Act, the date on which copyright expires under subsection (3) of that section

...

- (3) If, in any case to which subclause (2)(d)(ii) of this clause applies, the identity of the author becomes known before the date on which the copyright would otherwise have expired, copyright expires in accordance with section 22(1) of this Act.

...

18 – Duration of copyright in certain works made on or after 1 April 1963 and before commencement

(1) In relation to a literary, dramatic, musical or artistic work (other than a photograph)

–

- (a) Made on or after the 1st date of April 1963 and before commencement; and
- (b) The author of which died before commencement; and
- (c) That was not, after the death of the author and before commencement, published or performed in public or included in a broadcast, or offered for sale to the public on a record, -

copyright exists until the end of the period of 75 years from the end of the calendar year in which the author died.

(2) In relation to a literary, dramatic, musical or artistic work (other than a photograph)

–

- (a) Made on or after the 1st day of April 1963 and before commencement; and
- (b) The author of which dies before commencement; and
- (c) That was, after the death of the author and before commencement, published or performed in public or included in a broadcast, or offered for sale to the public on a record, -

copyright exists until the expiry of the shorter of the following periods:

- (d) 50 years from the end of the calendar year in which an act referred to in paragraph (c) of this subclause was first done
- (e) 75 years from the end of calendar year in which the author died.

26 – Acts permitted on assumptions as to expiry of copyright or death of author in relation to anonymous or pseudonymous works

Section 67(1)(b)(ii) of this Act applies –

- (a) To a work of unknown authorship that was unpublished before commencement, being a literary, dramatic, musical, or artistic work (other than a photograph), only after the end of the period of 50 years from the end of the calendar year in which the new copyright provisions came into force; and
- (b) To a work referred to in clause 17 of this Schedule, if the work is one to which, under that clause, a section of this Act applies.

40 – Copyright to pass under will with unpublished works

(1) Section 115 of this Act –

- (a) Does not apply where the testator dies before the 1st day of April 1963; and
- (b) Where the testator died on or after that date and before commencement, applies only in relation to an original document embodying a work.

(2) In the case of an author who dies before the 1st day of April 1963, the ownership after the author's death of a manuscript of the author, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work that has not been published or performed in public, is prima facie proof of the copyright being with the owner of the manuscript.

Appendix C

NSW waivers of copyright in judgments and legislation

Notice: Copyright in judicial decisions (1995)²³⁸

Recognising that the Crown has copyright in decisions of the courts and tribunals of New South Wales, including but not limited to prerogative rights and privileges of the Crown in the nature of copyright, and that it is desirable in the interests of the people of New South Wales that access to such decisions should not be impeded except in limited special circumstances:

I, The Honourable John Hannaford, Attorney General for the State of New South Wales, make and publish this instrument on behalf of the State of New South Wales.

Definitions

1. In this instrument:

“**authorisation**” means the authorisation granted by this instrument;

“**copyright**” includes any prerogative right or privilege of the Crown in the nature of copyright;

“**Council**” means the Council of Law Reporting established by the Council of Law Reporting Act 1969 of New South Wales;

“**judicial decision**” means:

- (a) a judgment, order or award of a State court; or
- (b) the reasons for any judgment, order or award given by the State court or a member of the State court, that has or have been publicly delivered, made or given;

“**State**” means the State of New South Wales, and includes the Crown in right of the State of New South Wales;

“**State court**” means:

- (a) any court constituted or continued by or under a law of New South Wales; or
- (b) any tribunal or other body constituted or continued by or under a law of New South Wales and exercising judicial or industrial arbitration functions.

Authorisation

2. Any publisher is by this instrument authorised to publish and otherwise deal with any judicial decision, subject to the following conditions:

- (a) copyright in judicial decisions continues to reside in the State;
- (b) the State reserves the right at any time to revoke, vary or withdraw the authorisation if the conditions of its grant are breached and otherwise on reasonable notice;
- (c) any publication of material pursuant to the authorisation must not indicate directly or indirectly that it is an official version of the material or that it is a version

²³⁸ The Hon John Hannaford MLC, Attorney General, ‘Notice: Copyright in judicial decisions’ *NSW Government Gazette* No.23 (3 March 1995) p. 1087.

of the material published by or for the Council or any other law reporting agency of the State;

(d) any publication of material pursuant to the authorisation must not:

- include any headnote or other summary of a judicial decision (or any summary of submissions) prepared by or for the Council or other law report agency, except with the further authority of the Council or agency; or
- reproduce any footnotes, comments, case lists, cross-references or other editorial material in any report of a judicial decision prepared by or for the Council or agency, except with the further authority of the Council or agency;

(e) the arms of the State must not be used in connection with the publication of material pursuant to the authorisation, except with the further authority of the Governor (acting with the advice of the Executive Council) or of the Attorney General;

(f) any publication of material pursuant to the authorisation is required to be accurately reproduced in proper context and to be of an appropriate standard.

Non-enforcement of copyright

3. The State will not enforce copyright in any judicial decision to the extent that it is published or otherwise dealt with in accordance with the authorisation. For this purpose, the authorisation has effect as a licence binding on the State.

Revocation, variation or withdrawal of authorisation

4. Any revocation, variation or withdrawal of the authorisation may be effected generally or in relation to specified publishers or specified classes of publishers. The authorisation may also be revoked, varied or withdrawn in relation to specified judicial decisions or specified classes of judicial decisions. Any such revocation, variation or withdrawal may be by notice in the New South Wales Government Gazette, or by notice to any particular publisher, or in any other way as determined from time to time by the Attorney General.

Unauthorised Documents Act 1922

5. Attention is drawn to the Unauthorised Documents Act 1922 of New South Wales, which restricts the use of the State coat of arms.

Copyright Act 1968 of the Commonwealth

6. Nothing in this instrument affects the rights of any person (other than the State) under the Copyright Act 1968 of the Commonwealth. In particular, attention is drawn to section 182A of that Act, which gives any person the right to make one copy, by reprographic reproduction, of a judicial decision.

Dated at Sydney this 28th day of February, 1995.

The Hon John Hannaford
Attorney General

Notice: Copyright in legislation and other material (1996)²³⁹

Whereas:

- (1) it is recognised that the Crown has copyright in the legislation of New South Wales and in certain other material, including but not limited to prerogative rights and privileges of the Crown in the nature of copyright, and that it is desirable in the interests of the people of New South Wales that access to such legislation and material should not be impeded except in limited special circumstances, and
- (2) a notice relating to such copyright was published in Government Gazette No 94 of 27 August 1993, and
- (3) it is expedient to extend the authorisation to publish and otherwise deal with such legislation and material, as provided for in that notice:

I, The Honourable J W Shaw QC, MLC, Attorney General for the State of New South Wales, make and publish this instrument on behalf of the State of New South Wales.

Definitions

1 In this instrument:

“authorisation” means the authorisation granted by this instrument.

“copyright” includes any prerogative right or privilege of the Crown in the nature of copyright.

“legislative material” means:

- (a) Acts of the Parliament of New South Wales, and
- (b) statutory rules within the meaning of the Interpretation Act 1987, and
- (c) environmental planning instruments within the meaning of the Environmental Planning and Assessment Act 1979, and
- (d) proclamations or orders made under an Act of the Parliament of New South Wales and published in the Government Gazette, and
- (e) admission rules made under the Legal Profession Act 1987 and rules made by the costs assessors’ rules committee under section 208R of that Act, and
- (f) any other instruments that are required under any law to be made, approved, or confirmed by the Governor or a Minister of State for New South Wales and that are published in the Government Gazette, and
- (g) provisions applying as a law of New South Wales, by virtue of an Act of the Parliament of New South Wales, and
- (h) any of the above in the form in which they are officially printed or reprinted, and with or without the inclusion of further amendments duly made, and
- (i) official explanatory notes and memoranda published in connection with any of the above, and
- (j) tables of provisions, indexes or notes published with any of the above.

“State” means the State of New South Wales, and includes the Crown in right of the State of New South Wales.

Authorisation

2 Any publisher is by this instrument authorised to publish and otherwise deal with any legislative material, subject to the following conditions:

²³⁹ The Hon JW Shaw QC, MLC, Attorney-General, ‘Notice: Copyright in legislation and other material’ *NSW Government Gazette* No. 110 (27 September 1996) p. 6611.

- (a) copyright in the legislative material continues to reside in the State,
- (b) State reserves the right at any time to revoke, vary or withdraw the authorisation if the conditions of its grant are breached and otherwise on reasonable notice,
- (c) Any publication of material pursuant to the authorisation must not indicate directly or indirectly that it is an official version of the material,
- (d) the arms of the State must not be used in connection with the publication of material pursuant to the authorisation, except with the further authority of the Governor (acting with the advice of the Executive Council) or of the Attorney General,
- (e) any publication of material pursuant to the authorisation is required to be accurately reproduced in proper context and to be of appropriate standard.

Non-enforcement of copyright

3 The State will not enforce copyright in legislative material to the extent that it is published or otherwise dealt with in accordance with the authorisation. For this purpose, the authorisation has effect as a licence binding on the State

Revocation, variation or withdrawal of authorisation

4 Any revocation, variation or withdrawal of the authorisation may be effected generally or in relation to specified publishers or specified classes of publishers. The authorisation may also be revoked, varied or withdrawn in relation to specified legislative material or specified classes of legislative material. Any such revocation, variation or withdrawal may be by notice in the Government Gazette, or by notice to any particular publisher, or in any other way as determined from time to time by the Attorney General.

Unauthorised Documents Act 1922

5 Attention is drawn to the Unauthorised Documents Act 1922, which restricts use of the State coat of arms.

Copyright Act 1968 of the Commonwealth

6 Nothing in this instrument affects the rights of any person (other than the State) under the Copyright Act 1968 of the Commonwealth.

Previous instrument

7 This instrument is intended to replace the instrument published in Gazette No 94 of 27 August 1993 in relation to copyright, and accordingly the authorisation granted by the previous instrument is subsumed by the authorisation granted by this instrument. However, this instrument does not affect any rights or liabilities accrued or accruing under the previous instrument.

Dated at Sydney this 17th day of September 1996
The Hon J W Shaw QC, MLC
Attorney General

Appendix D

In researching for and formulating this Report, we consulted with a number of key stakeholders:

| Contact | Organisation | Consulted on: |
|-------------------|--|---|
| Jessica Coates | Creative Commons Australia | Jessica is leading the “Opening Australia’s Archives” initiative. We consulted with her on issue concerning the GLAM sector, including copyright in unpublished and orphan works. |
| Adrian Cunningham | National Archives | Copyright issues affecting the National Archives and the GLAM sector |
| Jeff Kingwell | Geoscience Australia | Geoscience Australia’s implementation of Creative Commons (CC) licensing |
| Siu-Ming Tam | Australian Bureau of Statistics (ABS) | ABS’s implementation of Creative Commons (CC) licensing |
| Tony Bannerman | Bureau of Meteorology (BoM) | BoM’s implementation of Creative Commons (CC) licensing |
| Richard Best | Department of Internal Affairs, New Zealand Government | Development of the (draft) New Zealand Government Open Access and Licensing Framework |
| Keitha Booth | State Services Commission, New Zealand Government | Development of the (draft) New Zealand Government Open Access and Licensing Framework |
| Neale Hooper | Department of Justice and Attorney-General, Queensland Government (on secondment to Department of Environment and Natural Resources) | Creative Commons and government; the Queensland Government’s Government Information Licensing Framework (GILF) |
| Jim Wretham | Office of Public Sector Information (OPSI), UK Government | Creative Commons and government; Implementation of the Power of Information Taskforce Recommendations |
| Andrew Mills | Chief Information Officer, Government of South Australia | Implementation of CC licensing in the government sector |
| Graham Vickery | Organisation for Economic Co-operation and Development (OECD) | International developments relating to implementation of the OECD Recommendation on PSI |
| Margaret Birtley | CEO, Collections Council of Australia | Copyright issues affecting the GLAM sector |

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Berne Convention for the Protection of Literary and Artistic Works

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