

## ENABLING OPEN ACCESS TO PUBLIC SECTOR INFORMATION WITH CREATIVE COMMONS LICENCES – THE AUSTRALIAN EXPERIENCE<sup>1</sup>

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**Governments are coming to realize that they are one of the primary stewards of intellectual property, and that the wide dissemination of their work—statistics, research, reports, legislation, judicial decisions—can stimulate economic innovation, scientific progress, education, and cultural development.**

David Bollier, “Viral Spiral: How the Commoners Built a Digital Republic of Their Own”, 2008, at p192

The management of informational works is one of the most significant issues for government in the current era.<sup>2</sup> During the last decade much attention has focused on policies and practices to enable public sector information (PSI)<sup>3</sup> to be more readily accessed and used,<sup>4</sup> as governments have come to appreciate that significant social, cultural and economic benefits stand to be gained from doing so.<sup>5</sup> As Senator Kate Lundy

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<sup>2</sup> See Brian Fitzgerald, *Copyright 2010: The Future of Copyright*, [2008] European Intellectual Property Review 43, <http://eprints.qut.edu.au/archive/00013305/>; Brian Fitzgerald and Ben Atkinson, *Copyright as an Instrument of Information Flow and Dissemination: the case of IceTV Pty Ltd v Nine Network Australia Pty Ltd*, [http://eprints.qut.edu.au/view/person/Atkinson,\\_Benedict.html](http://eprints.qut.edu.au/view/person/Atkinson,_Benedict.html); Elliott Bledsoe, Jessica Coates and Brian Fitzgerald, *Unlocking the Potential Through Creative Commons: and industry engagement and action agenda*, (2007) ARC Centre of Creative Industries and Innovation <http://creativecommons.org.au/unlockingthepotential>.

<sup>3</sup> The term “public sector information” (PSI) is used here in a broad sense to include information and data produced by the public sector, including materials produced by government employees, materials commissioned by government from non-government parties, materials provided to government by non-government parties pursuant to a legislative obligation and materials that result from publicly-funded cultural, educational and scientific activities. It can include policy documents and reports of government departments, public registers, legislation and regulations, meteorological information, scientific research databases, statistical compilations and datasets, maps and geospatial information and numerous other data and information products produced by government for public purposes. Increasingly the term public sector information is being used globally to describe what was formerly often referred to as government information. See the European Directive on Access to and Reuse of Public Sector Information, [http://ec.europa.eu/information\\_society/policy/psi/rules/eu/index\\_en.htm](http://ec.europa.eu/information_society/policy/psi/rules/eu/index_en.htm). See also the OECD’s *Seoul Declaration on the Future of the Internet Economy* (2008) and the OECD Council’s *Recommendation for Enhanced Access and More Effective Use of Public Sector Information* (2008), available at <http://www.oecd.org/dataoecd/0/27/40826024.pdf>. The Seoul Declaration, in paragraph (b), refers to “public sector information and content” as including scientific data and works of cultural heritage.

<sup>4</sup> See Chapter 4 in this book, *Open Access and Public Sector Information: Policy Development in Australia and Key Jurisdictions*.

<sup>5</sup> See: *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>; *Powering Ideas: An Innovation Agenda for the 21st Century*, Department of Innovation, Industry, Science and Research, 12 May 2009, available at [http://www.innovation.gov.au/innovationreview/Documents/PoweringIdeas\\_fullreport.pdf](http://www.innovation.gov.au/innovationreview/Documents/PoweringIdeas_fullreport.pdf); *Australia’s Digital Economy: Future Directions*, Department of Broadband, Communications and the Digital Economy, July 2009, available at <http://www.dbcde.gov.au/?a=117295>; *Information Policy and E-Governance in the Australian Government: Report: A report for the Department of Prime Minister and Cabinet*, Ian Reinecke, March 2009 (updated to 31 July 2009), available at [http://www.dpmc.gov.au/publications/information\\_policy/index.cfm](http://www.dpmc.gov.au/publications/information_policy/index.cfm); *National Government Information Sharing Strategy: Unlocking Government information assets to benefit the broader community*, Australian Government Information Management Office (AGIMO), Department of Finance and Deregulation, at p 7, August 2009, available at <http://www.finance.gov.au/publications/national-government-information-sharing-strategy/docs/ngiss.pdf>.

observed at the 2009 Free and Open Source Software for Geospatial Conference, “open access to government data can dramatically increase the value created from the data both socially and economically [and] the society as a whole benefits from access to the data.”<sup>6</sup>

This chapter considers how open content licences - specifically, Creative Commons (CC) licences<sup>7</sup> - can be used by governments as a simple and effective mechanism to support the reuse of their copyright-protected PSI, particularly where materials are made available in digital form online or distributed on disk. In Australia, as in other countries worldwide, there is a growing awareness at the governmental level of the advantages of using open content licences when distributing their copyright materials.<sup>8</sup>

In building frameworks to improve the flow of PSI, it is necessary to ensure not only the interoperability of technical systems and document formats but also that legal interests in PSI are understood and effectively managed.<sup>9</sup> The importance of identifying and managing the range of legal interests relevant to PSI, to ensure that they operate to support - not hinder - efforts to improve access and reuse is central to the Organisation for Economic Cooperation and Development (OECD) **Recommendation for Enhanced Access and More Effective Use of Public Sector Information** (“the OECD PSI Recommendation”).<sup>10</sup> In establishing a primary principle of openness in order to maximise the availability of PSI for use and reuse, the OECD PSI Recommendation requires that any legal grounds that restrict the default presumption of openness should be clearly defined and justified.<sup>11</sup> Among the most commonly identified legal considerations displacing the presumption of openness are national security interests and obligations to maintain the privacy of personal information and to comply with undertakings regarding the confidentiality of information disclosed to a government agency during, for example, a tendering process. The OECD PSI Recommendation advocates making PSI available for access and reuse under transparent, broad, non-discriminatory and competitive conditions.<sup>12</sup> Where possible, PSI

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<sup>6</sup> Senator Kate Lundy, **Geospatial: the lifeblood of data**, address to the Free and Open Source Software for Geospatial Conference (FOSS4G), Darling Harbour, Sydney, 22 October 2009, available at <http://www.katelundy.com.au/2009/10/22/geospatial-the-lifeblood-of-data/>.

<sup>7</sup> Creative Commons licences are standardized, copyright licences which grant permission to use copyright works, in accordance with the terms of the particular set of template clauses applied by the licensor (who may be the copyright owner or another person who has the authority to license the use of the material). See generally [www.creativecommons.org.au](http://www.creativecommons.org.au).

<sup>8</sup> In August 2009, the New Zealand Government released the Draft New Zealand Government Open Access and Licensing Framework (NZGOAL), available at <http://www.e.govt.nz/policy/information-data/nzgoalframework.html> (accessed 25 January 2010). NZGOAL proposes that government agencies provide open access to copyright works, applying “the most liberal of the New Zealand Creative Commons law licences to those of their copyright works that are appropriate for release, unless there is a restriction which would prevent this. This most liberal Creative Commons licence is the Attribution (BY) licence.” See also Keitha Booth, State Services Commission, **Draft NZ Government Open Access and Licensing Framework (NZGOAL)**, Linux Miniconf, Wellington, 19 January 2010 at <http://www.aupsi.org/news/LINUX2010.jsp> (accessed 25 January 2010). In the December 2009 report, **Putting the Frontline First: Smarter Government**, (available at <http://www.hmg.gov.uk/frontlinefirst.aspx>) the UK Government indicated its intention to “establish a common licence to re-use data which is interoperable with the internationally recognised Creative Commons model”. Upon the launch of the data.gov.uk website on 22 January 2010, the UK Government announced that the datasets would be made available under new, straightforward, machine readable licensing terms and conditions that are interoperable with Creative Commons licences and permit both commercial and non-commercial reuse of the data. The new simple terms and conditions replace the existing Click-Use Licence and are the “first major step towards the adoption of a non-transactional, Creative Commons style approach to licensing the re-use of government information”. The National Archives is working with Creative Commons teams in the UK, the US, Australia and NZ to assess whether revised versions of the UK CC licences (due for release in May 2010) are suitable for licensing of UK government data and databases. See Perspectives blog (OPSI), 21 January 2010 at <http://perspectives.opsi.gov.uk/2010/01/licensing-and-datagovuk-launch.html> (accessed 25 January 2010). Further information on use of CC licences by governments worldwide is available at [http://wiki.creativecommons.org/Government\\_use\\_of\\_CC\\_licenses](http://wiki.creativecommons.org/Government_use_of_CC_licenses) (accessed 25 January 2010).

<sup>9</sup> See A Fitzgerald and K Pappalardo, **Building the Infrastructure for Data Access and Reuse in Collaborative Research: An Analysis of the Legal Context**, OAK Law Project and Legal Framework for e-Research Project (June 2007) <http://eprints.qut.edu.au/archive/00008865/01/8865.pdf>; and A Fitzgerald, K Pappalardo and A Austin, **Practical Data Management: A Legal and Policy Guide**, OAK Law Project and Legal Framework for e-Research Project (September 2008), available at [http://eprints.qut.edu.au/14923/1/Microsoft\\_Word\\_-\\_Practical\\_Data\\_Management\\_-\\_A\\_Legal\\_and\\_Policy\\_Guide.doc.pdf](http://eprints.qut.edu.au/14923/1/Microsoft_Word_-_Practical_Data_Management_-_A_Legal_and_Policy_Guide.doc.pdf).

<sup>10</sup> 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>.

<sup>11</sup> OECD PSI Recommendation, the “Openness” principle states: “Maximising the availability of public sector information for use and re-use based upon presumption of openness as the default rule to facilitate access and re-use. Developing a regime of access principles or assuming openness in public sector information as a default rule wherever possible no matter what the model of funding is for the development and maintenance of the information. Defining grounds of refusal or limitations, such as for protection of national security interests, personal privacy, preservation of private interests for example where protected by copyright, or the application of national access legislation and rules.”

<sup>12</sup> OECD PSI Recommendation, the “Access and transparent conditions for re-use” principle states: “Encouraging broad non-discriminatory competitive access and conditions for re-use of public sector information, eliminating exclusive arrangements, and

should be made available online and in electronic form, and unnecessary restrictions on access, use, reuse, combination and sharing should be removed, so that, in principle, all accessible information is open for all to reuse, for any purpose. As most governments worldwide claim copyright in at least some of their PSI (the most notable exception being the United States federal government), in order to give effect to an open access policy, it will be necessary to ensure that the government's copyright is not relied upon to justify (or excuse) restrictions on access, reuse and sharing. While copyright protection does not extend to mere information or facts, many of the informational works created or held by government will fall within the groups of material to which copyright applies (literary, artistic, sound and video recordings) and will be sufficiently original to attract protection. The OECD PSI Recommendation acknowledges that intellectual property rights in PSI should be respected, and recommends that governments exercise their copyright in ways that facilitate reuse, by developing simple mechanisms to encourage wider access and reuse, such as simple and effective automated online licensing systems.<sup>13</sup>

CC licences offer the kind of “simple and effective licensing arrangement” envisaged by the OECD PSI Recommendation, providing non-discriminatory access and conditions of reuse for copyright-protected PSI. This Chapter gives an overview of the key features of the CC licences developed for use in Australia and considers their advantages for governments when distributing their copyright PSI. The experience of Australian governments in assessing the potential of CC licences and applying them in practice is described, beginning in 2005 with the collaborative project between Queensland University of Technology (QUT) and the Queensland Government (which became known as the Government Information Licensing Framework (GILF) project),<sup>14</sup> through to the widespread adoption of CC licences by Australian federal, State and local government agencies. An account is given of several of the most significant projects in which CC licensing has been applied and the conclusions and recommendations of various government reviews that have considered and supported the use of CC licences on public sector materials.

## THE COMPLEX FLOWS OF PUBLIC SECTOR INFORMATION

Improving the flow of PSI requires a detailed understanding of the kinds of materials produced, how they have been created, and by whom. As these factors all bear upon the existence, ownership and exercise of copyright, they need to be taken into account in any strategy for licensing PSI materials designed to enable PSI to move without impediment among government agencies and between government and the private sector.<sup>15</sup>

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 teams). However, a significant part of the materials held by government is produced externally, by recipients of government funding (such as research institutes) and parties who are required to provide certain documents and reports to government. Governments commonly

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removing unnecessary restrictions on the ways in which it can be accessed, used, re-used, combined or shared, so that in principle all accessible information would be open to re-use by all. Improving access to information over the Internet and in electronic form. Making available and developing automated on-line licensing systems covering re-use in those cases where licensing is applied, taking into account the copyright principle below.”

<sup>13</sup> OECD PSI Recommendation, the “Copyright” principle states: “Intellectual property rights should be respected. There 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. Exercising copyright in ways that facilitate re-use (including waiving copyright and creating mechanisms that facilitate waiving of copyright where copyright owners are willing and able to do so, and developing mechanisms to deal with orphan works), and where copyright holders are in agreement, developing simple mechanisms to encourage wider access and use (including simple and effective licensing arrangements), and encouraging institutions and government agencies that fund works from outside sources to find ways to make these works widely accessible to the public.”

<sup>14</sup> All the authors of this chapter have been involved with the Government Information Licensing Framework (GILF) project since its inception in 2005. See generally <http://www.gilf.gov.au>. For the background to the GILF project, see 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/0/F82522D9F23F6F1C4A2572EA007D57A6/\\$FILE/Stage%202%20Final%20Report%20-%20PDF%20Format.pdf?openement](http://www.qsic.qld.gov.au/QSIC/QSIC.nsf/0/F82522D9F23F6F1C4A2572EA007D57A6/$FILE/Stage%202%20Final%20Report%20-%20PDF%20Format.pdf?openement).

<sup>15</sup> See generally, B Atkinson and B Fitzgerald (2008) **Copyright as an Instrument of Information Flow and Dissemination: the case of ICE TV Pty Ltd v Nine Network Australia Pty Ltd**, available at <http://eprints.qut.edu.au/15208/> (accessed 29 January 2010).

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

Systems to facilitate PSI access and reuse must be designed so that government-produced materials can flow both to other government agencies as well as to non-government users. Materials provided to government by private sector parties need to be usable not only by the particular agency that receives them but also by other government bodies. However, the flow of PSI does not only involve government-generated materials flowing to other government agencies and the private sector. Government often needs to be able to on-distribute materials generated by a private sector party to others in the private sector. Any model for licensing of 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.

As awareness has grown of the importance of enabling access to PSI, so have the barriers to achieving this objective become more readily apparent. The importance of clear policy frameworks and practices is increasingly well understood and is dealt with at length in Chapter 4. However, as well as developing a policy framework, it is necessary to address the impediments presented by cultural factors and inadequate information management practices. The complexities of PSI creation and use mean that unless the conditions of use are stated in clear and easily understood terms, licensing is likely to prove to be an impediment to information flows.<sup>16</sup> 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.<sup>17</sup>

## CREATING A COMMONS OF PUBLIC SECTOR MATERIALS

From a copyright law perspective, the concept of “public domain” traditionally connoted materials that were not subject to copyright protection, whether because copyright had expired or because they did not qualify for copyright in the first place (such as mere facts or information and, in the United States, works produced by the federal government).<sup>18</sup> As David Bollier explains:

For decades, the public domain was regarded as something of a wasteland, a place where old books, faded posters, loopy music from the early twentieth century, and boring government reports go to die. It was a dump on the outskirts of respectable culture.<sup>19</sup>

During the last decade there has been a rethinking of what the public domain is<sup>20</sup> and how it functions,<sup>21</sup> such that it is now accepted that it has an intrinsic economic and cultural value,<sup>22</sup> and that its openness can be structured and reinforced by law (including copyright and contract).<sup>23</sup> With the changing role of knowledge in

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<sup>16</sup> See M Heller, *The Gridlock Economy – How Too Much Ownership Wrecks Markets, Stops Innovation and Costs Lives*, Basic Books, New York, 2008.

<sup>17</sup> See KPMG Consulting, *Executive Summary: Geospatial Data Policy Study – Project Report*, 2001, Recommendation 5 at pp 24-25, available at [http://www.geoconnections.org/publications/policyDocs/keyDocs/KPMG/KPMG\\_E.pdf](http://www.geoconnections.org/publications/policyDocs/keyDocs/KPMG/KPMG_E.pdf).

<sup>18</sup> B Fitzgerald, A Fitzgerald et al, *Internet and E-Commerce Law: Technology, Law, and Policy*, Lawbook Co/Thomson, Sydney, 2007 at p 265.

<sup>19</sup> David Bollier, *Viral Spiral: How the Commoners Built a Digital Republic of Their Own*, The New Press, New York, 2008 at p 42, available at <http://www.viralspiral.cc/download-book> (accessed 10 December 2009).

<sup>20</sup> See D Lange, *Recognising the Public Domain* (1981) 44 *Law and Contemporary Problems* 147; T Ochoa, *Origins and Meanings of the Public Domain* (2002) 28 *University of Dayton L Rev* 215 at p 237; E Lee, *The Public's Domain: the evolution of legal restraints on the government's power to control public access through secrecy or intellectual property* (2003) 55 *Hastings L J* 91 at pp 102-105.

<sup>21</sup> See J Litman, *The Public Domain* (1990) 39 *Emory L J* 965; see also Elinor Ostrom, *Governing the Commons: the evolution of institutions for collective action*, Cambridge University Press, Cambridge UK, 1990.

<sup>22</sup> See J Boyle, *The Second Enclosure Movement and the Construction of the Public Domain* (2003) 66 *Law and Contemporary Problems* 33; P Samuelson, *Enriching Discourse on Public Domains*, (2006) 55 *Duke L J* 783; B Fitzgerald and I Oi, *Free Culture: Cultivating the Creative Commons* (2004) 9(2) *Media and Arts LR* 137; W Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach* (2000) 9 *George Mason LR* 1; L Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World*, Random House, New York, 2001; J Cohen, *Copyright, Commodification and Culture: Locating the Public Domain*, in L Guibault and P B Hugenholtz (eds), *The Future of the Public Domain: Identifying the Commons in Information Law*, Kluwer, The Netherlands, 2006.

<sup>23</sup> J H Reichman and P F Uhler, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, (2003) 66 *Law & Contemporary Problems* 315-462; A Fitzgerald and K Pappalardo, *Building the Infrastructure*



society and the economy, the concept of public domain has been recast more broadly to mean “open” knowledge and content – that is, ideas, information and materials that can be accessed, reused and redistributed by participants in an online social community.<sup>24</sup> This public domain – or commons – of openly accessible knowledge and content does not consist only of materials that are not subject to any rights whatsoever but, rather, encompasses materials that are protected by copyright but are made available for access and reuse under, for example, open source software and open content licences.<sup>25</sup>

Based on this broader conceptualisation of public domain, much of the effort directed towards improving access to public sector materials is not now driven by assumptions that improved access and reuse can only be achieved in situations where copyright does not exist.<sup>26</sup> Although superficially attractive, the deficiencies of a “no copyright” approach towards the structuring of the public domain are now fairly well understood. There is a growing awareness that the key to facilitating access to public sector materials revolves not so much around the issues of subsistence and ownership of copyright, but depends rather on the licensing and pricing arrangements for access to and reuse of the material.<sup>27</sup> That the subsistence of copyright is not incompatible with promoting 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”.<sup>28</sup>

In fact, there are very few jurisdictions worldwide that do not recognise copyright in government-produced materials, the most prominent example being the United States federal government.<sup>29</sup> Like Australia, many governments adopt a position with respect to copyright that is at the opposite end of the spectrum, continuing to recognize the subsistence and ownership of copyright in all or most works produced or commissioned by the government.<sup>30</sup> Others, such as New Zealand, have excluded a range of public materials from the scope of government copyright, but continue to assert government ownership of copyright in other

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for Data Access and Reuse in Collaborative Research: An Analysis of the Legal Context, OAK Law Project and Legal Framework for e-Research Project, QUT, Brisbane, July 2007, available online at [http://www.oaklaw.qut.edu.au/files/Data\\_Report\\_final\\_web.pdf](http://www.oaklaw.qut.edu.au/files/Data_Report_final_web.pdf).

<sup>24</sup> Yochai Benkler refers to “that most precious of all public domains – our knowledge of the world that surrounds us”. See Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, (2000) 15 Berkley Tech. L.J. 535.

<sup>25</sup> For a discussion of the concept of “public domain”, see R Pollock, *The Value of the Public Domain*, Institute for Public Policy Research, July 2006, available at <http://www.ippr.org/publicationsandreports/publication.asp?id=482> (accessed 22 October 2008).

<sup>26</sup> See Intrallect Ltd (E Barker and C Duncan) and AHRC Research Centre (A Guadamuz, J Hatcher and C Waelde), *The Common Information Environment and Creative Commons, Final Report*, October 2005, Ch 3.6, available at [http://www.intrallect.com/index.php/intrallect/knowledge\\_base/general\\_articles/creative\\_commons\\_licensing\\_solutions\\_for\\_the\\_common\\_information\\_environment\\_1/](http://www.intrallect.com/index.php/intrallect/knowledge_base/general_articles/creative_commons_licensing_solutions_for_the_common_information_environment_1/) (accessed 29 January 2010); UK Government, Office of Fair Trading, *The Commercial Use of Public Information*, (December 2006), available at [http://www.offt.gov.uk/advice\\_and\\_resources/publications/reports/consumer-protection/oft861](http://www.offt.gov.uk/advice_and_resources/publications/reports/consumer-protection/oft861) (accessed 29 January 2010).

<sup>27</sup> Section 105 of the US Copyright Act 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.” For a US perspective on s 105, see Maj. 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 <http://www.stormingmedia.us/81/8166/A816604.html> (accessed 10 December 2009).

<sup>28</sup> 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>.

<sup>29</sup> The United States 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”. The closest to this approach is found in the Philippines’ copyright law, the *Intellectual Property Code of the Philippines (Republic Act No. 8293)* which is influenced by US copyright law. Section 176.1 (“Works of the Government”) provides that “no copyright shall subsist in any work of the Government of the Philippines”, but goes on to state that “prior approval of the government agency or office wherein the work is created shall be necessary for exploitation of such work for profit [and that] such agency or office may, among other things, impose as a condition the payment of royalties.” However, no prior approval or conditions are required for the use of “statutes, rules and regulations, and speeches, lectures, sermons, addresses, and dissertations, pronounced, read or rendered in courts of justice, before administrative agencies, in deliberative assemblies and in meetings of public character”. Available at [http://www.congress.gov.ph/download/ra\\_10/RA08293.pdf](http://www.congress.gov.ph/download/ra_10/RA08293.pdf) (accessed 02 February 2010).

<sup>30</sup> For a comprehensive survey of the copyright position in different countries and 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](http://linkinghub.elsevier.com/retrieve/pii/S1352023704000279).

materials.<sup>31</sup> Even within the United States, the majority of States continue to recognize government copyright in a large proportion of their materials.<sup>32</sup> 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.<sup>33</sup>

United States' experience has led to a reappraisal of the appropriateness of the blanket “no copyright” rule, 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.<sup>34</sup> Even if no copyright subsists 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 resources 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 and ownership of copyright in government materials than to the failure to adopt a clear policy position on access and reuse and the lack of established practices (ranging from licensing to use of interoperable file formats) supporting open access and reuse.

The point that the management of copyright to enable dissemination and reuse of PSI should not simply revolve around considerations about the subsistence or otherwise of copyright was made in submissions to the CLRC's Crown Copyright review. 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.<sup>35</sup>

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. His Honour stated that copyright ownership of judicial materials was not necessarily “inconsistent with having them readily available, but would be useful in discouraging inappropriate use of them.”<sup>36</sup> Judge McGill pointed out that abolishing copyright in judgments “may well be a huge incentive to plagiarism”, noting:

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.<sup>37</sup>

Advocates of the abolition of copyright in most or all government materials typically suggest that governments can exercise sufficient control over their PSI by other means, such as imposing contractual obligations on users, technological mechanisms and jurisdiction-specific laws governing the use of official

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<sup>31</sup> 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.

<sup>32</sup> 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](http://linkinghub.elsevier.com/retrieve/pii/S1352023704000279).

<sup>33</sup> See B W Mitchell at p 17 and Table 1 at pp 20-21.

<sup>34</sup> See Maj. 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 <http://www.stormingmedia.us/81/8166/A816604.html> (accessed 10 December 2009).

<sup>35</sup> 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](http://www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Present_Inquiries_Crown_copyright_Submissions_2004_Sub_No_17_-_Professor_Brian_Fitzgerald).

<sup>36</sup> Submission 70, p2, referred to in CLRC, **Crown Copyright**, 2005 at p 42, para 4.50.

<sup>37</sup> Ibid, referred to in CLRC, **Crown Copyright**, 2005, para 4.71 at p 54.

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*.<sup>38</sup> 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**.<sup>39</sup> [emphasis added]

### Advantages of a copyright-based licensing approach

Adoption of a copyright-based, licensing approach for PSI has some distinct advantages that are not readily achievable otherwise. The most readily identified benefits of this approach are that it enables governments to achieve their open access policy objectives, ensures that information about the provenance of PSI is distributed along with it and avoids government and citizens being locked out (through pricing or technical barriers) from accessing and using materials produced with public funding.

#### *Supports government's open access policy objectives*

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.

While permitting a broad range of uses of PSI, government may often, justifiably, want to continue to be able to control the use of its material, even though that power may only rarely be exercised. This is especially the case where PSI takes the form of materials that are part of the official record or have authoritative status. An integral aspect of governmental responsibility is ensuring that important records and documents are distributed in an accurate and reliable form. Government policy may support unrestricted access to these materials and encourage users to copy and widely distribute them, provided that the copies circulated are accurate, or, if altered, are not misrepresented as being the original versions released by government. For such materials, the continued recognition of copyright is regarded as central to ensuring the integrity and authenticity of PSI, so that the public can be aware of the status of each publication.<sup>40</sup> Distribution of PSI under copyright licensing conditions provides governments with a means of ensuring the integrity and authenticity of their materials, whether by terminating the licence and/or bringing an action for copyright infringement if materials are misused or misrepresented.<sup>41</sup>

Fully a decade before the implementation of CC licences in Australia, the advantages of a copyright-based licensing approach were recognised by Australian governments<sup>42</sup> which issued general copyright licences to promote the widespread accessibility of judicial and legislative materials.<sup>43</sup> Under what are (somewhat misleadingly) referred to as "copyright waivers", the New South Wales government granted general licences,

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<sup>38</sup> 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](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.

<sup>39</sup> Ibid.

<sup>40</sup> See CLRC, *Crown Copyright*, 2005, footnote 93, para 4.66 at p 53 and para 4.68, at p 53, referring to Submission 64 (Victorian Government) at p 1.

<sup>41</sup> 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](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1996_3/bannister) (accessed 9 November 2009), commenting on *Baillieu and Poggoli (of and on behalf of the Liberal Party of Australia, Victorian Division) v Australian Electoral Commission and Commonwealth of Australia* [1996] FCA 1202.

<sup>42</sup> New South Wales and the Northern Territory.

<sup>43</sup> See CLRC, *Crown Copyright*, 2005 at pp 58-59.

initially just for legislation (1993)<sup>44</sup> but later extended to judgments (1995),<sup>45</sup> authorising any publisher to “publish and otherwise deal with” these materials, subject to compliance with specified conditions. Importantly, the New South Wales government did not relinquish or abandon its copyright interests in the licensed materials. Rather, the notices published in the Government Gazette make it clear that copyright continues to reside with the New South Wales government but that it will not be enforced if the material is published or otherwise dealt with in accordance with the authorisation. In publishing the materials, publishers are prohibited from indicating (directly or indirectly) that their publication is an official version of the material and must ensure that it is “accurately reproduced in proper context and [is] of an appropriate standard”.<sup>46</sup> While publishers are granted extensive rights to publish legal materials, the government retains rights which can be exercised to ensure the accuracy and integrity of the published versions of its material, through the express reservation of the right to revoke, vary or withdraw its permission if the conditions of the grant are breached.

### *Provenance and attribution*

For much PSI, it is important that information about its origin, quality, currency and significance continues to be displayed on or in association with it, for example, by means of a metadata description accompanying the document or accessible via hyperlink. The credibility a user gives to information (whether generated by the public sector or otherwise) relates directly to who has created it and how, and what it represents. Ensuring that the provenance of PSI is properly documented is even more important for authoritative or official materials and in circumstances where correct attribution of ideas and information is a prerequisite to its public release, such as with scientific research results.<sup>47</sup> Using copyright-based licence conditions to ensure that provenance and attribution information is retained with PSI not only enhances its reliability but also significantly improves its discoverability by search engines. Where PSI represents the findings of scientific research, the inclusion of an attribution requirement in a copyright-based open content licence provides formal legal expression of the well-established normative practice of attribution that is central to “the traditional system under which [scientific] ideas and research output are shared”.<sup>48</sup> As Victoria Stodden observes:

[t]his mechanism largely mirrors how scientific work is typically cited and built upon, with the difference that the attribution process is formalised in a legal licence, as opposed to academic citation.<sup>49</sup>

### *Avoids financial and technical lock-up of taxpayer-funded materials*

In the absence of copyright protection for PSI, any recipient of PSI that is distributed without restrictions as to its reuse<sup>50</sup> is free to incorporate it into a new work. The newly created independent work may consist primarily of PSI which has been value added, for example, through features which better organise the base material and make it more easily searchable, or may consist largely of new materials produced by third parties. In either situation, the creator of the new work will own copyright and may assert their rights against all other parties, including the government, notwithstanding that the work has been produced by drawing on, and incorporates, PSI.<sup>51</sup> PSI is produced at taxpayers’ expense. Yet, if PSI is distributed without copyright-based or other

<sup>44</sup> 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](http://www.legislation.nsw.gov.au/copyleg_2001.pdf).

<sup>45</sup> The Hon John Hannaford MLC, Attorney General, **Notice: Copyright in judicial decisions**, NSW Government Gazette No.23 (3 March 1995) p. 1087.

<sup>46</sup> Clause 2, **Notice: Copyright in legislation and other material**, NSW Government Gazette No. 110 (27 September 1996) p. 6611; and Clause 2, **Notice: Copyright in judicial decisions**, NSW Government Gazette No.23 (3 March 1995) p. 1087.

<sup>47</sup> See V Stodden, **Enabling Reproducible Research: Licensing for Scientific Innovation** (2009) 13 International J of Communications Law & Policy at pp 18-19.

<sup>48</sup> V Stodden, **Enabling Reproducible Research: Licensing for Scientific Innovation** (2009) 13 International J of Communications Law & Policy at p 18.

<sup>49</sup> Ibid at p19.

<sup>50</sup> Such restrictions could apply under a contract between the government and a particular recipient or could apply generally under legislative provisions.

<sup>51</sup> 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. .... Open-content licenses offer a solution by ensuring that taxpayer financed works will be available to and benefit the



obligations designed to ensure that it continues to be freely accessible and reusable, there is nothing to prevent a private entity from including it in a new, copyright-protected work access to which is restricted by legal and technological controls. It is desirable to avoid creating a situation where government and taxpayers are precluded from accessing and using materials that have been produced at public expense and released into the public domain by the government without any legal or technical encumbrance. Retaining copyright in PSI and distributing it under open content licences such as Creative Commons ensures that PSI released by the government continues to be freely available for access and reuse, even where it has been included in a value added commercial product or locked up behind technological measures. Importantly, copyright preserves the openness of PSI and avoids the situation which would see governments and citizens alike having to obtain permission and pay for the pleasure of using their publicly funded democratic and cultural heritage. Concerns that, in the absence of Crown copyright, governments may pay more than once for PSI were raised by the Federal and State governments in their submissions to the Copyright Law Review Committee's (CLRC) review of Crown Copyright in 2004-05:

[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.<sup>52</sup>

## GOVERNMENT ("CROWN") COPYRIGHT

Under Australian law, copyright protects much of the creative, cultural, educational, scientific and informational material generated by federal, State/Territory and local governments and their constituent departments and agencies. Ownership of copyright by the government agencies is dealt with in Part VII of the **Copyright Act 1968** (the "Crown copyright" provisions). The principal provisions on which government ("Crown") 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".<sup>53</sup> 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.<sup>54</sup>

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 but by a more extensive (but not clearly defined) group:

[122] "By" is concerned with those circumstances where a servant or agent of the Crown brings the work into existence for and on behalf of the Crown. "Direction" and "control" are not concerned with the situation where the work is made by the Crown but with situations where the person making the work is subject to either the direction or control of the Crown as to how the work is to be made. In the copyright context, that may mean how the work is to be expressed in a material form.

[123] Direction might mean order or command, or management or control (Macquarie Dictionary Online). Direction might also mean instructing how to proceed or act, authoritative guidance or instruction, or keeping in right order management or administration (Oxford English Dictionary Online).

[124] Control might mean the act or power of controlling, regulation, domination or command (Macquarie Dictionary Online). Control might also mean the fact of controlling or of checking and directing action, the function or power of directing and regulating, domination, command, sway: Shorter Oxford English Dictionary (5th ed, Oxford University 2002).

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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> (accessed 10 December 2009).

<sup>52</sup> See Copyright Law Review Committee, **Crown Copyright**, 2005 at p 81, para 5.66, quoting from the submission by the New South Wales Attorney General's Department. A similar concern was expressed by the Federal government's Department of Finance and Administration.

<sup>53</sup> 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).

<sup>54</sup> **Copyright Act 1968**, s 179.

[125] Thus, when the provisions refer to a work being made under the direction or control of the Crown, in contrast to being made by the Crown, the provisions must involve the concept of the Crown bringing about the making of the work. It does not extend to the Crown laying down how a work is to be made, if a citizen chooses to make a work, without having any obligation to do so.<sup>55</sup>

Governments own copyright in a vast range of written and other materials (including legislation, judgments, parliamentary materials and reports of government-commissioned review bodies).<sup>56</sup> 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, government can exercise the same range of rights as non-government copyright owners.<sup>57</sup> 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.<sup>58</sup> Consequently, to give effect to their information access and reuse policies, governments need to develop and implement copyright management strategies to ensure that their exclusive rights are exercised consistently with their open access objectives.

The primary rights of copyright are the rights to reproduce (copy), first publish, publicly perform, make an adaptation<sup>59</sup> of the work and to communicate it to the public in digital form (e.g. on a website).<sup>60</sup> Other important rights of copyright owners in the digital era 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.<sup>61</sup>

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.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> In certain circumstances the removal or alteration of ERMI relating to a copyright work may be a criminal offence under the **Copyright Act**.<sup>65</sup> 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

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<sup>55</sup> **Copyright Agency Limited v State of New South Wales** [2007] FCAFC 80, paras 122 – 125.

<sup>56</sup> For a listing of the various kinds of copyright materials produced by or for governments, see CLRC, **Crown Copyright**, 2005 at pp 10-11, available at <http://www.clrc.gov.au/www/agd/agd.nsf/Page/RWPBB79ED8FE4858F514CA25735100827559> (accessed 9 November 2009). Whilst the view that ownership of copyright in judgments vests in the Crown is generally non-controversial the contrary view is expressed (usually by the judges themselves) from time to time. See the CLRC's **Crown Copyright** report, 2005, at pp 46 – 48, for discussion of submissions from members of the judiciary on whether copyright in judgments is owned by the Crown or by the judges: Chief Justice Black (Federal Court) at para 4.47; Chief Justice Doyle (Supreme Court of South Australia) at para 4.49; and Judge McGill (District Court of Queensland) at para 4.50.

<sup>57</sup> Section 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.

<sup>58</sup> **Copyright Act 1968**, ss 180, 181.

<sup>59</sup> For literary, dramatic and musical works: **Copyright Act 1968**, s 31(1)(a)(vi).

<sup>60</sup> **Copyright Act 1968**, ss 31, 85-88.

<sup>61</sup> For an overview of the operation of these provisions, see Chapter 4, "Copyright" in B Fitzgerald, A Fitzgerald et al, **Internet and E-Commerce Law: Technology, Law, and Policy**, Lawbook Co/Thomson, Sydney, 2007, at pp 216- 244.

<sup>62</sup> 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.

<sup>63</sup> **Copyright Act 1968**, s10(1) defines it as information that:

- (a) is electronic; and
- (b) either: (i) is or was attached to, or is or was embodied in, a copy of the work or subject-matter; or (ii) appears or appeared in connection with a communication, or the making available, of the work or subject-matter; and
- (c) either: (i) identifies the work or subject-matter, and its author or copyright owner (including such information represented as numbers or codes); or (ii) identifies or indicates some or all of the terms and conditions on which the work or subject-matter may be used, or indicates that the use of the work or subject-matter is subject to terms or conditions (including such information represented as numbers or codes).

<sup>64</sup> **Copyright Act 1968**, ss 116B-116D.

<sup>65</sup> **Copyright Act 1968**, ss 132AQ-132AS.

knowingly deal in devices designed to circumvent TPMs<sup>66</sup> and, where the TPM controls access to a copyright work, it is an infringement to knowingly circumvent the TPM.<sup>67</sup>

As well as the rights described above, individual authors of copyright works can also exercise moral rights, which are personal to the author and cannot be transferred. An author's moral rights 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.<sup>68</sup>

Although government does not, itself, have moral rights, government may own copyright in materials in respect of which individual authors can exercise moral rights. This situation can arise where copyright ownership vests in the government (including through an assignment of rights) but the individual creator of the materials has not consented that their moral rights will not be respected.<sup>69</sup> As moral rights are not transferred along with the economic rights, the individual creator will still be able to exercise their moral rights unless they have agreed not to exercise them.

While government, as copyright owner, enjoys the same exclusive economic rights as other copyright owners, the nature and purpose of government copyright means that these rights should not be exercised in a way that restricts the flow of PSI. It seems to be widely acknowledged, in Australia and other jurisdictions that at least part of the original rationale for government copyright ownership was to “promote the accuracy and integrity of official government publications”.<sup>70</sup> However, it is also apparent that the concept of Crown copyright in the United Kingdom and Australia is inextricably connected with what is now known as open content licensing. The earliest House of Commons documents explaining Crown copyright make it clear that publications such as reports of Select Committees or Royal Commissions, and Acts of Parliament were produced for the “use and information of the public and it [was] desirable that the knowledge of their contents should be diffused as widely as possible. A “general rule permitting full and free reproduction” of such copyright works would apply and, while the rights of the Crown would continue, no steps would ordinarily be taken to enforce the Crown's copyright.<sup>71</sup> Consequently, the exclusive rights to copy, publish, perform and distribute electronically to the public would not usually be exercised by governments to restrict the distribution of accurate and integral copies of the vast majority of government copyright materials. The exercise of these rights to prevent others from using government works would occur only in a narrow and distinct range of circumstances, such as to halt the circulation of erroneous or falsely attributed materials or where it is necessary for national security reasons.

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 containing confidential or otherwise sensitive information).<sup>72</sup> Where, under an open access policy, PSI has been identified

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<sup>66</sup> Copyright Act 1968, s 116AO(1).

<sup>67</sup> Copyright Act 1968, s 116AN(1). The meaning of the statutory definition “access control technological protection measure” (TPM), appearing in section 10(1) of the Copyright Act 1968, was considered at first instance by Sackville J. in *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2002] FCA 906; on appeal to the Full Court of the Federal Court in, *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2003] FCAFC 157; and on appeal to the High Court in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58. See Chapter 4, “Copyright” in B Fitzgerald, A Fitzgerald et al, *Internet and E-Commerce Law: Technology, Law, and Policy*, Lawbook Co/Thomson, Sydney, 2007, at pp 223-230.

<sup>68</sup> Copyright Act 1968, Part IX, ss 189-195AZR.

<sup>69</sup> Subject to their terms of employment, government employees may be entitled to moral rights in respect of copyright works which they authored.

<sup>70</sup> See Copyright Law Review Committee, *Crown Copyright*, 2005 at p xxiv, available at <http://www.clrc.gov.au/www/agd/agd.nsf/Page/RWPBB79ED8E4858F514CA25735100827559>.

<sup>71</sup> See B Fitzgerald, A Fitzgerald et al, *Internet and E-Commerce Law: Technology, Law, and Policy*, Lawbook Co/Thomson, Sydney, 2007 at pp 267-268.

<sup>72</sup> 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

as suitable to make available for access and reuse, the government should not rely on copyright to control use of the work (such as by copying, digitisation, electronic distribution or inclusion in new works), irrespective of the purpose for which the PSI is used.

## CREATIVE COMMONS LICENCES

Creative Commons licences are standardized, “open content” copyright licences which grant permission to use copyright works, in accordance with the terms of the particular set of template clauses applied by the licensor (who may be the copyright owner or another person who has the authority to license the material). “Open content” licences are based on copyright, with the copyright owner retaining ownership and exercising their rights liberally to ensure that the work can be accessed and used. While copyright is claimed in the work, under the terms of an open content licence, the copyright owner exercises their exclusive rights to permit the copying, publication and distribution by users for a wide range of purposes, subject only to restrictions on certain kinds of reuse.<sup>73</sup>

The open content model of copyright licensing can be contrasted with traditional, “all rights reserved” copyright licensing practices in which the copyright owner exercises their rights by limiting the use of the copyright material to specified persons and purposes. The focus of traditional copyright licensing is on the exercise of the exclusive rights to reproduce and distribute copies of the work, with rights being granted to specific parties, on certain conditions and often for some economic return to the licensor. Open content licensing, by contrast, is predicated on the exercise of the exclusive rights to permit reproduction and distribution by all users, subject to specific conditions applying to use of the copyright work.<sup>74</sup> Another important point of difference is that traditional licences of informational copyright works often seek to impose, by contractual means, additional obligations or constraints on users. Such obligations commonly relate to how the information contained in a copyright work can be used, with the recipient required to maintain the confidentiality of the information or to impose the same reuse restrictions on parties to whom the licensee passes the material, through a contractual “daisy chain”.<sup>75</sup>

As open content licensing starts from the premise that copyright will be exercised to permit reproduction and distribution of the copyright material by users (although there may be other conditions of use), it is particularly relevant in systems designed to facilitate access to and re-use of PSI, especially where material is distributed online in digital form. While acknowledging the government’s ownership of copyright in the material, open content licences enable a government to give effect to its open access policy and to set the conditions on which PSI may be accessed and reused. Open access licences such as CC can be seen as both the legal expression of a policy supporting access and reuse and the means of implementing the policy. Although it was not initially envisaged or intended that CC licences would be used on government materials, their potential for use by governments and publicly funded research institutes was soon recognised, particularly in jurisdictions such as Australia where copyright subsists in a vast range of PSI.<sup>76</sup>

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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.

<sup>73</sup> See N Suzor and B Fitzgerald, “The Role of Open Content Licences in Building Open Content Communities: Creative Commons, GFDL and Other Licences”, in C Kapitzke and M Peters (eds.) *Global knowledge cultures*, 2007, Sense Publishers, Rotterdam, Netherlands, pp 145-159. For the background to the Creative Commons licences, see David Bollier, *Viral Spiral: How the Commoners Built a Digital Republic of their Own*, The New Press, New York, 2008, available at <http://www.viralspiral.cc/download-book> (accessed 10 December 2009).

<sup>74</sup> Whilst there are 6 types of Creative Commons licences, the most appropriate for use with most PSI in practice is the CC-BY (attribution) licence, with CC- BY- ND (no derivatives) being appropriate for a more limited segment of PSI. By contrast, the use by government of either of the Share Alike licences may in practice result in more restricted reuse than intended.

<sup>75</sup> *Government Information and Open Content Licensing: An Access and Use Strategy*. *Government Information Licensing Framework Project* (Stage 2 Report), at p 7, para 5.6. See <http://www.qsic.qld.gov.au/qsic/QSIC.nsf/CPByUNID/BFDC06236FADB6814A25727B0013C7EE>. See the representation of the Indirect Licensing Model (the “daisy chain” model) in Figure 1 below.

<sup>76</sup> An early Australian example of recognition of the potential for applying CC licences to PSI is the GILF project. See 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 14 November 2009. See the submission by Professor Brian Fitzgerald to the Copyright Law Review Committee in Chapter 18 of this book; 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](http://www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Present_Inquiries_Crown_copyright_Submissions_2004_Sub_No_17_-_Professor_Brian_Fitzgerald). In the UK, see *The Common Information Environment and Creative Commons. Final Report to the Common Information Environment Members of a study on the applicability of Creative Commons licences* (October 2005), available at



## Creative Commons – Australian licences

Creative Commons (CC) licences were devised from the outset to operate in both the digital, online and analog environments and aimed to be user friendly for non-lawyers.<sup>77</sup> Each of the CC licences contains standardised licensing terms describing user permissions in simple (“human readable”) language, depicted by symbols (the “Licence Deed” or “Commons Deed”), a legally enforceable (“lawyer readable”) licence (the “Legal Code”), and computer (“machine readable”) code (the “Digital Code” or “Licence Metadata”).

Australian versions of the CC licences were released in January 2005. They enable owners of materials that qualify for protection under the **Copyright Act** 1968 to license them in accordance with Australian law. The Australian CC licences contain the same basic elements as those found in the international CC licences, but in terms crafted to reflect Australian law.<sup>78</sup> The current version of the Australian CC licences is version 2.5; work on porting the updated version 3.0 of the licences is underway and version 3.0 of the Australian licences will be published in 2010. In Australia, the Creative Commons office is based at the Queensland University of Technology (QUT), in Brisbane, Queensland.<sup>79</sup>

Under each of the CC licences, users are expressly granted permission to do a range of specified acts in relation to the licensed material – these are referred to here as the “baseline rights”. However, CC licences do not grant users the right to do everything within the scope of the copyright owner’s rights but, rather, some of the rights are kept (or “reserved”) by the owner. In reliance on the rights retained by the copyright owner, under CC licences the licensor – as well as granting rights to users – imposes restrictions (or conditions) on the use of the licensed material. The recipient of a CC-licensed work is permitted to exercise the rights granted, subject to respecting the restrictions (or conditions) imposed by the copyright owner. In practice, the user of a CC-licensed work will be required, depending on which CC licence has been selected by the licensor, to observe conditions that range from simply acknowledging the author of the work (or the copyright owner as indicated), to refraining from using it for commercial purposes or from making any derivative works.

The baseline rights granted under the CC licences are:

- to reproduce the work;
- to incorporate the work into Collective Works;<sup>80</sup>
- to reproduce the work as incorporated in the Collective Works; and
- to publish, communicate to the public, distribute copies or records of, exhibit or display publicly or perform publicly the Work (including as incorporated in Collective Works).<sup>81</sup>

Each of the CC licences – other than those which include a “No Derivative Works” condition – also grant the user the rights:

- to create and reproduce Derivative Works;<sup>82</sup> and

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[http://www.intrallect.com/index.php/intrallect/knowledge\\_base/general\\_articles/creative\\_commons\\_licensing\\_solutions\\_for\\_the\\_common\\_information\\_environment\\_\\_1/](http://www.intrallect.com/index.php/intrallect/knowledge_base/general_articles/creative_commons_licensing_solutions_for_the_common_information_environment__1/) (accessed 10 December 2009).

<sup>77</sup> For the background to the Creative Commons licences, see David Bollier, *Viral Spiral: How the Commoners Built a Digital Republic of their Own*, The New Press, New York, 2008, available at <http://www.viralspiral.cc/download-book> (accessed 10 December 2009); B Fitzgerald, “Structuring open access to knowledge: The Creative Commons story”, in C Kapitzke and B Bertram (eds), *Libraries: Changing information space and practice*, 2006, Lawrence Erlbaum Associates, pp 271-280; and B Fitzgerald, *Open Content Licensing (OCL) for Open Educational Resources*, presented at the OECD Expert Meeting on Open Educational Resources, 6 and 7 February 2006, Malmo, Sweden, available at <http://eprints.qut.edu.au/3621/> (accessed 29 January 2010).

<sup>78</sup> The CC licences do not limit or remove statutory rights, such as “fair dealing”, conferred under the **Copyright Act** 1968 (Cth).

<sup>79</sup> The office was established under the terms of an Affiliation Agreement entered into between QUT and Creative Commons Corporation in 2004. The QUT Project leads are Professor Tom Cochrane and Professor Brian Fitzgerald. For more information on the CC licences see the Creative Commons website at <http://www.creativecommons.org> and the Creative Commons Australia (CCau) website at <http://www.creativecommons.org.au>. For more information on Creative Commons the organisation see <http://creativecommons.org/about/>.

<sup>80</sup> As defined in Clause 1(a), Legal Code, Attribution 2.5 Australia to mean “a work, such as a periodical issue, anthology or encyclopedia, in which the Work in its entirety in its unmodified form, along with a number of other contributions, constituting separate and independent works in themselves, are assembled into a collective whole.”

<sup>81</sup> Clause 3(a) – (d), Legal Code, Attribution 2.5 Australia.

<sup>82</sup> As defined in Clause 1(b), Legal Code, Attribution 2.5 Australia to mean “a work that reproduces a substantial part of the Work, or of the Work and other pre-existing works protected by copyright, or that is an adaptation of a Work that is a literary,

- to publish, communicate to the public, distribute copies or records of, exhibit or display publicly or perform publicly the Derivative Works.<sup>83</sup>

There are four standardised sets of conditions which can be applied by copyright owners when licensing their materials under a CC licence:



Attribution (BY): The work is made available to the public with the baseline rights, on condition that the work is distributed with the licensing information, the author or another specified person (e.g. the custodian) is attributed in the manner specified in the licence, the work is not falsely attributed to another person and the work is not distorted or altered to the prejudice of the author's reputation.



Non-Commercial (NC): The work can be copied, displayed and distributed, provided any use of the material is for non-commercial purposes.<sup>84</sup>



No Derivative Works (ND): This licence grants baseline rights, but it does not allow Derivative Works to be created from the original. A Derivative Work is one in which a substantial part of the licensed work is reproduced or an adaptation of the work (for example, a translation or dramatisation).



Share Alike (SA): Derivative works based on the licensed work can be created, but the Derivative Work must be distributed under a Share Alike licence, creating a "viral" licence aimed at maintaining the openness of the original work.<sup>85</sup>

These four sets of conditions, together with the baseline permissions, can be combined to create six licences:

- Attribution 2.5 (BY)  
< <http://creativecommons.org/licenses/by/2.5/au/> >
- Attribution No Derivatives 2.5 (BY-ND)  
< <http://creativecommons.org/licenses/by-nd/2.5/au/> >
- Attribution Non-Commercial 2.5 (BY-NC)  
< <http://creativecommons.org/licenses/by-nc/2.5/au/> >
- Attribution Non-Commercial No Derivatives 2.5 (BY-NC-ND)  
< <http://creativecommons.org/licenses/by-nc-nd/2.5/au/> >
- Attribution Non-Commercial Share Alike 2.5 (BY-NC-SA)  
< <http://creativecommons.org/licenses/by-nc-sa/2.5/au/> >
- Attribution Share Alike 2.5 (BY-SA)  
< <http://creativecommons.org/licenses/by-sa/2.5/au/> >

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dramatic, musical or artistic work...[but] a work that constitutes a Collective Work will not be considered a Derivative Work for the purpose of this Licence".

<sup>83</sup> Clause 3(a) – (d), Legal Code, Attribution 2.5 Australia.

<sup>84</sup> Creative Commons has conducted consultations around the meaning of the term "non-commercial". In September 2009, Creative Commons published the report, **Defining "Noncommercial": A Study of How the Online Population Understands "Noncommercial Use"**, See <http://creativecommons.org/press-releases/entry/17721> and [http://wiki.creativecommons.org/Defining\\_Noncommercial](http://wiki.creativecommons.org/Defining_Noncommercial) (accessed on 21 January 2010).

<sup>85</sup> It is important to note that a licence cannot feature both the Share Alike and No Derivative Works options. The Share Alike requirement applies only to derivative works.

The Attribution (BY) condition applies to each of the current Australian CC licences. Interestingly, when the suite of CC licences was first drafted in 2002, it extended to a total of eleven licences – the six that are currently used (as listed above) as well as versions which did not require attribution of the author: Share Alike (SA); No Derivatives (ND); Non-Commercial (NC); Non-Commercial, Share Alike (NC-SA); and Non-Commercial, No Derivatives (NC-ND). As few people were choosing the five no-attribution licences, in May 2004 Creative Commons decided to “retire” them, leaving the current set of six, all of which include the Attribution requirement.<sup>86</sup> In 2008, it was estimated that there were at least 130 million works licensed under CC licences, up from about 90 million in the previous year.<sup>87</sup>

### Copyright-based, direct licences

The CC licensing model is inspired by the work of Richard Stallman, who developed the GNU General Public Licence (GNU GPL) for free software.<sup>88</sup> Stallman’s “powerful insight” was that:

[C]opyright in software code can be used not only to restrict access and exploit its benefits for monetary reward, but also to maintain open access for downstream users and developers.<sup>89</sup>

The GNU GPL explicitly recognises the use of free and open source software (FOSS) licences to ensure that others can use, copy, modify and redistribute the software at no cost:

The licenses for most software and other practical works are designed to take away your freedom to share and change the works. By contrast, the GNU General Public License is intended to guarantee your freedom to share and change all versions of a program--to make sure it remains free software for all its users.<sup>90</sup>

Like FOSS licences, CC licences are based on the copyright in the licensed work. The permitted uses under the CC licences are consents or permissions<sup>91</sup> to do acts within the scope of the copyright owner’s exclusive rights.<sup>92</sup> Copyright licences can be contractual or bare: a contractual licence is one granted by the licensor to the licensee under the terms of a contract, whereas a bare licence is merely “permission to do that which would otherwise be unlawful”.<sup>93</sup> Acting outside the scope of a bare copyright licence will put the licensee in the position of infringing copyright (unless some exception or defence can be relied upon) whereas breach of a contractual copyright licence gives rise to both a breach of the contract and infringement of copyright.

The CC licences commence with the words:

By exercising any rights to the work provided here, you accept and agree to be bound by the terms of this licence. The licensor grants you the rights contained here in consideration of your acceptance of such terms and conditions.

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<sup>86</sup> On this aspect of the history of CC licences, see David Bollier, *Viral Spiral*, 2008, at pp 118-120, available at <http://www.viralspiral.cc/download-book> (accessed 10 December 2009). Where either of the CC Share Alike licences (e.g. BY-SA or BY-NC-SA) is selected and applied to copyright material it is permissible to use (e.g. mix or mash up) this material with other copyright material licensed under a later version of the same type of Share Alike (SA) licence or indeed with material licensed under another country’s version of the same type of SA licence. This ability is referred to as “versioning up”. Creative Commons has conducted consultations around the meaning of the term “non-commercial”. In September 2009, Creative Commons published the report, *Defining “Noncommercial”: A Study of How the Online Population Understands “Noncommercial Use”*. See <http://creativecommons.org/press-releases/entry/17721> and [http://wiki.creativecommons.org/Defining\\_Noncommercial](http://wiki.creativecommons.org/Defining_Noncommercial) (accessed 10 December 2009).

<sup>87</sup> See “History” page on Creative Commons website at <http://creativecommons.org/about/history> (accessed 6 November 2009).

<sup>88</sup> For information on the GNU General Public Licence, see <http://www.gnu.org/licenses/licenses.html> (accessed 25 January 2010).

<sup>89</sup> See: B Fitzgerald and N Suzor, *Legal Issues Relating to Free and Open Source Software in Government*, 2005, Melbourne University Law Review vol. 29, p 412. This does not mean that successful business models cannot be built around open licensing. IBM, RedHat, and Revver are examples of such successful business models. For further information on Revver, see <http://revver.com/go/faq/#general1>. Revver is the first viral video network that pays, using Creative Commons Attribution-NonCommercial-NoDerivatives 2.5 as its default licence. See also UNCTAD, *Free and Open Source Software: Policy and Development Implications* (2004), available at [http://www.unctad.org/en/docs/c3em21d2\\_en.pdf](http://www.unctad.org/en/docs/c3em21d2_en.pdf).

<sup>90</sup> The Free Software Foundation, GNU General Public License v3.0 (2007) at <http://www.gnu.org/licenses/gpl-3.0.html> (accessed 25 January 2010).

<sup>91</sup> *Computermate Products (Aust) Pty Ltd v Ozi-Soft Pty Ltd* (1988) 20 FCR 46 at 49.

<sup>92</sup> See Mark Henley, *Jacobsen v Katzer and Kamind Associates – an English legal perspective* (2009) 1 International Free and Open Source Software Law Review 41 at p 43.

<sup>93</sup> H Laddie, P Prescott and M Vitoria, *Modern Law of Copyright*, Butterworths, London, 3<sup>rd</sup> ed, 2000 at para 24.2. See also P Johnson, “Dedicating” Copyright to the Public Domain (2008) 71(4) Modern Law Review 587 at p 604.

Although the CC licences use contractual language, in reality they will often take effect as a bare (non-contractual) licence. Notwithstanding mention of “acceptance” by the licensee and “consideration” flowing from the licensor, in many circumstances where CC licences are used, all the elements required for a valid contract to be formed (offer, acceptance and consideration) will not be present.<sup>94</sup> Even if there is an offer by the licensor which is accepted by the licensee and consideration is provided by the licensor, the element of consideration from the licensee will generally not be satisfied.<sup>95</sup> In circumstances where there is sufficient consideration (such as where the work is licensed for money) and a contract is formed, the copyright-based licence can co-exist with any contractual promise in relation to the work.<sup>96</sup>

As non-exclusive copyright licences, CC licences do not require any formalities or writing (unlike exclusive licences of copyright which must be evidenced in writing, signed by the licensor). The licence operates directly from the licensor to each recipient of the licensed material, notwithstanding that the recipient has not obtained the material directly from the licensor. The operation of CC licences as a direct licence between the licensor and each recipient of the material (rather than a sub-licence to subsequent recipients) is explained in Clause 8(a) and (b): when the licensee publishes, communicates to the public, distributes or publicly digitally performs the licensed Work, a Collective Work or a Derivative Work, the licensor offers to the recipient a licence on the same terms and conditions as the licence granted to the licensee.<sup>97</sup>

**Figure 1** (following) represents the situation where a copyright work (W) is distributed unaltered to downstream recipients, commencing with the original licensor (A) and passing to a series of licensees (B, C, D, E). It illustrates both the direct licensing model adopted in CC licences (above the line of letters A-B-C-D-E) and the indirect licensing model typically used in contractual licences that permit sub-licensing of copyright works (below the line of letters A-B-C-D-E). In the indirect, contractual licensing model – often referred to as the “daisy chain” model – each licensee of the work is granted the right to sub-license it to subsequent recipients further down the distribution pathway. Under the direct licensing relationship established by CC licences, each downstream recipient of the copyright work (B, C, D, E) obtains a direct licence from the original licensor (A), even though they may have received the work indirectly (eg where E receives it from D, not A). By contrast, when the original licensor (A) licenses the copyright work under a contractual licensing arrangement that permits sub-licensing, none of the subsequent recipients (other than B) has a direct legal relationship with A. Only B forms a direct, contractual relationship with A, while all subsequent recipients are in a direct relationship with the party from whom they have obtained the licensed material (eg C relates to B, E relates to D). The result is that the legal relationship between A and each recipient of the licensed material (except B) is indirect: A can enforce the licence directly against B, but each subsequent party in the distribution

<sup>94</sup> This is the case in common law based jurisdictions (eg Australia, US and UK) where the presence of consideration is a fundamental requirement for the formation of a legally enforceable contract. Nevertheless some have reasoned that in common law jurisdictions the CC licences are contract-based or have a contractual element. The weight of opinion and the better view is that true consideration is not present but rather only illusory consideration which will not support a legally enforceable contract. Two authors supporting the illusory consideration analysis, addressed principally in the context of open source software licences, are Ben Giles ‘*Consideration and the open source agreement*’ (2002) 49 NSW Society for Computers and the Law, available at <http://www.nswscl.org.au/journal/49/Giles.html>, and Jeremy Malcolm, *Problems in Open Source Licensing* (2003) see <http://www.ilaw.com.au/public/licencearticle.html> (accessed 25 January 2010). In civil law based jurisdictions (eg EU member states and Japan), where unlike common law jurisdictions no requirement of consideration exists, there is considerable support for the view that a contract may arise where an open source licence or a Creative Commons licence is entered into. For a civil law analysis or perspective on these issues see Andres Guadamuz-Gonzales *The License/Contract Dichotomy in Open Licenses: A Comparative Analysis* (2008-9) at [http://heinonline.org/HOL/Page?handle=hein.journals/jjuv130&div=18&g\\_sent=1&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/jjuv130&div=18&g_sent=1&collection=journals).

<sup>95</sup> The legal theory underpinning CC licensing is explained as follows by David Bollier in *Viral Spiral*, 2008, at p 118: “To ensure that the licenses would be enforceable, the CC lawyers built on the same legal base as the GPL; the licenses were crafted not as contracts, but as conditional permissions based on copyright law. A contract requires that the licensee have the opportunity to accept or reject the terms of an agreement, which would not be the case here. A conditional permission, by contrast, is the legal prerogative of a copyright holder. She is simply offering advance permission to use a CC-licensed work (to share, modify, distribute, etc.) so long as the specified terms are respected.” Professor Eben Moglen, former General Counsel of the Free Software Foundation, considering GPL open source software licences, takes the view that the GPL “is a very simple form of copyright license...because it involves no contractual obligations”: “[T]he work’s user is obliged to remain within the bounds of the license not because she voluntarily promised, but because she doesn’t have any right to act at all except as the license permits.” See E Moglen at <http://www.gnu.org/press/mysql-affidavit.html> and E Moglen, *Free Software Matters: Enforcing the GPL*, I, 12 August 2001, available at <http://moglen.law.columbia.edu/publications/lu-12.html>.

<sup>96</sup> *Copyright Agency Limited v State of New South Wales* [2008] HCA 356 at para [9].

<sup>97</sup> Clause 8(a), (b), Legal Code, Attribution 2.5 Australia.



chain is accountable only to the immediate party from which it has obtained the licensed material (eg C is liable to B; E is liable to D).<sup>98</sup>

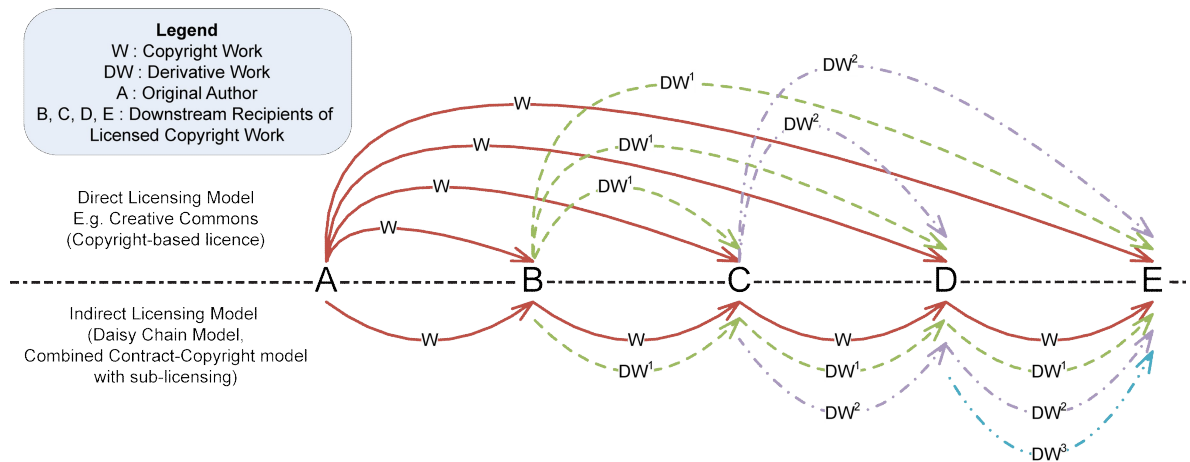


Figure 1: Direct and indirect licensing models

### Attribution based on economic and moral rights

Each of the CC licences contains provisions relating to the inclusion of copyright and licensing information, the identification of the author and other nominated parties, and prohibition of false attribution of authorship and dealings with the work that prejudice the author's honour or reputation. These attribution requirements are based on the economic rights of copyright owners to maintain electronic rights management information (ERMI)<sup>99</sup> they have applied to their works and the moral rights of individual authors of copyright works (the rights of attribution of authorship, integrity and to prevent false attribution).<sup>100</sup>

Clause 4 of the Legal Code of the Attribution 2.5 Australia licence contains various provisions designed to ensure that licensed works are correctly attributed and identified and that the terms of the licence can be readily ascertained by licensees using the work:

- A copy of the CC licence, or the Uniform Resource Identifier (URI) for the licence, must be included with each copy of the work that the licensee publishes, communicates to the public, distributes, publicly exhibits or displays, or publicly performs or digitally performs. The licensee is not permitted to impose terms that “exclude, alter or restrict the terms of [the] Licence or the recipients’ exercise of the rights granted” under it.<sup>101</sup>
- All copyright notices for the work must be kept intact when the licensee publishes, communicates to the public, distributes, publicly exhibits or displays, publicly performs or publicly digitally performs the licensed work, any Derivative Works or Collective Works.<sup>102</sup> Where the licensee creates a Collective Work or a Derivative Work they must, if requested by the licensor, remove any credit that would otherwise be required.<sup>103</sup>
- Clear and reasonably prominent credit must be given to the Original Author (that is, the individual or entity who created the licensed work), by name or pseudonym where possible, and any other party designated for attribution in the copyright notice (e.g. a sponsor institute, publishing entity or journal).

<sup>98</sup> As well as illustrating the situation where the copyright work (W) is on-distributed in an unaltered form, the diagram represents the situation where B adapts or adds value to W and creates a Derivative Work (DW1) which is distributed to the downstream parties C, D and E. C, in turn, adapts or adds value to DW1 and creates another or second Derivative Work (DW2). The discontinuous curved lines show the legal relationships (and the flow of rights) in relation to DW1 and DW2, under the direct and the indirect licensing models respectively.

<sup>99</sup> Copyright Act 1968, ss 116B – 116D.

<sup>100</sup> Copyright Act 1968, Part IX.

<sup>101</sup> Clause 4(a), Legal Code, Attribution 2.5 Australia.

<sup>102</sup> Clause 4(b), Legal Code, Attribution 2.5 Australia.

<sup>103</sup> Clause 4(a), Legal Code, Attribution 2.5 Australia.

If accreditation is required, it must be given in the particular manner made known by the Original Author, and otherwise as reasonable to the medium being used, by conveying the identity of the Original Author or other designated party, the title of the licensed work, the URI specified by the licensor (where reasonably practicable). Accreditation may be done in any reasonable manner, provided that, where the licensed work is used in a Derivative Work or a Collective Work, such credit appears where any other comparable accreditation of authorship appears and at least as prominently as any other comparable accreditation.<sup>104</sup>

- The licensed work is not to be falsely attributed to someone other than the Original Author when the licensee publishes, communicates to the public, distributes, publicly exhibits or displays, or publicly performs or digitally performs the work, or any Derivative Works or Collective Works, unless as agreed in writing by the licensor.<sup>105</sup>
- The licensee must not do anything that results in a material distortion of, mutilation of, or a material alteration to the licensed work, or any other act in relation to the licensed work, that is prejudicial to the Original Author's honour or reputation, except as otherwise agreed in writing by the licensor.<sup>106</sup>

Where PSI is licensed under a CC licence, the government (or a particular government agency) will typically be the party designated for the purpose of attribution. Where an individual author continues to exercise moral rights, it may also be necessary to attribute the author, even though ownership of copyright may have been transferred to the government.

A question which frequently arises when datasets and databases are developed from numerous sources is how the attribution requirement - a standard feature in all CC licences - can be complied with in practice. This question is particularly relevant where numerous individual contributors (potentially numbering in their thousands) contribute data into highly collaborative works. The requirement to attribute the creators of a huge number of data compilations is often referred to as "attribution stacking". The attribution condition in CC licences enables the licensor to specify how they are to be attributed and how the work is to be identified. The CC licences do not require attribution to take any particular form and, in fact, the licensor may not insist on being positively attributed and may indicate as much in the copyright notice on the work. It is generally a matter for the licensor to indicate what form of attribution, if any, is required. In some projects the conditions of operation or conduct agreed among all the participants may be to the effect that attribution of individual inputs or contributions will not be shown.<sup>107</sup> Instead, it may be agreed that the only party attributed will be the owner of copyright in the composite database or material produced collaboratively by project participants.<sup>108</sup> However, even if positive attribution is not required or is not feasible in the circumstances, licensors may still insist - via the attribution condition - that the work is not falsely attributed to another person<sup>109</sup> and is not altered in a manner derogatory to the licensor's reputation.

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<sup>104</sup> Clause 4(b), Legal Code, Attribution 2.5 Australia.

<sup>105</sup> Clause 4(c), Legal Code, Attribution 2.5 Australia.

<sup>106</sup> Clause 4(d), Legal Code, Attribution 2.5 Australia. Note that the moral right of integrity is not addressed in the US version of the CC licences. Compare the Australian Attribution 2.5 licence (<http://creativecommons.org/licenses/by/2.5/au/legalcode>) to the United States Attribution 3.0 licence (<http://creativecommons.org/licenses/by/3.0/us/legalcode>).

<sup>107</sup> For example, a nationwide project undertaken by a federal government agency may invite citizens and firms to upload comments or information on a topical issue to a designated website as part of a policy consultation or development process. The conditions under which the comments or information are provided could be clearly set out on the relevant website for all potential participants to see before deciding whether to upload information. In such an example, it could be stated in the conditions that all contributions provided are to be provided under a CC-BY licence and that the results of the consultation will be made available through the website by the government agency under a CC-BY licence with a general form of attribution only to be included such as "All participants in the XYZ policy consultation exercise (2009)" with no specific attribution to be given to any individual input or contribution.

<sup>108</sup> Another operational response where numerous parties require attribution is to provide a link to a separate website containing the attribution details for the numerous contributors.

<sup>109</sup> On this issue, see the submission of Judge McGill, Queensland District Court, to the Copyright Law Review Committee's review of Crown copyright, submission no 70 at p 2. His Honour noted: "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." See Copyright Law Review Committee, *Crown Copyright*, 2005, para 4.71 at p 54, available at <http://www.clrc.gov.au/www/agd/agd.nsf/Page/RWPBB79ED8E4858F514CA25735100827559>.

CC0 (“CC zero”) is a form of Creative Commons dedication by which the licensor (known as the “affirmer”) waives all their copyright and related rights in a particular work to the maximum extent legally permissible.<sup>110</sup> Although it has been proposed for use by Science Commons in some jurisdictions as a way of ensuring that data remains free and open for access and reuse, this approach is problematic in the Australian legal environment and its use is not generally recommended, particularly for data produced by publicly funded researchers or government research institutes. For publicly funded material in Australia, the CC BY licence will usually be the most appropriate licence to facilitate broad access and reuse with minimal restrictions (users are only obliged to retain associated metadata or rights management information and to correctly attribute authorship and maintain the integrity of the data).

Under the CC0 approach all copyrights and related rights in a work are purported to be waived. However, the operation of moral rights means that the general waiver of all rights which the CC0 licence purports to achieve will not be effective if the work is copyright-protected and has been created by an individual author. The **Copyright Act** does not permit an author to grant a general waiver of their moral rights in a copyright work.<sup>111</sup> To effectively waive their moral rights, the author must consent to specified acts/omissions or specified classes or types of acts/omissions. The CC0 terms state that where the CC0 waiver does not work for any reason, CC0 acts as an unconditional, irrevocable, non-exclusive, royalty free licence to use the work for any purpose (“the default licence”). Where the work has been produced by an individual author, the default licence would still be subject to the author’s moral rights, with the consequence that, in attempting to use a CC0 licence, the licensor is left in the position of using a licence subject to conditions similar to those found in the Attribution clause of CC licences.

If a CC0 “no rights” affirmation is used, and even assuming that it operates in the manner intended with all rights having been totally surrendered, the consequences of abandoning all rights based on the economic rights of copyright and moral rights need to be fully appreciated. Once all rights are abandoned, users of the material are entirely unrestricted in what they do with it, subject only to limitations that may arise through other legal obligations (such as contractual terms or the operation of fair trading laws). In waiving all rights under a CC0 affirmation, the affirmer loses not only their right to positive attribution (i.e. the right to be named as author of the work), but also the right to protect against false attribution (e.g. to prevent the work being distributed with someone else’s name attached) and the moral right of integrity of authorship (e.g. the right to prevent an altered and inaccurate version of the work being circulated under the affirmer’s name). If users are to be required to comply with obligations such as identification of author/s, maintain the integrity of the work or retention of metadata, these obligations will only be enforceable if they are imposed by another legal means, such as a contract between the author and each user of the material.

### Access and control not limited by technological means

Copyright owners have the right to prevent the circumvention of technological protection measures they have applied to their copyright materials to control access to or copying of the works. Such technological measures are often referred to as digital rights management (DRM)<sup>112</sup> and encompass a range of technologies, including encryption<sup>113</sup> and digital watermarking.<sup>114</sup> CC licences cannot be used to license copyright material if the copyright owner has applied a technological protection measure to preclude unauthorised use of the material. Clause 4 of the Legal Code of the Attribution 2.5 Australia licence states that the licensed copyright work must not be published, communicated to the public, distributed, publicly exhibited, displayed, performed or digitally

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<sup>110</sup> In ‘Dedicating’ Copyright to the Public Domain, *The Modern Law Review* (2008) 71(4) 587-610, Phillip Johnson considers whether an author can effectively dedicate or give up their copyright to the public domain. The author suggests that the dedications are not legally effective to place copyright in the public domain and instead operate, under English law at least, as no more than a bare copyright licence, which may be terminated at any time provided reasonable notice of revocation is provided. The author considers (at p 606) what period of time might represent reasonable notice in a range of situations. See <http://www3.interscience.wiley.com/cgi-bin/fulltext/120751054/PDFSTART>.

<sup>111</sup> **Copyright Act** 1968, s 195AWA (other than films), and s 195AW (films).

<sup>112</sup> For an overview of many technological and legal issues relating to digital rights management, see Reihaneh Safavi-Naini and Moti Yung (eds), **Digital Rights Management: Technologies, Issues, Challenges and Systems** (2006). Note, in particular, the chapter by Yee Fen Lim, “Digital Rights Management: Merging Contract, Copyright and Criminal Law” in R. Safavi-Naini R & Yung M (Eds.) **Proceedings of First International Conference on Digital Rights Management: Technologies, Issues, Challenges and Systems**, 2005, Lecture Notes in Computer Science Series 3919, Springer-Verlag Berlin Heidelberg 2006, at pp 66-74.

<sup>113</sup> Encryption involves the scrambling of the information embedded within a digital object so that it cannot be used without a password.

<sup>114</sup> Digital watermarks (which can be visible or invisible) embed information (e.g. about the author, publisher, terms and conditions of use) into the data and removing them causes the quality of the data to be severely degraded.

performed “with any technological measures that control access or use of the Work in a manner inconsistent with the terms of this Licence”. However, where the licensed work is included in a Collective Work, it is not necessary for the Collective Work (apart from the licensed work itself) to comply with this requirement.<sup>115</sup>

### Termination on breach

The grant of rights under a CC licence is perpetual, lasting for the full duration of copyright.<sup>116</sup> CC licences do not contain an express provision which entitles the licensor to terminate the licence solely for the licensor’s convenience,<sup>117</sup> although the licensor reserves the right to release the work under a different licence or to stop distributing it at any time.<sup>118</sup> A CC licence and the rights granted under it will terminate automatically if there is a breach of the terms of the licence by the user.<sup>119</sup> If a CC licence terminates due to breach by the licensee, in the absence of an ongoing licence to use the copyright material, the ordinary principles of copyright law come into operation. This means that, following termination for breach, any unauthorised use of the copyright material by the licensee may be an infringement of copyright that is subject to civil and criminal penalties.

Some commentators have contended that the absence of a right to terminate for convenience means that CC licences are irrevocable. For most practical purposes, the issue of termination for convenience is unlikely to arise where government has distributed PSI under a CC licence to give effect to a policy position supporting open access to government materials. The question of revocation of CC licences will usually only arise in the event that government changes its policy, either generally or in relation to a specific copyright work or category of materials, or if the distribution of the PSI in question is found to be illegal or to raise national security concerns. An operational response to a shift in policy of this kind would be for the government agency to cease distributing the material or to continue making it available under altered licence conditions,<sup>120</sup> although any material that has already been distributed under the original licence would continue to be so.<sup>121</sup>

A bare (non-contractual) licence can be revoked at any time, provided that adequate notice of revocation is given to any licensee: **Trumpet Software v Ozemail** [1996] FCA 560 (“Trumpet Software”). Accordingly, where a CC licence takes effect as a bare licence, it may be revoked at any time by the government agency (the licensor) that has applied the licence to its material, upon giving reasonable notice to the licensee.<sup>122</sup> What period of notice will be “reasonable” will depend upon the circumstances in each case but might range from a period of some weeks to several months or more.<sup>123</sup> In the Trumpet Software case, the plaintiff had distributed its internet connection Trumpet Winsock computer program as shareware available for free download from FTP<sup>124</sup> sites, under a bare licence which permitted those who obtained a copy to use it for a specified period for assessment and to pass on the entire program (including the same terms of use) to other users. As is the case with CC licences, the licence granted to users of Trumpet Winsock (to use it as shareware for a 30-day evaluation period) operated directly from the plaintiff to each user. Heerey J rejected the defendant’s assertion that the method of distribution of Trumpet Winsock as shareware gave rise to a licence which could not be revoked, even if reasonable notice of termination was given. While Heerey J countenanced that it may be the case “that a bare licence not supported by consideration can still only be revoked on giving the licensee

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<sup>115</sup> Clause 4(a), Legal Code, Attribution 2.5 Australia.

<sup>116</sup> Clauses 3 and 7(b), Legal Code, Attribution 2.5 Australia.

<sup>117</sup> Such termination for convenience clauses are commonly found in Australian federal government contracts, but are much more rarely used by State and Territory governments.

<sup>118</sup> Clause 7(a), Legal Code, Attribution 2.5 Australia.

<sup>119</sup> Clause 7(a), Legal Code, Attribution 2.5 Australia.

<sup>120</sup> Both of these options are provided for in Clause 7(b), Legal Code, Attribution 2.5 Australia.

<sup>121</sup> Clause 7(b), Legal Code, Attribution 2.5 Australia.

<sup>122</sup> In this respect, CC licences operate in a similar fashion to the general “waivers” of copyright in judgments and legislative material issued by the New South Wales government. Under the “waivers”, the NSW government retains copyright in the materials and expressly authorises publishers to publish and otherwise deal with the materials, subject to specified conditions. The authorisation takes effect “as a licence binding on the State” which can be revoked, varied or withdrawn by the State if the conditions are breached or upon giving notice. The authorisation may be revoked, varied or withdrawn generally, or in respect of specified publishers or classes of publishers, or in relation to specified classes of materials, upon the government giving notice in the NSW Government Gazette or by notice to any particular publisher, or otherwise as determined by the Attorney General: **Notice: Copyright in judicial decisions**, NSW Government Gazette No.23 (3 March 1995) p. 1087; and **Notice: Copyright in legislation and other material**, NSW Government Gazette No. 110 (27 September 1996) p. 6611.

<sup>123</sup> See P Johnson, “Dedicating” Copyright to the Public Domain, (2008) 71(4) Modern Law Review 587 at pp 605-606. Johnson (at p 606) comments that six months’ notice was considered reasonable where the licensee had spent substantial sums in reliance upon the licence (**Dorling v Honnor Marine** [1963] RPC 205), but a reasonable notice period might be considerably less where the licensee had expended less.

<sup>124</sup> File Transfer Protocol.



reasonable notice: **Computermate Products (Aust) Pty Ltd v Ozi-Soft Pty Ltd** (1988) 20 FCR 46 at 49”, he said it would be without foundation to hold that such a licence could not be revoked at all.<sup>125</sup>

A contractual copyright licence can be revoked in accordance with the terms of the contract. Where a CC licence takes effect as a contract and the licensee is in material breach of the terms of the licence, the licensor would be entitled to notify the licensee of the breach and allow a reasonable period within which to remedy the breach. Failure by the licensee to remedy within that period would entitle the licensor to terminate the CC licence.

The basis for the contention that CC and other open source/content licences are irrevocable seems to owe more to the practical difficulties of recalling works that have been widely distributed, to users other than those who are the immediate recipients of the work from the licensor, than to the lack of legal grounds for revocation.<sup>126</sup> Notwithstanding the earlier impracticalities of seeking to give notice of revocation of a licence to all the distributed recipients of a copyright work, in the internet era the core features of CC licences assist in locating copies of licensed works and notifying users of changed conditions of use. All CC licences include provision for the identification of the licensor and Digital Code, which enable the web location of licensed works to be discovered by search engines such as Google and Yahoo. Consequently, it is not difficult to locate copies of CC-licensed works on the web and to notify the administrators of websites where they are displayed that the licence has been or will be terminated.

While the issue of revocability of CC licences may be a theoretical rather than a practical concern,<sup>127</sup> if a licence of PSI granted by a government were to be revoked, the licensee may still be entitled – under the estoppel doctrine – to continue using the material.<sup>128</sup> To successfully raise estoppel, the licensee would need to show that they had, in reliance on the CC licence, altered their position such that it would now be unreasonable (unconscionable) for the government agency/licensor to withdraw permission to use the licensed material. Where the licensee has relied on the terms of the CC licence to their detriment, the doctrine of estoppel would prevent the licensor from resiling from the representations made in the licence about how it will exercise its rights as copyright owner.

It is established in Australian law that estoppel can be raised against a government. In the leading case, **The Commonwealth v Verwayen** (the “Voyager” case) [1990] HCA 39, (1990) 170 CLR 394, members of the High Court of Australia applied the doctrine of estoppel, holding that the Commonwealth could not avail itself of a defence that a tort action was statute barred when it had earlier made representations to the plaintiff that it would not rely on that defence.<sup>129</sup> Chief Justice Mason explained the doctrine of estoppel as one which:

provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness.<sup>130</sup>

Deane J numerated the elements of the doctrine:

2. The central principle of the doctrine is that the law will not permit an unconscionable - or, more accurately, unconscientious - departure by one party from the subject matter of an assumption which has been adopted by the other party as the basis of some relationship, course of conduct, act or omission which

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<sup>125</sup> **Trumpet Software Pty Ltd v OzEmail Pty Ltd** [1996] FCA 560.

<sup>126</sup> Note that this reasoning is implicit in the argument put forward by the defendants in **Trumpet Software Pty Ltd v OzEmail Pty Ltd** [1996] FCA 560 that the shareware licence granted by the plaintiff to users of its Trumpet Winsock software was irrevocable.

<sup>127</sup> See: B Fitzgerald and N Suzor, **Legal Issues Relating to Free and Open Source Software in Government**, 2005, Melbourne University Law Review vol. 29, p 412. In ‘Dedicating Copyright to the Public Domain’, *The Modern Law Review* (2008) 71(4) 587-610, at page 606, Phillip Johnson expresses the view that if a bare licence were to be revoked or withdrawn, upon giving reasonable notice, the users of the works are likely to need to rely upon estoppel to protect their ongoing right to use the material. See <http://www3.interscience.wiley.com/cgi-bin/fulltext/120751054/PDFSTART>. Jeremy Malcolm, ‘Problems in Open Source Licensing’, *iLaw Barristers and Solicitors*, 2003, available at <http://www.ilaw.com.au/public/licencearticle.html>.

<sup>128</sup> Estoppel could also be raised on the basis of the express statements in the New South Wales government’s “waivers” of copyright in legislation and judgments that “[t]he State will not enforce copyright in any judicial decision [or legislative material] to the extent that it is published or otherwise dealt with in accordance with this authorisation”: Clause 3, **Notice: Copyright in judicial decisions**, NSW Government Gazette No.23 (3 March 1995) p. 1087; and Clause 3, **Notice: Copyright in legislation and other material**, NSW Government Gazette No. 110 (27 September 1996) p. 6611.

<sup>129</sup> Mason CJ at p413, Deane J at pp446-51; Dawson J at pp455-63.

<sup>130</sup> Mason CJ at para 36, p413.

would operate to that other party's detriment if the assumption be not adhered to for the purposes of the litigation.

3. Since an estoppel will not arise unless the party claiming the benefit of it has adopted the assumption as the basis of action or inaction and thereby placed himself in a position of significant disadvantage if departure from the assumption be permitted, the resolution of an issue of estoppel by conduct will involve an examination of the relevant belief, actions and position of that party.

4. The question whether such a departure would be unconscionable relates to the conduct of the allegedly estopped party in all the circumstances. That party must have played such a part in the adoption of, or persistence in, the assumption that he would be guilty of unjust and oppressive conduct if he were now to depart from it.<sup>131</sup>

While the principles of estoppel have developed mainly in the area of private law, the elements of the doctrine apply in the same way in both public and private law. The main difference is that estoppel cannot be invoked against a government entity to stop it exercising its statutory powers.<sup>132</sup> In **Baillieu and Poggoli v Australian Electoral Commission** [1996] FCA 1202, the AEC was estopped from enforcing its copyright in postal vote application forms and brochures. There was no issue of the exercise of a statutory discretion by the AEC. Rather, the AEC as owner of copyright in the materials in question, was asserting its rights in the same way as any other copyright owner. Since s 64 of the **Judiciary Act** 1903 (Cth) provides that in an action to which the Commonwealth is a party, the rights of the parties are to be "as nearly as possible" the same as in a suit between subject and subject, there was no basis for holding that the Commonwealth could not be estopped.<sup>133</sup>

In **Computermate Products (Aust) Pty Ltd v Ozi-Soft Pty Ltd** (1988) 20 FCR 46 at 49 the Full Federal Court considered the operation of the estoppel doctrine in circumstances where the assumption relied upon is based upon a bare licence:

[W]here the bare licence has been acted upon by the licensee to the detriment of the licensee, in an appropriate case there may be an estoppel against the licensor preventing the revocation of the licence, either at all or otherwise than upon notice: **Waltons Stores (Interstate) Ltd v Maher** [1988] HCA 7; (1988) 164 CLR 387.

As CC licences operate as a direct licence between the licensor and each of the licensees receiving the copyright material, the estoppel would operate not only between the licensor and an initial recipient of the licensed material but also between the licensor and all subsequent (downstream) recipients, even though they have not obtained the material directly from the licensor.<sup>134</sup>

While the **Crown Proceedings** legislation enacted in each of the Australian jurisdictions makes it clear that the rights and liabilities of the Crown are, as far as possible, the same as those of private parties,<sup>135</sup> some Crown immunities and privileges nevertheless survive, exempting governments from compliance with their civil obligations. Of particular relevance is the doctrine of executive necessity (also known as government effectiveness) which allows a government to override existing rights, including those based on contract, where it is necessary to do so for governmental reasons (such as in an emergency or a bona fide change in policy). Consequently, irrespective of whether a CC licence takes effect as a bare (non-contractual) or a contractual licence, where required by public interest considerations, a government would be able to terminate the licence to give effect to its policy, even in the absence of any breach by the licensee.<sup>136</sup>

## Jurisdiction - applicable law

It is well established and prudent practice in commercial and other cross-border or international transactions for the operative document to specify the laws of which jurisdiction are to govern the transaction (the

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<sup>131</sup> Deane J at para 21, pp444-445.

<sup>132</sup> See Sir Anthony Mason, "The Place of Estoppel in Public Law" in M Groves (ed), **Law and Government in Australia**, Federation Press, Sydney, 2005 at p160.

<sup>133</sup> **Baillieu and Poggoli of and on behalf of the Liberal Party of Australia (Victorian Division) v Australian Electoral Commission and Commonwealth of Australia** [1996] FCA 1202 per Sundberg J at paras 60-64.

<sup>134</sup> See Figure 1.

<sup>135</sup> See, for example, **Crown Proceedings Act** 1980 (Qld), s 9(2), **Judiciary Act** 1903 (Cth), s 64.

<sup>136</sup> See generally, N Seddon, **Government Contracts: Federal, State and Local**, 4<sup>th</sup> ed, Federation Press, Sydney, 2009; and A Fitzgerald, **Mining Agreements: Negotiated Frameworks in the Australian Minerals Sector**, Prospect, Sydney, 2002 at pp 56- 63.

“applicable law”). The jurisdiction selected need not be that of any of the parties, although the laws of the jurisdiction should be comprehensive and fully developed in relation to the subject matter of the transaction. Nomination of the jurisdiction whose laws are to govern the transaction is intended to introduce certainty and to avoid the complexities which would otherwise arise in determining which laws should apply.

The Australian Creative Commons licences specify the laws applying in the state of New South Wales as the applicable law to govern the licensing transactions.<sup>137</sup> In a federal legal system such as Australia’s, the laws of one State or Territory jurisdiction need to be specified to provide certainty. The selection of New South Wales is appropriate – as would have been one of the other jurisdictions in the Australian Federation – as its laws are comprehensive and fully developed.

## Non-endorsement

An additional provision has been developed for inclusion in the next version of the Creative Commons licences to dispel or negate any suggestion made by a licensee of material provided under a CC licence that the licensor approves, sponsors or endorses in some way the licensee or the licensee’s use of the licensed materials. Before a licensee is authorised to make any such suggestion they must first obtain the licensor’s written approval to do so. The Creative Commons Australia 3.0 consultation drafts of the CC Attribution (BY) 3.0 and the Attribution Non-Commercial Share Alike (BY-NC-SA) 3.0 licences<sup>138</sup> contain an explicit “non-endorsement” provision to this effect.

## No indemnity or warranty of title

The CC licences are unmediated, with standard, predetermined provisions which do not include an indemnity provision in favour of the licensor.<sup>139</sup> Nor do the CC licences include a warranty provision under which the licensor “guarantees” their good title to all rights, including intellectual property rights, in the material being licensed.<sup>140</sup> The Disclaimer clause,<sup>141</sup> which appears in each of the CC licences, states that the material is licensed without “any representations, warranties or conditions regarding ...title...[or]...noninfringement”. This clause also excludes other warranties, such as fitness for purpose, to the full extent permitted by law. Clause 6 (“Limitation on Liability”) is a comprehensive limitation of legal liability provision, applying to the full extent permitted by law.<sup>142</sup>

The absence of a warranty of title and an assertion that the licensed material does not infringe any other party’s rights has given rise to expressions of concern that third party copyright materials may be included in works licensed by government agencies under CC licences. In fact, the issue of inclusion of third party copyright materials in works being licensed for reuse is equally relevant whether the licensor is a government agency or a private party and whether the material is being licensed under a CC licence or some other form of licence. Good licensing practice for any licensor – whether government or private sector – is to conduct a due diligence or provenance review before proceeding to license the material, to ascertain whether it includes any material in which copyright is owned by a party other than the licensor. If the review establishes the existence of third party copyright interests, before proceeding further the licensor should contact the relevant party and endeavour to secure all necessary rights to license the material as intended. If the third party rights cannot be secured, the licensor would normally not proceed further as to do so would risk incurring liability. The various Intellectual Property guidelines and policies adopted by Australian governments require government agencies to acknowledge and respect the intellectual property rights of other parties. Implicit in the concerns expressed

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<sup>137</sup> For example, Clause 8(f), Legal Code, Attribution 2.5 Australia provides: “The construction, validity and performance of this Licence shall be governed by the laws in force in New South Wales, Australia.”

<sup>138</sup> The “non-endorsement” provision in each Australian CC consultation draft licence is Clause 2.3 which, in relevant part, states: [You/the licensee] must not assert or imply any connection with, sponsorship of or endorsement by the Original Author or Licensor of You or Your use of the Work, without their separate, express prior written permission.

Internationally, a non-endorsement provision was included in the Creative Commons Unported (i.e. generic or non-country specific) 3.0 licences. For more historical details see <http://creativecommons.org.au/v3draft>.

<sup>139</sup> The use of prudent information management practices by government agencies has the effect of reducing the risk of legal liability associated with information transactions, in the vast majority of transactions, to acceptably low levels in accordance with proper risk management principles and practices. In such circumstances the seeking of an indemnity in the vast majority of transactions is neither appropriate nor required.

<sup>140</sup> See, for example, the Australian Creative Commons Attribution 2.5 Licence terms at <http://creativecommons.org/licenses/by/2.5/au/legalcode>.

<sup>141</sup> Clauses 5, Legal Code, Attribution 2.5 Australia.

<sup>142</sup> Clause 6, Legal Code, Attribution 2.5 Australia.

about the inclusion of third party materials in works licensed under CC licences is that government agencies would not bother – and, perhaps, would not be capable of – seeking authorisation to use the material but would simply proceed to use it under the statutory licence in ss 183 and 183A of the **Copyright Act 1968**. While the statutory licensing provisions exempt from infringement activities done by government “for the services of the State” provided equitable remuneration is paid to a declared copyright collecting society (in this case, Copyright Agency Limited), they will not exempt the unauthorised use of the third party material by parties who receive it from a government agency under a CC licence. In fact, the application of CC licences to PSI will not expose government to any significant risk of liability if government agencies adopt reasonable and prudent information management practices.

### **Fees and charges – upfront payment for licensed material**

The application of CC licences by a government agency is not inconsistent with imposition of a statutory charge or fee, payable by the licensee at the time the PSI is made available to the user. For example, the government agency could make a digital file available for access on a web site where it can be viewed but not copied by a user; however, if the user wants to proceed to download a licensed copy of the file for use and reuse, they may be required to pay a charge or fee. Here, the downloaded digital material can be licensed by the government to the user under a CC licence – including a CC BY-NC licence – notwithstanding that the licensor obtains payment from the licensee. The terms of the CC licence describe the scope of the permission granted to the licensee, not the licensor’s rights in relation to the copyright material. There is no restriction on the licensor making the material available to the licensee under a CC BY-NC licence and requiring payment before providing the material even though the licensee is prohibited from using the licensed material for commercial purposes.

## **ADVANTAGES OF USING CC LICENCES ON GOVERNMENT COPYRIGHT MATERIALS**

CC licences have several advantages for governments in managing copyright to give effect to open access policy objectives. Where an open access policy has been adopted, CC licences provide a means of managing copyright to establish a commons of PSI in which the broadest possible rights of access and reuse are conferred on all users.

### **Enforceability**

It is not disputed that bare (non-contractual) licences applied to copyright materials distributed in digital form on the internet will be recognised and enforced by the Australian courts. This much was established in Australia as far back as 1996 in **Trumpet Software v OzEmail** [1996] FCA 560, a case involving shareware distributed on openly accessible FTP sites.<sup>143</sup> If a copyright owner grants a licence authorising the doing of certain of the acts within the owner’s exclusive rights under s 31 of the Copyright Act, any such act will be deemed to have been done with the permission of the copyright owner. However, if the licensee does acts outside the scope of their licence, those acts may infringe copyright.<sup>144</sup>

Notwithstanding (or perhaps because of) the widespread use of CC and other open content and open source licences, there have been relatively few cases in which their validity and enforceability has been tested in court. As Lawrence Rosen comments:

In what in retrospect may seem like a leap of faith, millions of software programmers around the world published their works expecting that their open source licences, including the GPL, would be honored and enforced in court.<sup>145</sup>

The most authoritative consideration to date of the effectiveness of open source licences is the decision of the United States Court of Appeals for the Federal Circuit in **Jacobsen v Katzer** in August 2008.<sup>146</sup> Although the

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<sup>143</sup> **Trumpet Software Pty Ltd & Anor v OzEmail Pty Ltd & Ors** [1996] FCA 560.

<sup>144</sup> See: **Quanta Software International Pty Ltd v Computer Management Services Pty Ltd** [2001] FCA 1459 and **Sullivan v FNH Investments Pty Ltd** [2003] FCA 323.

<sup>145</sup> L. Rosen, *Bad facts make good law: The Jacobsen case and Open Source*, (2009) 1 International Free and Open Source Software Law Review 27.

<sup>146</sup> **Jacobsen v. Katzer**, 535 F.3d 1373 (Fed.Cir. Aug 13, 2008), on remand, **Jacobsen v. Katzer**, 609 F.Supp.2d 925 (N.D.Cal. Jan 5, 2009), available at <http://www.cafc.uscourts.gov/opinions/08-1001.pdf>. For comment, see: B Fitzgerald and R Olwan, “The



licence at issue was an open source licence of computer programming code, the decision is of direct relevance to CC licences as Creative Commons intervened in the appeal as *amici curiae*. In this case, software was licensed for no fee under a copyright-based open source licence (the “Artistic License”) which permitted users to modify and distribute the copyright material, subject to a requirement that certain attribution and identification information was distributed along with it. As the authorisation to modify and distribute the software was subject to the conditions expressly stated in the open source licence, by failing to include the copyright notices and the “copying” file, the defendant had gone beyond the scope of the licence and thereby infringed copyright. From the decision in *Jacobsen v Katzer* it is clear that open source and CC licences will be upheld by the courts, even though they are applied to copyright materials distributed for no financial reward, and that failure to comply with the licence conditions may be an infringement of copyright, for which the usual remedies will apply. CC licences have also been enforced in the Netherlands and Bulgaria,<sup>147</sup> treated as valid in court cases in Spain and enforced in Norway.<sup>148</sup>

### Explicit statement of reuse rights

Government agencies can use CC licences to clearly communicate to users just what they are permitted to do with the licensed PSI, without having to seek permission or to engage in time-consuming negotiation of licensing conditions. Unlike the static websites of the web 1.0 era, CC licences can be included not only on each of the individual pages of a website but also on every digital object or file downloaded from the site. 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.<sup>149</sup> A survey of 130 New South Wales government websites conducted in mid-2006 found there to be a diversity of licensing approaches and no uniform whole-of-government policy on copyright notices.<sup>150</sup> Eleven per cent of websites had no copyright notice at all, 8% had a basic one<sup>151</sup> 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.<sup>152</sup> A total of 52% of websites conveyed “either no or few explicit permissions” other than those provided for in the **Copyright Act**.<sup>153</sup>

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 permitted activities. 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.<sup>154</sup>

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Legality of Free and Open Source Software Licences: the case of *Jacobsen v. Katzer*” in M. Perry and B. Fitzgerald (eds.) **Knowledge Policy for the 21st Century**, Irwin Law Toronto, 2008, available at <http://eprints.qut.edu.au/15148/> (accessed 29 January 2010).

<sup>147</sup> See “Creative Commons Bulgaria Licence upheld in court”, Veni Markovski, 9 June 2008, at <http://blog.veni.com/?p=494>

<sup>148</sup> See “Creative Commons License Honoured, US\$ 2150 for Flickr Photo”, on Gisele Hannemyr’s “Trails” blog, 15 October 2006, at <http://heim.ifi.uio.no/~gisle/blog/?p=92>, accessed 14 November 2009.

<sup>149</sup> 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.

<sup>150</sup> 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>.

<sup>151</sup> For example, © Copyright – AHO 2002.

<sup>152</sup> 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/other/AIPLRes/2006/43.html>.

<sup>153</sup> Ibid, at para 2.4.2.

<sup>154</sup> 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 34, available <http://www.unece.org/stats/documents/ece/ces/ge.45/2009/wp.11.e.pdf>.

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.

### **Clear statement that information is sourced from government – increased user confidence**

The amount of information accessible online is increasing exponentially, and is of variable quality and reliability. A clear advantage for government in applying CC licences to PSI is that the source or provenance of the material is made clearly apparent to users. This is an important and practical factor for users online when trying to assess the character of information and confidence they can have in its quality, accuracy and other features.

While users will not automatically assume that information sourced from government is correct in all respects and therefore suitable for use, on balance, users are likely to see government as a reliable source of information of reasonable standard or quality. Where the source is clear the user may make an informed decision about whether or not to use the information or the degree of credence to be given to it. Importantly, all CC licences have a requirement that attribution be given to the author, or other party (e.g. the owner of copyright) designated for the purposes of attribution. In this way the source of the information is identified clearly to the user. Conversely, if the provenance of information is not stated in clear and transparent terms, the degree of confidence a user may have in it will diminish, reducing the likelihood that - and the extent to which - the information will be used or relied upon.<sup>155</sup>

Another advantage of adopting a standard practice of applying CC licences to copyright material is that it prospectively avoids the problem of so-called “orphan” copyright works, for which it is not possible to identify or locate the copyright owner in order to obtain permission to use the material. The orphan works problem is not confined to privately owned materials, but equally affects a great deal of material held by the public sector, much of which is of great scientific, cultural and historic value. At least with respect to PSI, the problems currently encountered with orphan works could be virtually eliminated in the future if metadata – including the name of the creator/s of the work, copyright owner/s and licensing permissions - were to be attached to or embedded in copyright works at the time they are created and before distribution. As CC licences identify the individual or entity responsible for creating the work and specify the terms on which it can be used, they simplify the process of ascertaining what can be done with the material and should make it easier to contact the copyright owner to obtain permissions beyond those granted in the standard licence.

### **Universal recognition of symbols**

The symbols used to indicate the terms of CC licences have the advantage of being widely recognised and understood, irrespective of the language in which the Licence Deed or Legal Code is written, or the location of the licensor. This is a particularly important advantage for works distributed online in digital form. When a government agency applies a CC licence and related symbols to a public sector work, the terms on which the work can be used are readily apparent to users, independently of their jurisdiction or language.

### **Discoverability of digital objects**

CC licences are designed for the web 2.0 environment. Each of the CC licences is expressed in machine readable Digital Code (or Licence Metadata) which is used to “tag” the digital object (or file), as well as the web page that links to it. Unlike the static copyright notices typically found on government websites, the Digital

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<sup>155</sup> The crucial role played by clearly stating the source or provenance of licensed information in facilitating the flows and reuse of the information is strongly affirmed in the report, by Dr Prodromos Tsiavos, **Case Studies Mapping the Flows of Content, Value and Rights across the Public Sector**, March 2009 (available at [www.jisc.ac.uk/contentalliance](http://www.jisc.ac.uk/contentalliance)) which contains an analysis of seven UK case studies of publicly funded e-content initiatives. The author, in the course of analysing the flows of rights and information in the case studies, states “the more rights offered to the licensee the more the need for – Attribution, Provenance, Quality Assurance, [and] Adherence to data protection rules...” (at p 40, para 5.4.1). In the Executive Summary, at page 6, in the key findings the author states under the heading, More freedom means more responsibility, “[t]he closer we get to a model of unrestricted sharing and re-purposing of content, the greater the need for attribution, quality assurance,.. source tracing and provenance”. On the need for compatible licences to facilitate flows and reuse the author states “the copyright licences used have to be compatible with each other, otherwise they will lead to derivative works infringing the copyright of the content on which they are based” (at p 40, para 5.4.1).

Code of CC licences is included in the digital object and travels with it, facilitating the distribution and discoverability of CC licensed works. As observed in the (draft) New Zealand Goal Open Access Framework:

Distribution and discoverability is increasingly significant in the digital age as it facilitates, among other things, machine-based indexing and searching of CC-licensed works by reference to the Digital Code's metadata.<sup>156</sup>

The machine-readable Digital Code enables CC-licensed materials to be indexed and retrieved by search engines such as Google, along with the licensing information. The inclusion of an express statement of user permissions with the digital file – both in the form of the human-readable Licence Deed and the machine-readable Digital Code – means that a user is immediately provided with information about what they can and cannot do with the material, which can be verified by checking with the licensor.

### Enable legal remixing of copyright materials

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. Although it may be possible, technologically, 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.<sup>157</sup>

To ensure that various information inputs or products can be remixed or mashed up without infringing copyright, it is necessary to carefully examine each of them to ascertain exactly what rights are granted to users and reusers. If the person who does the remixing or mashing proposes to license the new work they produce so that it can be used by others, they will not lawfully be able to grant more extensive rights of reuse than those they have themselves. Where there are different reuse rights attaching to the various components of a remixed or mashed work, the lowest common denominator principle applies: the most restrictive reuse rights applying to any one of the inputs will govern what can be done with the whole of the remixed or mashed work, irrespective of whether it is intended to be used only by the person who has produced it or licensed to other parties for downstream use. When licensing the remixed work, the person who has created it would only be able lawfully to license or grant the lowest common denominator rights of reuse. This can have a severely limiting effect on the scope of the reuse of remixed information products, representing a significant impediment to reuse of PSI.

The use of numerous different licences, often with inconsistent or incompatible terms, has been identified in numerous reviews as an impediment to effective flows of PSI. Open content licences such as Creative Commons are a legally effective and efficient way in which to promote globally compatible reuse rights for copyright material, including PSI. The Government Information Licensing Framework (GILF) project was instigated by QSI specifically to address the recurring problems in accessing and sharing spatial information among government agencies and utility service providers during and after natural disasters,<sup>158</sup> due to the fragmented, inefficient and confusing arrangements for information access and reuse.<sup>159</sup> 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.<sup>160</sup> The **National Government Information Sharing Strategy** (NGISS)<sup>161</sup> identified several existing

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<sup>156</sup> New Zealand Government, State Services Commission, **Draft New Zealand Government Open Access and Licensing Framework** (NZGOAL), August 2009, at p 18, available at <http://www.e.govt.nz/policy/information-data/nzgoalframework.html> (accessed 25 January 2010).

<sup>157</sup> On the importance of being able to remix from among a wide range of existing materials, see Dr T Cutler, **The Role of Cultural Collections in Australia's Innovation System**, keynote address presented at the State Library of Victoria, 23 October 2009, at pp 3-4. Dr Cutler introduces the term “combinatorial innovation” to refer to remix.

<sup>158</sup> 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.

<sup>159</sup> 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>. See also <http://www.gilf.gov.au>.

<sup>160</sup> 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

barriers to information sharing, including “information management practices that restrict sharing capability” and recommended the development of “appropriate governance arrangements for information sharing [which are] clearly defined and applied consistently across government”.<sup>162</sup> In particular, NGISS recommended that the governance documentation should include “instructions regarding information conditions of use e.g. copyright, licensing etc” and referred to the GILF as one of the tools to be used in establishing clear governance arrangements for shared information.<sup>163</sup> The draft **New Zealand Open Access and Licensing Framework (NZGOAL)**<sup>164</sup> 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.<sup>165</sup>

## Monitoring levels of usage

With the increasing sophistication of online search capabilities it is now practicable for licensors to monitor the level of usage of their material licensed in the online world. This ability largely removes the need for licensors to continue to seek to impose a reporting obligation on a licensee to record and report back on the number of licences granted over a specified period. In practice, the accuracy of any usage or customer details reports was largely dependent upon the licensee’s diligence and record keeping ability. Now, the licensor can simply do an internet search for the licensed material, largely eliminating the need for detailed reporting conditions. Other considerations may well apply in the rather limited number of commercially focused licensing arrangements where a payment regime based on levels of usage or customer numbers is employed. However, considerations of this kind are unlikely to be a factor in the vast majority of PSI licensing arrangements.

## USE OF CREATIVE COMMONS LICENCES BY AUSTRALIAN GOVERNMENTS

Although the CC licences were not originally developed with the intention that they would be used on copyright-protected datasets or government materials, the potential for application of the new licensing model quickly became apparent to some of those who had been grappling with open access to research outputs and government materials. In the United States, Paul Uhler and Jerome Reichman urged the group that developed the CC licences to “expand its mission to include scientific research and take an international perspective”<sup>166</sup>. Around the same time, in the United Kingdom and Australia the demands for greater access to copyright-protected PSI and dissatisfaction with existing licensing arrangements caused attention to focus on CC as a way of overcoming legal barriers to reuse. During 2004 and 2005, investigations into the applicability of CC licences to government copyright materials began almost simultaneously, but quite independently, in the United Kingdom and Australia.

In 2005, in the UK the Common Information Environment (CIE)<sup>167</sup> commissioned a study<sup>168</sup> to investigate the applicability of CC licences in the public sector with the objective of clarifying and simplifying the process of making digital resources available for reuse. The report, **The Common Information Environment and Creative**

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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>.

<sup>161</sup> **National Government Information Sharing Strategy: Unlocking Government information assets to benefit the broader community**, Australian Government Information Management Office (AGIMO), Department of Finance and Deregulation, August 2009, available at <http://www.finance.gov.au/publications/national-government-information-sharing-strategy/docs/ngiss.pdf>.

<sup>162</sup> Ibid at pp 6 and 19.

<sup>163</sup> Ibid.

<sup>164</sup> New Zealand Government, State Services Commission, **Draft New Zealand Government Open Access and Licensing Framework (NZGOAL)**, August 2009, available at <http://www.e.govt.nz/policy/information-data/nzgoalframework.html>.

<sup>165</sup> Ibid at p 7.

<sup>166</sup> David Bollier, *Viral Spiral: How the Commoners Built a Digital Republic of their Own*, 2008 at p 105, available at <http://www.viralspiral.cc/download-book> (accessed 10 December 2009).

<sup>167</sup> The Common Information Environment (CIE) was a group of key UK public sector bodies, including Becta, the British Library, the Department for Education & Skills (DfES), the e-Science Core Programme, the Joint Information Systems Committee (JISC), the Museums Libraries & Archives Council (MLA), the National Archives, the National Electronic Library for Health, the Scottish Library & Information Council (SLIC), the BBC, Culture Online, English Heritage, The National Library of Scotland and UKOLN.

<sup>168</sup> The study was carried out by Intrallect (E Barker and C Duncan) and the AHRC Research Centre for Studies in IP and IT Law (A Guadamuz, J Hatcher and C Waelde). See further, [http://www.intrallect.com/index.php/intrallect/knowledge\\_base/general\\_articles/creative\\_commons\\_licensing\\_solutions\\_for\\_the\\_common\\_information\\_environment\\_\\_1/](http://www.intrallect.com/index.php/intrallect/knowledge_base/general_articles/creative_commons_licensing_solutions_for_the_common_information_environment__1/) (accessed 29 January 2010).

**Commons** (October 2005), found that there were many advantages to using CC licences<sup>169</sup> and concluded that CC licences “would allow a substantial amount of CIE resources to be made available for reuse”.<sup>170</sup> By the time Creative Commons Australia was launched in 2005, there was an established appreciation of the advantages of open content licensing in the education sector<sup>171</sup> and a growing awareness of the potential for CC licences to be applied to facilitate access to PSI.<sup>172</sup> Submissions to the Copyright Law Review Committee’s inquiry into Crown Copyright (2004 – 2005) urged the Committee to consider not only how the elimination of copyright could enhance access to PSI but also the potential for this objective to be achieved through open content licensing.<sup>173</sup> Immediately upon the release of the Australian CC licences in 2005, senior Queensland public servants who had been looking to improve the licensing arrangements for PSI turned their attention to the potential of the new suite of open content licences.<sup>174</sup>

## Government Information Licensing Framework (GILF) Project

The Government Information Licensing Framework Project (GILF project)<sup>175</sup> has been the single most important initiative in leading the way towards the adoption of CC licensing in the government sector in Australia and New Zealand. It grew out of a project initiated in 2004 by the Queensland Spatial Information Council (QSIC)<sup>176</sup> to address long-standing frustrations with the perceived limitations of the prevailing legal arrangements and practices for data access and sharing, both within government and between government and the private sector. Since 2005, work on GILF was progressed 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).<sup>177</sup>

<sup>169</sup> The identified advantages included: “ease of use; widespread adoption leading to familiarity; choices offering flexibility; human-readable, machine-readable and symbolic representations of the licences; sharing a common licence with many others; a direct link between the resource and its licence”: Intrallect Ltd (E Barker and C Duncan) and AHRC Research Centre (A Guadamuz, J Hatcher and C Waelde), **The Common Information Environment and Creative Commons**, Final Report (10 October 2005), Executive Summary, p 4, available at [http://www.intrallect.com/index.php/intrallect/knowledge\\_base/general\\_articles/creative\\_commons\\_licensing\\_solutions\\_for\\_the\\_common\\_information\\_environment\\_1/](http://www.intrallect.com/index.php/intrallect/knowledge_base/general_articles/creative_commons_licensing_solutions_for_the_common_information_environment_1/) (accessed 29 January 2010).

<sup>170</sup> Ibid.

<sup>171</sup> AShareNET had pioneered the use of standardised licensing in the education sector in Australia. See further, B Fitzgerald, A Fitzgerald, M Perry, S Kiel-Chisholm, E Driscoll, D Thamapillai and J Coates, **Creating a Legal Framework for Copyright Management of Open Access within the Australia Academic and Research Sector** (OAK Law Report No 1), available at [http://eprints.qut.edu.au/6099/1/Printed\\_Oak\\_Law\\_Project\\_Report.pdf](http://eprints.qut.edu.au/6099/1/Printed_Oak_Law_Project_Report.pdf) (accessed 29 January 2010); B Fitzgerald, **Open Content Licensing (OCL) for Open Educational Resources**, presented at the OECD Expert Meeting on Open Educational Resources, 6 and 7 February 2006, Malmo, Sweden, 2005, available at <http://eprints.qut.edu.au/3621> (accessed 29 January 2010).

<sup>172</sup> Digital Content Industry Strategic Industry Leaders Group, **Unlocking the Potential: Digital Content Industry Action Agenda Report**, March 2006, at pp 29, 46, 62, available at [http://www.archive.dcita.gov.au/2007/12/unlocking\\_the\\_potential\\_digital\\_content\\_industry\\_action\\_agenda\\_report](http://www.archive.dcita.gov.au/2007/12/unlocking_the_potential_digital_content_industry_action_agenda_report) (accessed 29 January 2010); S Cunningham, T Cutler, A Fitzgerald, Neale Hooper, Tom Cochrane, Why Governments and Public Institutions Need to Understand Open Content Licensing in B Fitzgerald, J Coates and S Lewis (eds) **Open Content Licensing Cultivating the Creative Commons**, Sydney University Press, 2007 at pp 74-92, available at <http://eprints.qut.edu.au/6677/1/6677.pdf> (accessed 2 February 2010).

<sup>173</sup> See the submission by Professor Brian Fitzgerald to the Copyright Law Review Committee in Chapter 18 of this book; 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](http://www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Present_Inquiries_Crown_copyright_Submissions_2004_Sub_No_17_-_Professor_Brian_Fitzgerald)

<sup>174</sup> For several years, 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.

<sup>175</sup> Initial consideration of the applicability of CC licences to government copyright materials occurred in response to a request to examine this issue 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, Department of Natural Resources and Water, Queensland and Rob Bischoff.

<sup>176</sup> Government Information Licensing Framework (GILF) Project website, <http://www.gilf.gov.au>; see also the Queensland Spatial Information Office (QSIC) website for background information about GILF, <http://www.qsic.qld.gov.au/QSIC/QSIC.nsf/CPByUNID/6C31063F945CD93B4A257096000CBA1A> accessed on 14 November 2009.

<sup>177</sup> From 2007 to 2010, the GILF project has been funded as part of the Cooperative Research Centre for Spatial Information (CRC-SI). 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. The authors have been associated with the GILF project since its inception in 2005. Other members of the team in the OESR that progressed the Government Information Licensing Framework (GILF) project from 2005 on included



From the outset, the principal focus of the project was the development of a standardised information licensing model for PSI which could be recommended for use with all kinds of government copyright materials to enable enhanced, seamless, on-demand access to PSI.<sup>178</sup> Importantly, the project did not directly address information policy. However, by focusing attention on the importance of removing barriers to access to and reuse of PSI caused by inadequate or inappropriate licensing practices, the GILF project's findings and recommendations about the use of CC licences directly influenced the reviews of information access policies and practices by the federal government,<sup>179</sup> other State governments,<sup>180</sup> the New Zealand Government<sup>181</sup> and the United Kingdom government.<sup>182</sup> 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.

Stage 1 of the project resulted in endorsement by QSIC and the Information Queensland Steering Committee of an open content licensing model, based on Creative Commons. Stage 2 of the project sought to update QSIC licensing practices and to produce a licensing framework based on an open content licensing model to support data and information transactions between the Queensland Government, other government jurisdictions and the private sector.<sup>183</sup> The report, **Government Information and Open Content Licensing: An Access and Use Strategy**<sup>184</sup> ("the Stage 2 report"), published in October 2006, described the work undertaken during Stage 2 of the project and set out its findings and recommendations.<sup>185</sup>

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.<sup>186</sup> A review of licensing practices and models in several Queensland Government agencies found there were significant

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Jenny Bopp, Brendan Cosman, Cathy McGreevy, Trish Santin-Dore and Baden Appleyard. For a chronological account of developments, see the GILF project website at <http://www.gilf.gov.au>.

<sup>178</sup> 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 14 November 2009.

<sup>179</sup> 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.

<sup>180</sup> 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](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.

<sup>181</sup> 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 a 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](http://www.geospatial.govt.nz/assets/Geospatial-Strategy/nz-geospatial-strategy-2007.pdf). The Draft New Zealand Government Open Access and Licensing Framework (NZGOAL), released for comment in August 2009, proposes the use of New Zealand Creative Commons licences by government agencies and explicitly refers (at p 9) to consultations with the GILF project team and Creative Commons Australia. See <http://www.e.govt.nz/policy/information-data/nzgoalframework.html> (accessed 25 January 2010).

<sup>182</sup> See **Power of Information Taskforce Report**, Richard Allan (chair), February 2009 at pp 7 and 25, available at <http://poit.cabinetoffice.gov.uk/poit/wp-content/uploads/2009/03/poit-report-final-pdf.pdf> (accessed on 27 January 2010). In the December 2009 report, **Putting the Frontline First: Smarter Government**, (available at <http://www.hmg.gov.uk/frontlinefirst.aspx>) the UK Government indicated its intention to "establish a common licence to re-use data which is interoperable with the internationally recognised Creative Commons model". For further details, see footnote 8.

<sup>183</sup> Ibid, p 1.

<sup>184</sup> 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.

<sup>185</sup> **Power of Information Taskforce Report**, Richard Allan (chair), February 2009 at pp 7 and 25, available at <http://poit.cabinetoffice.gov.uk/poit/wp-content/uploads/2009/03/poit-report-final-pdf.pdf> (accessed on 27 January 2010).

<sup>186</sup> Ibid, p 36.

problems with the current approach, including a lack of uniformity and clarity in licensing practices.<sup>187</sup> Stage 2 identified a need for clear and succinct guiding principles for access, reuse and pricing and concluded that CC licences were the most appropriate for 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.<sup>188</sup>

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 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<sup>189</sup> 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).<sup>190</sup> The GILF project envisaged that the six CC licences and the clauses of the Restrictive Licence would cover the vast majority of PSI.

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<sup>187</sup> Ibid, pp 3 & 4.

<sup>188</sup> Ibid, pp 1-2.

<sup>189</sup> As had been proposed in recommendation 2.7.

<sup>190</sup> 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>.

## Australian Government

Since 2008, there have been significant developments and initiatives at the federal government level, both with respect to policy support for access to and reuse of PSI and the adoption of CC licences to give effect to the policy. The development of the federal government's policy and practice in relation to PSI is apparent in a series of reports published in 2008 and 2009:

- (1) The 2008 Green Paper 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 [and that material] released for public information by Australian governments should be released under a creative commons licence."<sup>191</sup> 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 21<sup>st</sup> Century**<sup>192</sup> in response to the **Venturous Australia** report.<sup>193</sup> On access to and reuse of PSI the White paper indicates broad agreement with the Cutler Report's recommendations and highlights the federal government's intention to build on the work already being undertaken by key federal agencies:<sup>194</sup> "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).<sup>195</sup> 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".<sup>196</sup> 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.<sup>197</sup> Consistent with the policy framework it lays out, the Digital Economy report is published under a Creative Commons Attribution-Non-Commercial-No Derivative Works (CC BY-NC-ND) 2.5 licence.
- (4) In June 2009, the federal Minister for Finance and Deregulation, Lindsay Tanner, and the Special Minister of State, Senator Joe Ludwig, launched the Government 2.0 Taskforce.<sup>198</sup> The Taskforce's Terms of Reference included advising and assisting the Australian Government to make government information more accessible and useable; to make government more consultative, participatory and transparent; and to build a culture of innovation within government.<sup>199</sup> In the report, **Engage: Getting on with Government 2.0**, delivered to the government in December 2009, the Taskforce made several recommendations, including that PSI should be "licensed to permit free reuse and transformation by others", using machine readable licences that "conform to some international standard such as Creative Commons".<sup>200</sup> The Taskforce proposed that CC BY should be the default licence applied when distributing PSI in which the government owns copyright, as well as PSI containing third party material, subject to negotiation with the copyright owner/s.<sup>201</sup> Further, it recommended that Crown

<sup>191</sup> See <http://www.innovation.gov.au/innovationreview/Documents/NIS-review-web.pdf>, Recommendation 7.8 at pg 95.

<sup>192</sup> Australian Government, Department of Innovation, Industry, Science and Research, **Powering Ideas: An Innovation Agenda for the 21<sup>st</sup> Century**, 12 May 2009, <http://www.innovation.gov.au/innovationreview/Pages/home.aspx> accessed on 11 June 2009.

<sup>193</sup> 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.

<sup>194</sup> Ibid, Chapter 6, "Public Sector Innovation", at p 53, available at <http://www.innovation.gov.au/innovationreview/Pages/home.aspx>.

<sup>195</sup> See <http://www.dbcde.gov.au/?a=117295>.

<sup>196</sup> **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>.

<sup>197</sup> Ibid, p 11.

<sup>198</sup> See <http://gov2.net.au/2009/06/22/speech-launch-of-the-government-2-0-taskforce/>.

<sup>199</sup> See <http://gov2.net.au/>

<sup>200</sup> Government 2.0 Taskforce, **Engage: Getting on with Government 2.0 – Report of the Government 2.0 Taskforce**, Department of Finance and Deregulation, 2009, at p xv, available at <http://gov2.net.au/report>.

<sup>201</sup> Ibid at p xv and 58.

copyright works should be automatically licensed under a CC BY licence at the time when government records become available for public access under the **Archives Act** 1983 (Cth).<sup>202</sup>

Key federal government departments (Geoscience Australia, the Australian Bureau of Statistics and the Bureau of Meteorology) have adopted CC licences to distribute PSI in accordance with their policies on access and reuse. In 2009, on the initiative of the Government 2.0 Taskforce, the Australian government set up the [data.australia.gov.au](http://data.australia.gov.au) site from which datasets contributed by the Australian and State governments can be downloaded. Many of the datasets available on [data.australia.gov.au](http://data.australia.gov.au) are licensed under the Creative Commons Attribution 2.5 Australia licence.

### Geoscience Australia (GA)

Geoscience Australia (GA) was an early adopter of CC, being the first Australian government agency to implement CC licences on its datasets in October 2008.<sup>203</sup> Earlier that year, in response to requests from clients for easier access to 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.<sup>204</sup> Following successful completion of the CC licensing trial, GA announced that it would use CC licences on its Moderate Resolution Imaging Spectroradiometer (MODIS),<sup>205</sup> the Australian Atlas of Mineral Resources,<sup>206</sup> the GeoMAP 250K dataset, digitised Bureau of Mineral Resources records and educational material about tsunamis. 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. In November 2009, GA began licensing all the material on its website, and the OzCoasts website<sup>207</sup> which it hosts, under the Creative Commons Attribution 2.5 Australia licence.<sup>208</sup>

Selection by GA of the CC BY licence is designed to assist in realising the potential of the information products by enabling "mash ups", including the layering together of different information products. As an example of how the attribution requirement in the CC BY licence has been applied in practice, when GA supplies satellite data and data products to users, attribution is to be given as follows:

One of the following statements must be displayed with, attached to or embodied in (in a reasonably prominent manner) any Satellite Data or Derivative Work provided to an End-user:

Where the Satellite Data is provided in unaltered form:

[insert Satellite Sensor] Data© Commonwealth of Australia (Geoscience Australia) [insert year in which the Satellite Data was published].

The Commonwealth gives no warranty regarding the Satellite Data's accuracy, completeness, currency or suitability for any particular purpose.

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<sup>202</sup> Ibid at p 59.

<sup>203</sup> See entry "New product licence improves customer access" at <http://www.ga.gov.au/news/archive/2008/dec/>. GA's adoption of CC licensing predated the implementation of CC licences by the Australian Bureau of Statistics by two months.

<sup>204</sup> 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.

<sup>205</sup> 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.

<sup>206</sup> See the Atlas of Mineral Resources, Mines and Processing Centres (the "Australian Mines Atlas") at <http://www.australianminesatlas.gov.au>.

<sup>207</sup> See <http://www.ozcoasts.org.au/>.

<sup>208</sup> 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.

Where a Derivative Work is provided, including any digital publication:

This product (insert Derivative Work name) incorporates [insert Satellite Sensor] Data which is © Commonwealth of Australia (Geoscience Australia) [insert year in which the Satellite Data was published].

[insert Satellite Sensor] Data has been used in (insert Derivative Work name) with the permission of the Commonwealth. The Commonwealth has not evaluated the Satellite Data as altered and incorporated within (insert Derivative Work name), and therefore gives no warranty regarding its accuracy, completeness, currency or suitability for any particular purpose.

Where a Derivative Work is provided and is a simple publication (that is, one page or less, such as a map or a web page), but not including digital products, the Licensee may elect to use the following short form notice:

This product (insert Derivative Work name) incorporates [insert Satellite Sensor] Satellite Data which is © Commonwealth of Australia (Geoscience Australia) [insert the year in which the Satellite Data was published].<sup>209</sup>

## Australian Bureau of Statistics

In November 2005, the Australian Bureau of Statistics (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.<sup>210</sup> 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.<sup>211</sup> 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.<sup>212</sup>

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 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

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<sup>209</sup> Creative Commons Attribution 2.5 Australia: Copyright notice – Attribute for Satellite Data and Data Products supplied by Geoscience Australia, see [http://www.ga.gov.au/image\\_cache/GA12434.pdf](http://www.ga.gov.au/image_cache/GA12434.pdf).

<sup>210</sup> Commencement of the use of the CC-BY licence for ABS materials was accompanied by the following statement of purpose on the ABS website:

The Australian Bureau of Statistics (ABS) has introduced Creative Commons (CC) licensing for the bulk of the content on this website. This will lessen the restrictions on the use of free data from the website considerably by changing the copyright from "all rights reserved" to "some rights reserved". In effect, what the ABS is asking is only that it be acknowledged as the source of the data. People are free to re-use, build upon and distribute our data, even commercially. This makes a wealth of data readily available to the community, researchers and business, facilitating innovative research and development projects based on quality statistics, and promoting the wider use of statistics in the community, which is one of our core objectives. ([http://www.abs.gov.au/websitedbs/D3310114.nsf/4a256353001af3ed4b2562bb00121564/8b2bdbc1d45a10b1ca25751d000d9b03?opendocument?utm\\_id=HPI](http://www.abs.gov.au/websitedbs/D3310114.nsf/4a256353001af3ed4b2562bb00121564/8b2bdbc1d45a10b1ca25751d000d9b03?opendocument?utm_id=HPI))

<sup>211</sup> Similar inhibitory outcomes from the adoption of restrictive licensing practices by government agencies were clearly identified in the 2001 Canadian report delivered by KPMG Consulting. The authors, in Recommendation 5 (at pp 24-25) identified the need to minimize the inhibiting impact of government agencies using restrictive licensing and copyright practices to prevent redistribution and the broader use of government geospatial data, in order to protect pricing policies. The authors pointed out this operational outcome was directly at odds with the stated government goals of maximising data use, with the identified resulting benefits. See Recommendation 5 in the Executive Summary at pp 24-25, available at [http://www.geoconnections.org/programsCommittees/proCom\\_policy/keyDocs/KPMG/KPMG\\_E.pdf](http://www.geoconnections.org/programsCommittees/proCom_policy/keyDocs/KPMG/KPMG_E.pdf) (accessed 9 November 2009).

<sup>212</sup> 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>.



information, as well as Recommendation 7.8 of the **Venturous Australia** Green Paper.<sup>213</sup> On 18 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.<sup>214</sup>

The background to the ABS's adoption of CC licences is explained in a paper, **Informing the Nation – Open Access to Statistical Information in Australia**, presented by Siu-Ming Tam, senior executive officer of the ABS, to the United Nations Economic Commission for Europe (UNECE) in May 2009.<sup>215</sup> It outlines the sequence of funding, economic and information policy and practice developments leading up to the current position. In explaining the reasoning behind the adoption of CC licences, Siu-Ming Tam emphasises the importance of a simple, easily understood licensing model to facilitate enhanced and innovative reuse such as through mash-ups in which different layers of information are combined:

33. The recent advent of Web 2.0 technologies increases the potential to use, share and 'mix and match' ABS data sets to add value to ABS information. 'Mash ups' are an excellent example of how the value of a product may be significantly enhanced by including different layers of information with statistical information. To facilitate this, and other innovative uses of ABS data, the ABS needs to have an internationally recognised licensing framework for accessing, using and reusing its statistical information.

....

49. One of the hallmarks of a democracy is freedom to choose one's own affairs. Choice requires decisions and in turn good decision making requires information. Therefore, open access to statistical information is fundamental to a democracy.

.....

52. Most recently, the introduction of Creative Commons licences, an internationally recognised licensing framework, onto the ABS website provides clarity on responsibilities and obligations on users of ABS statistics when using, sharing and reusing ABS information. It is our belief that this initiative will facilitate an environment for creativity, innovation, and the development of value added products, all of which will lead Australia to be a better place for its citizens.<sup>216</sup>

Ongoing work in ABS involves the development of "injector" software which will enable CC licences to be inserted into downloadable files, so that users can view the licensing conditions in files they have downloaded from the ABS website.<sup>217</sup>

## Bureau of Meteorology

The **Water Act** 2007(Cth) expanded the role of Bureau of Meteorology (BoM) to include management of water information, with the establishment of the Australian Water Resources Information System (AWRIS).<sup>218</sup> BoM is required to collect water information from a range of sources and to disseminate it for widespread reuse, including by publishing a National Water Account and periodic reports on water resource use and availability. A major outcome of BoM's work will be increased transparency, confidence and understanding of water information on a national level.

To ensure that water information provided to BoM under the **Water Regulations** 2008 can be widely reused, BoM has sought the support of the States and Territories for the adoption of a CC licensing framework for copyright-protected water datasets and databases.<sup>219</sup> BoM recommends that each of the 260 data suppliers required to provide information to it under the **Water Regulations** 2008 should apply CC licences – and,

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<sup>213</sup> **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>.

<sup>214</sup> 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.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid, at paras 33 and 52

<sup>217</sup> Ibid, at para 48.

<sup>218</sup> See: <http://www.bom.gov.au/waterjobs/awris.htm>.

<sup>219</sup> See [www.parliament.vic.gov.au/edic/inquiries/access to PSI/submissions/PSI\\_Sub\\_17\\_Bureau Meteorology.pdf](http://www.parliament.vic.gov.au/edic/inquiries/access%20to%20PSI/submissions/PSI_Sub_17_Bureau_Meteorology.pdf).

specifically, the Creative Commons Attribution Australia 2.5 Licence (CC BY) – to all the data they provide to AWRIS, so that it can be reused by anyone on condition that the original data supplier is acknowledged.<sup>220</sup>

An account of BoM's approach towards the licensing of information and data is set out in its August 2008 submission to the Victorian Parliament's Economic Development and Infrastructure Committee's inquiry into Improving Access to Victorian Public Sector Information and Data.<sup>221</sup> In response to the Committee's invitation to comment on whether "the use of open source and open content licensing models, including Creative Commons, would enhance the discovery, access and use of Government information", BoM stated:

25. The Bureau has been reviewing its current licensing arrangements and giving consideration to the application of open content licensing models, including Creative Commons. It is considered that such arrangements might better reflect the agency's mandate and attitudes to the provision of its public interest information and data for the benefit of the Australian community.

26. At present, the Bureau has formal licensing procedures in place for most of its cost-recovery products and services, and for secondary distributors, in the form of a written Access Agreement. All information on the Bureau web site contains a copyright statement and incorporates a link to the Bureau's copyright notice. However as new products and services become available and new technology opens up new and innovative ways of working, these arrangements must evolve. A more robust and transparent licensing scheme needs to be developed to reflect both the specific characteristics of Bureau products and modern mechanisms of data exchange and use.

27. The Creative Commons licensing framework provides a method, based on copyright law, of making data and information freely available while retaining some rights for the data owners and licensors. Use of Creative Commons licensing is increasing worldwide and its use by government agencies for data sharing is also becoming more common. This "open content" approach to licensing is gaining favour as it maximises the social benefits of public information, encourages the use and reuse of data and information, and provides a simpler, legally robust licensing framework replacing existing data sharing arrangements which are often complex, expensive to administer, unresponsive to user needs, or legally untested.

28. In Australia, the Working Group on Data for Science report to the Prime Minister's Science, Engineering and Innovation Council (PMSEIC) in December 2006 includes a recommendation that "the principle of open equitable access to publicly-funded scientific data be adopted wherever possible and that this principle be taken into consideration in the development of data for science policy and programmes", while a report on the open access to public sector information (PSI) summit held in July 2007 concludes that "a broad consensus emerged in favour of the benefits to be derived from government implementing an open access policy ... and the use of Creative Commons (CC) open content licences for the majority of PSI which is unaffected by privacy or other restricting factors".

29. The Water Regulations associated with the Water Act came into force on 30 June 2008 and Bureau staff are currently working with State and Territory water agencies to ensure the smooth provision of water information. The Bureau is actively seeking support from States and Territory jurisdictions for the use of a Creative Commons framework and has recently written to all Departments of Premier and Cabinet alerting them to the Bureau's intention to use Creative Commons Attribution as the licensing regime for water data.<sup>222</sup>

In mid-2009, BoM prepared an Item Paper entitled "Creative Commons Licensing" outlining its support for and intention to implement Creative Commons licensing within AWRIS, for consideration by the 6<sup>th</sup> meeting of the Jurisdictional Reference Group on Water Information (JRGWI)<sup>223</sup> held in Melbourne on 23 and 24 July 2009. The Item Paper states:

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<sup>220</sup> <http://www.bom.gov.au/water/regulations/cc/disseminating.shtml>

<sup>221</sup> See *Inquiry into Improving Access to Victorian Public Sector Information and Data: Submission by the Bureau of Meteorology*, 18 August 2008, available at [http://www.parliament.vic.gov.au/edic/inquiries/access\\_to\\_PSI/submissions/PSI\\_Sub\\_17\\_Bureau\\_Meteorology.pdf](http://www.parliament.vic.gov.au/edic/inquiries/access_to_PSI/submissions/PSI_Sub_17_Bureau_Meteorology.pdf) accessed on 23 July 2009. See also the oral submission by Dr L Minty, Assistant Director, Water Analysis and Reporting, Water Division, Bureau of Meteorology, available at [http://www.parliament.vic.gov.au/edic/inquiries/access\\_to\\_PSI/transcripts/EDIC\\_080908\\_BOM.pdf](http://www.parliament.vic.gov.au/edic/inquiries/access_to_PSI/transcripts/EDIC_080908_BOM.pdf) accessed on 23 July 2009.

<sup>222</sup> Ibid, see [www.parliament.vic.gov.au/edic/inquiries/access\\_to\\_PSI/submissions/PSI\\_Sub\\_17\\_Bureau\\_Meteorology.pdf](http://www.parliament.vic.gov.au/edic/inquiries/access_to_PSI/submissions/PSI_Sub_17_Bureau_Meteorology.pdf).

<sup>223</sup> The following account of the Jurisdictional Reference Group on Water Information (JRGWI) appears in the Explanatory Statement to the *Water Regulations* 2008 under the *Water Act* 2007:

The Jurisdictional Reference Group on Water Information (JRGWI) is made up of two representatives from each of the state and territory governments. JRGWI plays a key role in bringing together the national water information

Under Section 123 of the **Water Act** 2007, the Director of Meteorology may publish any water information that the Bureau holds without the need to obtain agreement from any provider to do so, unless he/she believes that it would not be in the public interest to do so.

However, while the **Water Act** 2007 implicitly supports access and normal use of water information by third parties (as part of the completion of the dissemination by the Bureau), it does not extend to granting any explicit usage rights to third party users. The Australian Government Solicitor (AGS) advises that the Water Act 2007 supports activities reasonably incidental to a user gaining access to the published information. This includes downloading, printing and internal or personal use, but probably not more 'downstream' use, such as the making of derivative material or creation of a product that is further distributed or communicated for commercial or non-commercial purposes.

Section 129 of the **Water Act** 2007 is explicit on the retention of ownership of water data by the data givers, stating that the "giving of information does not affect a person's property rights with respect to that information". The Bureau therefore will not own the bulk of the information it acquires under the Water Regulations 2008.

The utility of Australia's water information will be maximised by making it freely available for use by all persons, including uses for commercial purposes. However, as discussed above, the Bureau is restricted in its right to apply any licence to that information or to confer any rights on third parties to use that information. We have therefore elected to promote and actively support the application by data owners of the Creative Commons Attribution licence to the water information they supply. The Creative Commons Attribution licence, known as the "By Licence", merely requires users to attribute the data owner when they use the data for any purpose not covered by the Water Act 2007 provisions.

....

The Bureau has been working actively with the lead water agencies to promote the uptake of CC licensing and will provide on-line and other support to enable data givers to understand and apply a CC license easily.

....

Use of CC licensing should be attractive to organisations as it provides a simple and effective way to open up access to data, whilst retaining some rights, and promises to reduce the administrative burden for data providers in maintenance and communication of licensing conditions.

Over the next six months, the Bureau will continue to actively promote the use of CC licensing to organisations providing data under the Water Regulations 2008. In late 2009, the Bureau will explicitly ask each data supplying organisation to agree or not agree to use of a CC license for their water data. Users of AWRIS will be able [to] identify information that is provided with a CC licence or, where information is not so licensed, to ascertain the contact details of the data provider so that they may seek any licence conditions that apply.

The Bureau acknowledges the work done by the Queensland Government and others, including the Australian Bureau of Statistics (ABS) and Geoscience Australia (GA), in pioneering the adoption of CC licensing. This approach aligns with growing recognition both nationally and internationally that governments, wherever possible, should not only make their information publicly available but also make it available on open access terms that permit and enable its use and reuse.

While CC licensing includes a standard suite of six licences, the Bureau is strongly encouraging organisations providing data to adopt the most open licence, CC Attribution. This is the licence used by

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activities of the Bureau with the regional water information activities undertaken by the states and territories. JRGWI membership is by invitation of the Director of Meteorology, based on the recommendations of the Department of Premier and Cabinet (or equivalent) in each jurisdiction. JRGWI provides a forum for states and territories to articulate their water information priorities and activities, improve the flow of water information between their agencies and the Bureau, discuss ways to contribute to the national water information strategy and provide feedback to the Bureau on its various water information products, both during the development and operational phases.

Representative agencies on JRGWI are responsible for liaising with other water data collectors in their jurisdiction regarding the Regulations and also the \$80 million Australian Government fund which the Bureau is administering to extend and modernise data collection nationally. Through JRGWI the Bureau is in discussion with many of the private data collectors included in the Regulations. Many of the major data collectors named in the Regulations have put forward or are proposing to put forward funding applications to the Bureau.

See [http://www.austlii.edu.au/au/legis/cth/num\\_reg\\_es/wr2008n106o2008275.html](http://www.austlii.edu.au/au/legis/cth/num_reg_es/wr2008n106o2008275.html).

ABS on most of its data and information products, and GA on some of its data sets available for download.<sup>224</sup>

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.

## State and Local Government initiatives

There have been several significant developments recently at State and local government level, and in major cultural institutions, which have as their objective open access and generous re-use rights through the use of CC or open content licensing. As well as providing direct access to their information products through State-based websites, several State governments have contributed numerous datasets (many licensed under CC licences, usually CC BY) to the data.australia.gov.au website established by the Federal government.<sup>225</sup>

## Queensland

Whilst there are various examples of Queensland Government agencies applying CC licences to information products, a whole-of-government policy on the use of CC licences has not yet been endorsed. Practical assistance is provided to agencies wishing to apply CC licences through an interactive, web-based licensing options tool that guides decision making about which of the CC licences or GILF Restrictive Licence template clauses should be used for a particular information product or materials.<sup>226</sup>

The Office of Economic and Statistical Research has released key statistical information products on its website under a CC BY licence, together with case studies of the decision processes followed in determining whether CC licences should be used.<sup>227</sup> The Queensland Government Chief Information Officer applied a CC licence to the Government Enterprise Architecture Framework 2.0 document.<sup>228</sup> The Queensland Museum releases photographs from its collection on Wiki Commons<sup>229</sup> under a CC BY SA licence.<sup>230</sup> Aged Care Queensland published its **eMentoring Handbook** (on CD Rom) – designed to assist aged care workers with training and mentoring advice and opportunities – under a CC BY licence.<sup>231</sup> The most concerted and systematic application of CC licensing in the Queensland Government has been by the Department of Environment and Resource Management (DERM) which is the custodian of some of the State's most significant environmental and spatial information datasets and databases. DERM has provided its Surface Water Database to BoM under a CC BY licence and has contributed several important datasets under CC BY licences to data.australia.gov.au, including the Property Boundaries Annual Extract (Lite DCDB).<sup>232</sup>

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<sup>224</sup> For further details, see BoM's website at <http://www.bom.gov.au/water/regulations/cc/disseminating.shtml>

<sup>225</sup> See <http://data.australia.gov.au>

<sup>226</sup> See <http://www.gilf.gov.au>.

<sup>227</sup> **Queensland Government Population Projections to 2056: Queensland and Statistical Divisions 3<sup>rd</sup> Edition**, 2008, see: <http://www.gilf.gov.au/queensland-government-population-projections-to-2056-3rd-edition-2008>; and **Gender in Queensland (Census 2006 Bulletin 1)** see: <http://www.gilf.gov.au/gender-in-queensland-census-bulletin-1>.

<sup>228</sup> See <http://www.qgcio.qld.gov.au/SiteCollectionDocuments/Architecture%20and%20Standards/QGEA%202.0/Queensland%20Government%20Enterprise%20Architecture%20Framework%20200%20v%201%200%200.pdf>. The following outline of the QGEA document is described in the Foreword at p ii as

The Queensland Government Enterprise Architecture (QGEA) provides the decision making and management structures to support the development of better services for Queenslanders, more efficient and effective use of information and ICT in government and effective partnering with the private sector through the application of whole-of-Government, cross agency and agency information and information communications technology policies and practices.

<sup>229</sup> See [http://commons.wikimedia.org/wiki/Main\\_Page](http://commons.wikimedia.org/wiki/Main_Page) (accessed 25 January 2010).

<sup>230</sup> See for example, digitized images of the A E Roberts collection at [http://commons.wikimedia.org/wiki/Category:A\\_E\\_%22Bert%22\\_Roberts\\_plate\\_glass\\_photo\\_collection](http://commons.wikimedia.org/wiki/Category:A_E_%22Bert%22_Roberts_plate_glass_photo_collection) (accessed 25 January 2010).

<sup>231</sup> See <http://www.acqi.org.au> and <http://www.creativecommons.org.au/node/247>

<sup>232</sup> See <http://data.australia.gov.au/152>. The Digital Cadastre DataBase (DCDB) is the spatial representation of the property boundaries and the related property descriptions of Queensland. The dataset made available on data.australia.gov.au is a fortnightly copy of the DCDB and is downloadable as an ESRI Shape File.

## Victoria

The Report of the Victorian Parliament's Economic Development and Infrastructure Committee (EDIC), **Inquiry into Improving Access to Victorian Public Sector Information and Data** (EDIC Report), was tabled in the (State) Victorian Parliament on 24 June 2009.<sup>233</sup> The Committee had been asked to report on the benefits and costs of maximising access to and use of PSI for commercial and non-commercial purposes and to consider how flexible licensing arrangements would facilitate reuse of PSI.<sup>234</sup>

The EDIC Report is very significant, as the EDIC inquiry was the first in Australia to consider in depth the issue of access to PSI and the Committee's findings provide valuable guidance for other governments. The key economic recommendation in the report was that the Victorian Government establish a comprehensive Information Management Framework (IMF), with open access to PSI at no or marginal cost as the default position and the development of specific guidelines to deliver with policy outcome.<sup>236</sup> The Committee formed the view that the economic and social benefits arising from the release of Victorian Government information at no cost far outweighs the benefits of treating it as a commodity.<sup>237</sup>

Specific key recommendations in the report included:<sup>238</sup>

**Recommendation 1:** That the Victorian Government release a public statement indicating that it endorses open access as the default position for the management of its public sector information.

**Recommendation 2:** That the Victorian Government develop a whole-of-government Information Management Framework (IMF) with the following key features:

- that the object of the IMF is to promote and facilitate increased access to and re-use of Victorian public sector information (PSI) by government, citizens, and businesses;
- that the default position of the IMF be that all PSI is made available;
- that the IMF define and describe criteria under which access to PSI may be restricted, or released under licence;
- that PSI made available under the IMF be priced at no cost or marginal cost; and
- that the IMF establish a systematic and consistent whole-of-government methodology for categorisation, storage and management of PSI.

.....

**Recommendation 14:** That the Victorian Government adopt the Creative Commons licensing model as the default licensing system for the Information Management Framework.

**Recommendation 15:** That the Victorian Government adopt a hybrid public sector information licensing model comprising Creative Commons and a tailored suite of licences for restricted materials.

.....

**Recommendation 20:** That the Victorian Government enhance its role as an information provider as a means to improve social benefits and facilitate commercial activity in the private sector.

In responding to the EDIC Report in February 2010,<sup>240</sup> the Victorian Government fully supported 32 of the 46 recommendations and gave in-principle support to the remainder, which are issues that will require further consideration in the development and implementation of the IMF. Recommendations 1, 14, 15 and 20 received unqualified support while recommendation 2 was supported in-principle.

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<sup>233</sup>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](http://www.parliament.vic.gov.au/edic/inquiries/access_to_PSI/final_report.html) (accessed 2 February 2010). The main recommendations are summarised in the accompanying media release, **21<sup>st</sup> Century Approach to Government Information: Committee calls for improved access to government information**, Economic Development and Infrastructure Committee, 24 June 2009, available at [http://www.parliament.vic.gov.au/edic/inquiries/access\\_to\\_PSI/PSI\\_Inquiry\\_Media\\_Release.pdf](http://www.parliament.vic.gov.au/edic/inquiries/access_to_PSI/PSI_Inquiry_Media_Release.pdf) (accessed 2 February 2010).

<sup>234</sup> EDIC adopted a broad definition of PSI, but excluding software: EDIC Report, at p 1.

<sup>236</sup> EDIC Report, Recommendation 16.

<sup>237</sup> EDIC Report, para 2.4, p 19.

<sup>238</sup> EDIC Report, pp xxv - xxvi.

<sup>240</sup> Government of Victoria, **Whole of Government Response to the Final Report of the Economic Development and Infrastructure Committee's Inquiry into Improving Access to Victorian Public Sector Information and Data**, February 2010, available at <http://www.diird.vic.gov.au/diird-projects/access-to-public-sector-information>



The Victorian Government endorsed the Committee's "overarching recommendation that the default position for the management of PSI should be open access" and committed itself to "the development of a whole-of-government Information Management Framework (IMF) whereby PSI is made available under Creative Commons licensing by default with a tailored suite of licences for restricted materials".<sup>241</sup> It stated:

Open access to PSI represents an important opportunity for the Victorian Government to increase its engagement with the community and to realise a range of social and economic benefits. The government is committed to improving access to PSI and will seek to bring current activities into a more consistent and comprehensive framework for the release of PSI to ensure it is addressing the varied needs and interests across the community...Open access to PSI has the potential to provide a range of benefits for government and citizens on policy issues, social benefits to citizens through availability to increased information on matters as diverse as health or recreation, and economic gains by the State through creative or enterprising use of PSI by the public and private sectors.<sup>242</sup>

The Victorian Government stated that implementation of an IMF to improve access to PSI<sup>243</sup> would provide the State with the opportunity to play a leading role in the development of policies and practices for access to government information and data in Australia, and enable it to realise significant economic and social benefits.<sup>244</sup> While supporting in-principle the recommendation (in recommendation 2) that the default position should be that all PSI be made available, the government noted that "there may be instances where legislation (especially legislation dealing with privacy or confidentiality), licensing or other contractual arrangements or an overriding public interest (including security concerns) prevent information from being publicly released".<sup>245</sup> The government stated that it would consider the issues raised by the Committee and work undertaken in other jurisdictions in defining the circumstances in which "access to PSI may be restricted, or released under licence". Another element of recommendation 2 that was supported in-principle was the recommendation that "PSI made available under the IMF be priced at no cost or marginal cost". Although supporting making PSI available at no cost or marginal cost,<sup>246</sup> the government noted that "this pricing structure may not be appropriate in all instances", such as "where revenue generated covers the cost of collecting or producing the information and data".<sup>247</sup> It indicated that, in developing the IMF, the nature and costs of servicing current and future information needs would be addressed and that it was likely that a range of pricing models would have to be adopted.<sup>248</sup>

## New South Wales

The Centre for Learning Innovation (CLI) in the New South Wales Department of Education and Training has released several of its learning resources under CC licences.<sup>251</sup> The CLI produces learning resources and provides leadership in the use of technology in education and training. Included in the resources licensed under a CC licence is the work "Dynamic Calculus", a collection of interactive learning objects for teaching calculus.<sup>252</sup>

At the local government level, in April 2009 the Mosman Municipal Council – the local government authority for the northern shores of Sydney Harbour – adopted a new Community Engagement Strategy and distributed it under a Creative Commons Attribution 2.5 Australia (CC BY) licence. By adopting the Strategy, the Council

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<sup>241</sup> Ibid, at p 8.

<sup>242</sup> Ibid, at pp 11 – 12.

<sup>243</sup> The steps involved in the first stage of development of an IMF are described as follows: "specifying the scope of PSI to which the IMF applies; obtaining further legal advice about the release of PSI and use of appropriate licensing arrangements including use of Creative Commons licensing, where appropriate, as the default licence; identifying and categorising datasets created and maintained by the Victorian Government; developing a hybrid licensing system that uses Creative Commons as the default licence; developing pricing models with no cost/marginal cost as the default; defining and describing criteria under which access to PSI may be restricted, or released under licence; and developing governance and funding arrangements for the implementation of the IMF. Ibid, at pp 8 – 9.

<sup>244</sup> Ibid, at p 9.

<sup>245</sup> Ibid, at p 12.

<sup>246</sup> Ibid, at p 8.

<sup>247</sup> Ibid, at p 12.

<sup>248</sup> Ibid, at pp 8 and 12.

<sup>251</sup> See <http://www.smartcopying.edu.au/scw/go/pid/921>.

<sup>252</sup>

<http://www.smartcopying.edu.au/scw/go/cache/offonce/pid/939;sessionid=B82C2B3E2A4E5F1A63A7878C586F5ACD>. See

This interactive resource is licensed under a Creative Commons Attribution-Noncommercial-Share Alike 2.5 Australia Licence.

intends to “inform”, “consult” and “involve” their residents in genuine participatory government of their local area, and to promote the objectives of transparency and accountability in government. As part of the Strategy, the Council is committed to adopting best practices in use of new technologies to engage with citizens, including:<sup>253</sup>

- use of blogs, wikis and other social network and social media platforms “where two-way communication between Council and the community is encouraged and nurtured”;
- developing appropriate guidelines for the use of these technologies by the Council “to ensure on-line discussions are appropriate, intelligent and lawful”;
- encourage community contribution of local knowledge to collaborative spaces including Wikipedia and OpenStreetMap;
- **releasing Council materials, where possible, under a Creative Commons licence “to promote the use and dissemination of Council’s materials while retaining Council’s rights of authorship”;**
- **releasing Council materials, where possible, in open format and as open data; and**
- building of an application programming interface (API) to that information. [emphasis added]

## South Australia

South Australian is the first of the Australian jurisdictions in which a formal decision has been made by Cabinet to apply CC licences to the State’s PSI. The lead agency in South Australia, the Office of the Chief Information Officer, became involved in considering the use of CC licences through the Cross Jurisdictional Chief Information Officers Committee (CJCIOC). On 5 November 2008, the South Australian government’s ICT Board – the State’s governance and strategic leadership body for whole-of-government ICT services and initiatives – endorsed a recommendation to Cabinet that the government support the adoption of the Government Information Licensing Framework (GILF) model. This recommendation was approved by Cabinet in December 2008 and implementation of the South Australian GILF Program began in June 2009 with the establishment of a Working Group of government agencies and support of agency chief executives.

## Cultural Institutions

Australia’s cultural institutions are increasingly seeking to engage with their audiences in ways that capitalise on the distributed and collaborative networking models available in the Web 2.0 environment. Digital technologies have dramatically changed the landscape of creating, collecting and providing access to cultural materials. In this environment, Australian museums and archives are exploring the potential of open access distribution models.

### Powerhouse Museum (Sydney)

The Powerhouse Museum in Sydney, a major Australian cultural institution, has adopted open access practices and commenced releasing a large amount of material under Creative Commons licences. The museum’s new practices are designed to “enable rich research and [to] encourage innovation”.<sup>254</sup> Materials available include the museum’s photo of the day project,<sup>255</sup> downloadable pdf files from its Play program<sup>256</sup> and the museum’s general collection information and data.<sup>257</sup> Since April 2009, all online descriptions of objects held by the museum have been available under a Creative Commons Attribution-Non-Commercial (CC BY-NC) licence whilst the primarily factual information about each of the objects is available under a Creative Commons

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<sup>253</sup> <http://creativecommons.org.au/node/255>. See also the case study on this Mosman Municipal Council initiative at [http://wiki.creativecommons.org/Case\\_Studies/Mosman\\_Municipal\\_Council](http://wiki.creativecommons.org/Case_Studies/Mosman_Municipal_Council). The Strategy also points to the need for appropriate training for Council officers and to ensure that citizens who are not technologically literate are not disadvantaged. To this end traditional means of communication and engagement will be retained.

<sup>254</sup> See, under the heading Open Licensing and Collections, the comments by Paula Bray, the Manager Image Services, at the Museum, in the context of developing business models based on the Commons project on Flickr: <http://www.archimuse.com/mw2009/papers/bray/bray.html>.

<sup>255</sup> <http://www.powerhousemuseum.com/imageservices/>. The CC licence used is CC BY-NC-ND (Attribution, Non-Commercial, No Derivatives).

<sup>256</sup> <http://play.powerhousemuseum.com/>. The CC licence used is CC BY-NC-ND (Attribution, Non-Commercial, No Derivatives).

<sup>257</sup> <http://www.creativecommons.org.au/node/225>.

Attribution-ShareAlike (CC BY-SA) licence. In addition, the museum makes photographs (in which there are no known copyright interests) available for public download through the Commons on Flickr.<sup>258</sup>

### Australian Broadcasting Corporation's "Pool"

Pool is an initiative established by the Australian national broadcaster, the Australian Broadcasting Corporation (ABC), with the support of the University of Technology Sydney (UTS), the Royal Melbourne Institute of Technology (RMIT) and the University of Wollongong.<sup>259</sup> The ABC website describes Pool as:

[A] space for people to upload and download, create profiles, share, remix and build communities. While encouraging this engagement, the ABC expects all users to treat each other with respect and courtesy. Pool is an open platform for conducting research in action at the intersection of conventional broadcast media and participatory media. Pool is a predictive project exploring this new territory asking the question: "how does a traditional broadcaster make sense of participatory media culture?"<sup>260</sup>

To contribute material it is necessary to first register, agree to conditions displayed on the site<sup>261</sup> and indicate the rights granted to the ABC and other parties to use the uploaded material, by selecting from among the six standard CC licences, an "all rights reserved" copyright notice and a public domain dedication. As well as inviting members of the public to upload material so that it is available on Pool, the ABC is releasing its archival material to the public for use and reuse under an open content licence.<sup>262</sup>

## CONCLUSION

How best to manage PSI to foster innovation is one of the most significant challenges faced by governments at the present time. Unlocking the potential of the huge amount of informational, creative, educational and scientific material produced or funded by government requires the development and implementation of copyright management and licensing strategies that facilitate access and reuse.<sup>263</sup> Recent Australian experience has shown that CC licences offer a legally and operationally effective means by which much copyright

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<sup>258</sup> This material may never have been protected by copyright or the term of copyright has expired. For an overview of the Powerhouse Museum's rights and permissions practices see [http://www.powerhousemuseum.com/imageservices/?page\\_id=157](http://www.powerhousemuseum.com/imageservices/?page_id=157).

<sup>259</sup> See <http://www.pool.org.au>.

<sup>260</sup> Ibid.

<sup>261</sup> The conditions include the following:

- 3.3 You agree to allow the ABC to select whole or part of Your Uploaded Content to be used for inclusion on Pool.
- 3.4 The ABC does not warrant that we will archive, back up, or continue to store Your Uploaded Content. You should keep a copy of Your Uploaded Content.
- 3.5 All copyright in Your Uploaded Content shall remain the property of you. At the time of adding Your Uploaded Content to Pool you will nominate the type of licence which will apply to Your Uploaded Content. You can select the following licensing options for Your Uploaded Content:
  - (a) Creative Commons Attribution Non-Commercial licence;
  - (b) Creative Commons Attribution Non-Commercial Non-Derivative licence;
  - (c) Creative Commons Attribution Non-Commercial Share Alike licence;
  - (d) Creative Commons Attribution Share Alike licence;
  - (e) Creative Commons Attribution No-Derivatives licence;
  - (f) Creative Commons Attribution ;
  - (g) All rights reserved; or
  - (h) Public domain
- 3.6 Your Uploaded Content may be edited or adapted at any time by the ABC in order to:
  - (i) meet the requirements of broadcasting authorities;
  - (ii) adhere to any requirements of the ABC Editorial Policies;
  - (iii) ensure Your Uploaded Content meets any legal classification requirements or to avoid any breach of law;
  - (iv) use Your Uploaded Content for promotional purposes; and/or
  - (v) use Your Uploaded Content on any other ABC media platform.
- 3.7 Should the ABC want to use Your Uploaded Content for any other purpose than those outlined in 3.5, the ABC will first obtain your consent.

<sup>262</sup> See [http://www.pool.org.au/users/abc\\_archives](http://www.pool.org.au/users/abc_archives).

<sup>263</sup> B Fitzgerald, "It's vital to sort out the ownership of ideas" February 27, 2008, The Australian (Higher Education Supplement) <http://www.theaustralian.news.com.au/story/0,25197,23280526-25192,00.html>; B Fitzgerald and B Atkinson "Third Party Copyright and Public Information Infrastructure/Registries: How much copyright tax must the public pay?" in B Fitzgerald and M Perry (eds), *Knowledge Policy for the 21st Century*, 2008, available at <http://eprints.qut.edu.au/archive/000113627/>; Tracey P. Lauriault and Hugh McGuire, "Data Access in Canada: CivicAccess.ca" (2008) <http://www.osbr.ca/ojs/index.php/osbr/article/view/514>; M van Eechoud and B van der Wal, *Creative Commons Licensing for Public Sector Information: Opportunities and Pitfalls*, 2007, available at <http://www.ivir.nl/creativecommons/index-en.html>.

protected PSI may be unlocked for innovative reuse. Open content licensing supports the shift by government towards open access policies and practices. Initiatives by Australian governments at the Federal, State and local level have shown that CC licences provide the “simple, open and internationally recognised licensing framework” which is required in order to maximise the value of PSI in the web 2.0 era.<sup>264</sup> Governments are increasingly delivering information and services online with the increasing efficiencies that it brings. The adoption of CC licences by Australian governments is a logical step towards utilising the functionality available through web 2.0 technologies (and beyond) for the benefit of all sectors of the Australian community. The adoption of CC licences by all levels of government in the online environment will fuel the development of a vibrant global commons of PSI, the real value of which can only be realised when it is reused for social, economic and cultural benefit.

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<sup>264</sup> 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 33, available at <http://www.unece.org/stats/documents/ece/ces/ge.45/2009/wp.11.e.pdf>.

## Abbreviations and Acronyms

ABC	Australian Broadcasting Corporation
ABS	Australian Bureau of Statistics
AEC	Australian Electoral Commission
API	application programming interface
AWRIS	Australian Water Resources Information System
BoM	Bureau of Meteorology
BY	Attribution
CC	Creative Commons
CC0	CC zero
CJCIOC	Cross-Jurisdictional Chief Information Officers Committee
CLI	Centre for Learning Innovation
CLRC	Copyright Law Review Committee
CRC-SI	Cooperative Research Centre for Spatial Information
DERM	Queensland Department of Environment and Resource Management
DRM	Digital Rights Management
EDIC	Victorian Parliament's Economic Development and Infrastructure Committee
ERMI	electronic rights management information
FOSS	Free and Open Source Software
FTP	File Transfer Protocol
GA	Geoscience Australia
GILF	Government Information Licensing Framework
GPL	GNU General Public Licence
IMF	Information Management Framework
JRGWI	Jurisdictional Reference Group on Water Information
MODIS	Moderate Resolution Imaging Spectroradiometer
NC	Non-Commercial
ND	No Derivative Works
NGISS	National Government Information Sharing Strategy
NZGOAL	New Zealand Open Access and Licensing Framework
OCC	Online and Communications Council
OECD	Organisation for Economic Cooperation and Development
OESR	Queensland Office of Economic and Statistical Research
PMSEIC	Prime Minister's Science, Engineering and Innovation Council
PSI	Public Sector Information
QSIC	Queensland Spatial Information Council
QUT	Queensland University of Technology
SA	Share Alike
TPM	technological protection measures
UNECE	United Nations Economic Commission for Europe
URI	Uniform Resource Identifier



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