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Re-use Rights and Australia's Unfinished PSI
Revolution

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Graham Greenleaf and Catherine Bond

Abstract

An understanding of the re-use of public sector information in Australia starts from the fact that the provisions for Crown Copyright in the Copyright Act 1968 means that no PSI (including legislation and cases) is available for re-use without permission, and there are nine different regimes (federal, plus States and Territories) governing re-use permissions. Since 2008 this situation is changing rapidly, with a series of reports leading to a federal government policy that, when it licences PSI the default licence will be a Creative Commons BY licence (requiring only attribution). However, we argue that this is incomplete, because there is as yet no requirement that PSI be licensed when it is made freely available to the public (in which case Crown Copyright still applies). The State of Queensland has taken a similar approach, but it is arguable (but not certain) that it has 'joined the dots' so that all PSI made available to the public should, in default, be under a Creative Commons BY licence. In both jurisdictions Information Commissioners with a new pro-active role in relation to freedom of information may facilitate the transition to a 're-use culture' in the public sector. In the other seven jurisdictions the position is still evolving, but the federal and Queensland practices are likely to be influential. This is a remarkable achievement in a few years for Creative Commons Australia, and for the development of Australian public policy.

Despite these very positive developments in Australian policies and practices, we argue that liberal licensing regimes are not enough, and that there is also a need to reform Australia's antiquated Crown Copyright by abolishing it for some categories of PSI such as legislation and related information, limiting its duration in other cases of government publications, and limiting the duration of copyright in unpublished government works.

Re-use Rights and Australia's Unfinished PSI Revolution

GRAHAM GREENLEAF, CATHERINE BOND*

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“Government works”, also more commonly referred to as “Public Sector Information (PSI)”, are one of the areas where there have been many positive developments in recent years, including in Australia¹. However, Australia's public rights start from a lot further behind than most other countries. This is an area where the Australian national public domain is very different from the position in other jurisdictions. In this article we consider the unusual position of Crown copyright in Australia before examining recent shifts towards ‘open’ data and public sector information.

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¹ In this chapter the term “government works” and “PSI” are used interchangeably, although, on any reading of copyright law, the information contained in such works is in the public domain. As J. Mason noted in the seminal government and copyright case *Commonwealth v John Fairfax & Sons Ltd*, “Copyright is infringed by copying or reproducing the document; it is not infringed by publishing information or ideas contained in the document so long as the publication does not reproduce the form of the literary work”. See (1980) 147 CLR 39, at 58.

1. CROWN COPYRIGHT – OUR PECULIAR INSTITUTION

The Australian institution of ‘Crown copyright’ takes up none of the invitations inherent in Article 2(4) of the Berne Convention, which provides that ‘[i]t shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts’. Thus, even legislation and court decisions are protected by copyright in Australia, as well as all other ‘official texts of . . . administrative and legal nature’. In terms purely of copyright law, though not in terms of government practice, Australia is at the most restrictive end of the international spectrum in relation to republication of government works.

With respect to the development of the current provisions contained in the *Copyright Act 1968* (Cth), the myriad of colonial copyright Acts enacted prior to federation did not make any special provisions for Crown copyright, and nor did the first post-federation Commonwealth statute, the *Copyright Act 1905* (Cth). The doctrine of Crown copyright was thus introduced into Australia by the *Copyright Act 1912* (Cth), which repealed the 1905 statute and, pursuant to Schedule 1, introduced the *Copyright Act 1911* (Imp). This included section 18, the first provision in an Anglo-Australian copyright statute that focused solely on the subsistence and ownership of copyright in government-produced works. That section mandated Crown ownership of works ‘prepared or published by or under the direction or control of His Majesty or any Government department’. This decision by the British Government to include a specific provision concerning government copyright provides an interesting contrast to the United States, where a section specifically excluding government materials from protection was part of the *Copyright Act 1909* (US)².

This was the position until the enactment of the *Copyright Act 1968*, when UK and Australian copyright law finally diverged. In its 1959 report the Spicer Committee briefly mentioned Crown copyright, recommending that a provision similar to section 39 of the recently-enacted *Copyright Act 1956* (UK) be implemented³. This introduced the somewhat controversial

² See section 8, *Copyright Act 1909* (US).

³ SPICER COMMITTEE, *Report of the Committee Appointed by the Attorney-General to Consider What Alterations Are Desirable in the Copyright Law of the Commonwealth*, Canberra, AGPS, 1959, par. 403; see also COPYRIGHT LAW REVIEW COMMITTEE, *Crown*

'direction or control' test into Australian law, a test that, although it has subsequently been repealed in the UK, remains a part of Australian law.

In summary, the key Crown copyright provisions in Part VII of the *Copyright Act 1968* are as follows:

1. Section 176(1) states that, where copyright would otherwise not subsist 'in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or a State' then copyright subsists in that work pursuant to this subsection. Section 176(2) then provides that the Commonwealth or a State is the owner of works that are created under its 'direction or control'.
2. Section 177 provides for Commonwealth or State ownership of copyright 'in an original literary, dramatic, musical or artistic work' where that work is 'first published in Australia if first published by, or under the direction or control of, the Commonwealth or the State'.
3. Section 178(1) states that where copyright protection would not otherwise be available, copyright subsists 'in a sound recording or cinematograph film made by, or under the direction or control of, the Commonwealth or a State' pursuant to this section. Section 178(2) then states that the Commonwealth or a State is the copyright owner of a recording or film 'made by, or under the direction or control of, the Commonwealth or the State, as the case may be.'
4. Section 179 provides that Crown copyright ownership pursuant to sections 176-178 'may be modified by agreement'.
5. The duration of copyright in Crown works is 50 years from first publication for literary, dramatic and artistic works, photographs, sound recordings and cinematograph films (ss180 and 181). However, as discussed below, if a government work remains unpublished, copyright continues to subsist indefinitely.

In addition to the statutory provisions in ss176-181, there are two other ways by which Australian governments may own copyright in works: by virtue of the government's ownership of works by its employees, under normal copyright principles (for example, section 35(6) of the *Copyright Act 1968*); and by the Crown prerogative in the nature of copyright, which is of uncertain scope but mainly applying to primary legal materials⁴.

Copyright, 2005, par. 3.33 and 3.34, available at <http://www.austlii.edu.au/au/other/clrc/18.pdf>.

⁴ COPYRIGHT LAW REVIEW COMMITTEE, *Crown Copyright*, cit., par. 3.12, Chapt. 6.

Who is or are the 'Crown', 'the Commonwealth' or 'a State' for the purposes of Crown copyright in Australia? It is generally considered that the 'Crown' encompasses the Federal, State and Territory governments, so there is in effect a separate 'Crown' for each jurisdiction. The question of whether all three arms of government – the judiciary, legislature and executive – are included in the 'Crown' for the purposes of Crown copyright, or whether only the executive is included, is a matter of considerable dispute on which even the Copyright Law Review Committee was unable to come to a view⁵. For our purposes we will assume that the broader view prevails, as the matter is uncertain.

1.1. Implications of FOI and Crown Copyright for Public Rights

In order to understand the practical impact of Crown copyright on the rights of the Australian public in relation to government information, it is necessary to consider its interaction with freedom of information (FOI) laws. All Australian jurisdictions have had FOI laws since the 1980s, and (as discussed below) some have undergone recent significant changes relevant to this discussion.

We can distinguish three principal categories of rights that the public may have in relation to government information where that information is subject to Crown copyright:

1. Reactive FOI – This is where individuals are given the right to request copies of government documents provided they can identify the documents they want. This was the basis of all Australian FOI laws from the 1980s until 2010.
2. Pro-active FOI – This is where government agencies have a statutory obligation to publish (a) documents in particular categories of government documents; and (b) information allowing documents in some categories to be more easily identified (including those provided under earlier requests), thus enabling FOI requests for the actual documents to be lodged. At its optimum, this pro-active publication is also required to be in digital form, via the Internet. These pro-active publication obligations have now been added to Commonwealth FOI legislation, and proposed but not yet enacted in some State jurisdictions, as discussed below. The same result is achieved where government agen-

⁵ COPYRIGHT LAW REVIEW COMMITTEE, *Crown Copyright*, cit., par. 2.02-2.16; see references cited therein.

cies voluntarily publish categories of documents via the Internet for free access. Many Australian government agencies have had a distinguished record in so doing, some from the mid-1990s onward.

3. Re-use licensing – This is where, when certain categories of government documents are published or made available on request by governments, they are coupled with a licence from the government which enables them to be further reproduced or re-used in other ways. We examine below where this is now starting to be done in Australia.

Neither reactive FOI nor pro-active FOI explicitly involve public rights in copyright, because neither of them give the recipients of the government documents any rights to reproduce those documents or to do any acts which would breach the rights of the copyright owner (the government)⁶. In short they cannot re-publish or re-use the PSI that they get from by virtue of FOI rights.

Because of Crown copyright, permission to re-use PSI must then be sought from the relevant office in each jurisdiction, if the copyright administrator can be identified⁷. There are no consistent policies governing the re-use of government materials applied across all Australian jurisdiction, but as we will see consistent policies are now starting to develop in some jurisdictions.

Thus, the starting point for an examination of public rights in relation to government works in Australia is that all PSI is affected by Crown ownership of copyright, potentially open to multiple abuses of censorship, stifling of innovative republication and value adding, and only available for publication or any other re-use at the whim of its overseers. Our aim is now to examine whether that is changing.

1.2. Unpublished Government Works

To further complicate matters, copyright in unpublished government works will never cease by effluxion of time (such works will therefore not

⁶ This is an over-simplification because the act of publication via the Internet in effect allows reproduction by any person, at least for individual use. Also making government documents more easily locatable, through publication either of the actual documents or of meta-data about them, is an essential pre-requisite to effective exercise of re-use rights.

⁷ At the Commonwealth level, requests for reproduction of Commonwealth materials can be made to the Commonwealth Copyright Administration section of the Attorney-General's Department, available at https://www.ag.gov.au/www/agd/agd.nsf/Page/CopyrightCommonwealth_Copyright_Administration. Beyond that, however, there is no central location to request re-use of government materials.

enter the Australian public domain in the 'narrow' sense). Copyright continues to subsist where these works remain unpublished and, on that basis, unpublished government documents will never enter the public domain⁸. The *Commonwealth v John Fairfax & Sons*⁹ decision highlights the implications of this issue. That case concerned a series of unpublished documents outlining Australian Government defence policies between the period 1965 to 1975. The documents were due to be published as extracts from a new book in a number of Fairfax newspapers. The Commonwealth intervened, seeking an injunction to restrain publication on the grounds of criminal law, breach of confidence and copyright infringement. It was only with respect to the last cause of action that the Commonwealth succeeded. In granting the injunction, Mason J of the High Court of Australia held that '[t]he plaintiff's concern to stop publication of the information in the documents is not a reason for refusing it the protection to which its copyright entitles it'¹⁰. However, His Honour also noted that the various fair dealing provisions of the *Copyright Act 1968* may apply differently to unpublished works in such circumstances¹¹:

However, there is another possible approach to the concept of "fair dealing" as applied to copyright in government documents, an approach which was not spelled out in argument by the defendants. It is to say that a dealing with unpublished works which would be unfair as against an author who is a private individual may nevertheless be considered fair as against a government merely because that dealing promotes public knowledge and public discussion of government action. This would be to adopt a new approach to the construction of ss. 41 and 42 and it would not be appropriate for me on an interlocutory application to proceed on the footing that it is a construction that will ultimately prevail. Situations such as the present case would scarcely have been within the contemplation of the draftsman when the two sections and their ancestors were introduced¹².

Such a proposition suggests that, although such works may never enter the public domain, there may be potential for them to enter the public arena by virtue of fair dealing.

⁸ *Copyright Act 1968* (Cth) s 33(3).

⁹ (1980) 147 CLR 39.

¹⁰ (1980) 147 CLR 39, 58.

¹¹ (1980) 147 CLR 39, 54-56.

¹² (1980) 147 CLR 39, 55.



1.3. *A Curate's Egg: The CLRC Crown Copyright Review (2005)*

A report undertaken by the Copyright Law Review Committee into Crown Copyright¹³ in 2005 was surprisingly timid. Despite wide terms of reference, which included an explicit requirement to consider the rationale for government ownership of copyright material, it did not take up the 'Berne invitation' to make a comprehensive reconsideration of the creative role that access to, and re-use of government information could play in a modern economy and society. The CLRC does not seem to have seriously considered (or given reasons for rejecting) any of the alternative ways by which more substantial changes could be made to create public rights in Public Sector Information.

The CLRC recommended a few reforms to Crown copyright, which (with two exceptions) would change its form but not its substance. The federal government has not yet acted upon them in six years, and there is no indication that it will, although the commitment of the current government to the recommendations of the Government 2.0 report suggests that some changes will take place, albeit not those proposed by the CLRC. The CLRC's central recommendation was to replace the provisions for subsistence and ownership of Crown copyright in ss176-9 with a clarified position of the rights of the Crown as employer over works made in the course of Crown employees' duties (Recommendations 1 and 3). In relation to the duration of copyright then held by the Crown as employer, the CLRC recommended mere acceptance of a 'publication plus 50 years' status quo, whereas this is one area where Berne gives latitude to choose any copyright term. Also, unpublished Crown works will continue to never enter the public domain, and the CLRC did not consider whether a different rule should apply to the Crown as applies to private copyright owners. The result therefore was no net substantive change to the subsistence or duration of Crown copyright, with one major exception.

The one significant recommendation concerning public rights was that CLRC recommended the abolition of copyright (and any accompanying right, for example, the Crown prerogative) in legislation, case law and similar works at the Federal, State and Territory levels (Recommendation 4, discussed later). The CLRC also recommended repeal of the 'first publication' provision (s177(2)), and (because of the repeal of the 'direction or control' test) its recommendations put the Crown in the same position in relation

¹³ COPYRIGHT LAW REVIEW COMMITTEE, *Crown Copyright*, cit.

to commissioned works as are other commissioning parties. Both changes increase fairness to those creating works, but do not affect public rights.

The CLRC did not consider any more general abolitions of Crown copyright for specific categories of documents other than legal documents, and nor did it consider a general licensing scheme for other government works (although Creative Commons had been in operation for five years and was referenced in some submissions)¹⁴. However, it did note that it seems the Commonwealth would not be liable to compensate the States for acquisition of property if it changed Crown copyright¹⁵, so it does not seem that this is an impediment to change.

Despite its limited recommendations, the CLRC acknowledged the policy reasons which would justify more extensive change. It noted the 'great danger in the possibility of government using copyright as an instrument of censorship'¹⁶, and the 'strong public interest in government materials being in the public domain'¹⁷. It rejected arguments that Crown copyright 'helps to promote the accuracy and integrity of official government publications'¹⁸, accepting that there are more appropriate ways to achieve these ends.

The alternatives that could have been considered would at least include (a) complete abolition of Crown copyright (and reliance on other types of law to protect public interests); (b) an attempt to categorise what content should be subject to Crown copyright and what should be in the public domain; (c) an opt-in scheme by which Crown-generated content would enter the public domain unless government opted to claim copyright over it by some declaratory mechanism; (d) a requirement on governments to licence to the public the use of government information (or declare it to be in the

¹⁴ See B. FITZGERALD, *Submission to CLRC on Crown Copyright*, in Fitzgerald B., "Access to Public Sector Information: Law, Technology & Policy", Sydney, Sydney University Press, Vol. 2, 2010, pp. 350-351; G. GREENLEAF, *Crown Copyright in Legal Materials: Strategies to Maximise Public Use of Public Legal Information*, Submission to the CLRC inquiry into Crown copyright, (2004), available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(756EDFD270AD704EF00C15CF396D6111\)~CLRC+Crown+Copyright+Submission+-+AustLII.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(756EDFD270AD704EF00C15CF396D6111)~CLRC+Crown+Copyright+Submission+-+AustLII.pdf/\$file/CLRC+Crown+Copyright+Submission+-+AustLII.pdf).

¹⁵ COPYRIGHT LAW REVIEW COMMITTEE, *Crown Copyright*, cit., above n. 3, par. 6.34-6.36.

¹⁶ *Ibidem*, p. xxvi.

¹⁷ *Ibidem*, p. xxii.

¹⁸ *Ibidem*, p. xxiv.

public domain), generally at no cost; or (e) a drastically shortened term of protection for material captured under the Crown copyright provisions.

2. AUSTRALIAN FEDERAL GOVERNMENT REFORMS CONCERNING PSI

The CLRC's report was a missed opportunity for comprehensive reconsideration of Crown copyright, rather than a reasoned case to accept the Crown copyright status quo. As a result, there was not prior to recent developments any comprehensive consideration of how public rights in PSI in Australia could stimulate innovation and serve the public interest in other ways, even though this had clearly been recognised by then in the European Union and some national jurisdictions.

2.1. *Limited Momentum before 2008*

Anne Fitzgerald's exhaustive study finds Australia largely immune from the international developments toward more open PSI until at least 2005¹⁹. From then there was interest in some States, particularly Queensland, and in some federal agencies. But there was little significant movement at the Federal level until the Rudd Labor government became active in 2008, following the change of government in late 2007.

In its 2007 report the Productivity Commission explains that the federal government had in recent years moved from cost recovery (based on Crown copyright) to free access with some important data:

In 2002, the Australian Government agreed in principle to the Productivity Commission's review of cost recovery to funding the 'basic information product set' of its agencies from taxation revenue. Basic information products are determined in reference to 'public good characteristics', significant positive spillovers, and other Government policy reasons. Subsequently issued cost recovery guidelines contain advice to agencies on determining basic information products. Agencies such as the ABS, ABARE and the Australian Institute of Health and Welfare now provide data and information online free of charge to users²⁰. (citations omitted)

¹⁹ A.M. FITZGERALD, *Policies and Principles on Access to and Reuse of Public Sector Information: A Review of the Literature in Australia and Selected Jurisdictions*, Chapter 1 and 2: Australia and New Zealand, v 1.0, 2008, available at <http://eprints.qut.edu.au/31071/>.

²⁰ *Public Support for Science and Innovation: Productivity Commission Research Report*, 2007, p. 242, available at <http://www.pc.gov.au/projects/study/science/docs/finalreport>.

However, the Productivity Commission's Report did not take up the general question of what approach to ownership of government-produced information goods would best serve Australia's productivity or capacity for innovation.

Cutler, later to chair a review into Australia's national 'innovation system'²¹, was more forthright in arguing that 'the failure of government to address the issue of Crown copyright is extraordinary'²² and that:

... a change in policy so that governments put the IP assets they develop or control – our assets – back into the public domain is one of the crucial things that could make an enormous difference to not only access to content but also industry development in Australia²³.

Outside government, dissatisfaction was also increasing. The Conference Report of the Australian National Summit on Open Access to Public Sector Information²⁴, held at QUT in 2007 included in its 'Stanley Declaration' that 'the adoption and implementation by governments of an open access policy to public sector information (PSI) will ensure the greatest public benefit is derived from the increased use of information created, collected, maintained, used, shared, and disseminated by and for all governments in Australia'²⁵.

2.2. A Pro-active Approach to FOI

In the last few years, there have been two main streams of development concerning public rights in relation to PSI at the federal level, one arising

²¹ Review of the National Innovation System, *Venturous Australia – Building strength in innovation* (Report), Department of Innovation, Industry, Science and Research, 2008, available at <http://www.innovation.gov.au/Innovation/Policy/Pages/ReviewoftheNationalInnovationSystem.aspx>.

²² T. CUTLER, *Why Governments and Public Institutions Need to Understand Open Content Licensing*, in Fitzgerald B. (ed.), "Open Content Licensing: Cultivating the Creative Commons", Sydney, Sydney University Press, 2007, p. 79.

²³ T. CUTLER, *Why Governments and Public Institutions Need to Understand Open Content Licensing*, cit., p. 80.

²⁴ *Australian National Summit on Open Access to Public Sector Information proceedings*, Queensland Treasury, 2007, available at <http://datasmart.oesr.qld.gov.au/Events/datasmart.nsf/0/CD8D2AF82A2007D34A25732C0006F9AE?OpenDocument>.

²⁵ Made 13 July 2007, cited in *(Queensland) Government Information Licensing Framework (GILF)*, available at http://wiki.creativecommons.org/Government_Information_Licensing_Framework.



from freedom of information (FOI) legislative reforms and the other arising from a plethora of reports within various governments, leading to policy reforms concerning re-use of PSI.

The FOI reforms stem from the *Australian Information Commissioner Act 2010*, establishing the Office of the Australian Information Commissioner (OAIC) headed by the Australian Information Commissioner and supported by two statutory office holders, the existing Privacy Commissioner and a new Freedom of Information Commissioner. The Information Commissioner has a new function additional to FOI and privacy responsibilities, of giving strategic advice to the federal government on information management generally. All aspects of public rights in PSI are therefore within the scope of this advisory role, and this is indicated by the OAIC's first Issues Paper²⁶, which canvasses progress on issues concerning re-use of PSI in many jurisdictions.

The Freedom of Information Amendment (Reform) Act 2010 includes two key reforms which the OAIC says have 'been described as a move from a reactive "pull" model of FOI disclosure based on individual access requests, to a proactive "push" model requiring agencies to take the initiative to make information available to the public'²⁷. The Information Publication Scheme (IPS), commencing on 1 May 2011, 'requires Australian Government agencies subject to the FOI Act to publish a broad range of information on their websites and make it available for download where possible. Agencies are also required to publish an Information Publication Plan showing how they intend to implement the IPS ...'²⁸. The Information Commissioner will publish guidelines to assist agencies to decide what information it would be useful to publish. Complementing the IPS, agencies must also publish a 'disclosure log' listing the information they have already released pursuant to FOI requests. This converts 'pull' into 'push', on the intuitively sensible basis that if one person has found it worth requesting a document then others may also find the document valuable.

The relevance of these FOI reforms to public rights in PSI is twofold. In order to re-use PSI (exercise rights otherwise held by the copyright owner),

²⁶ OFFICE OF THE AUSTRALIAN INFORMATION COMMISSIONER (OAIC), *Towards an Australian Government Information Policy*, Issues Paper n. 1, Nov. 2010, available at http://www.oaic.gov.au/publications/issues_paper1_towards_an_australian_government_information_policy.html.

²⁷ *Ibidem*, 69.

²⁸ *Ibidem*, 70.

you first have to know it exists and how to obtain it. Only then do questions of licences to re-use become relevant. Second, publication on a website is in effect providing a licence for individual reproduction and personal use, which are otherwise exclusive rights. Such publication also makes the PSI available for the purposes of fair dealing.

However, if a member of the public wishes to make any further use of federal government PSI provided in this way, or any other way, Crown copyright prevents them from doing so, unless they first obtain a licence enabling them to do so. Progress toward the goal of providing efficient and comprehensive licensing mechanisms is still not quite complete, but once successful will have many fathers, some of whom are now introduced.

2.3. *The Government 2.0 Blueprint for Public Rights in PSI*

The warm-up act for PSI reform was *Venturous Australia*. The 2008 report of the Review of the National Innovation System committee (chaired by Terry Cutler), commissioned by the Department of Innovation, Industry, Science and Research, recommended that 'Australian governments should adopt international standards of open publishing as far as possible. Material released for public information by Australian governments should be released under a creative commons licence'²⁹. It also recommended that the Australian Government should establish a National Information Strategy, of which one of the two fundamental aims would be to 'maximise the flow of government generated information, research, and content for the benefit of users (including private sector resellers of information)³⁰. The government response in 2009³¹ did not respond to these recommendations at all, it merely said it would take advice on their implementation from the Australian Public Service Management Advisory Committee and the Auditor-General.

The Government 2.0 Taskforce (chaired by Nicholas Gruen), commissioned by the Minister for Finance and Deregulation and the Special Min-

²⁹ REVIEW OF THE NATIONAL INNOVATION SYSTEM, *Venturous Australia - Building strength in innovation* (Report), Department of Innovation, Industry, Science and Research, 2008, Recommendation 7.8, available at <http://www.innovation.gov.au/Innovation/Policy/Pages/ReviewoftheNationalInnovationSystem.aspx>.

³⁰ *Ibidem*, Recommendation 7.7.

³¹ AUSTRALIAN GOVERNMENT, *Powering ideas: An innovation agenda for the 21st Century*, May 2009, available at <http://www.innovation.gov.au/innovation/policy/pages/PoweringIdeas.aspx>.



ister of State, examined how new technologies, particularly 'web 2.0' concepts and techniques, could improve government. Its 2009 Report, *Engage: Getting on with government 2.0*³² contains the most detailed set of high-level recommendations concerning PSI in Australia. The government, in its May 2010 response³³ to the Government 2.0 Report, accepted most of its recommendations, with some modifications. It decided that the Australian Government Information Management Office (AGIMO) within the Department of Finance and Deregulation would be the lead agency, supported by a steering committee including AOIC. The Taskforce's recommendations will therefore be considered in tandem with the government's response.

The Taskforce defined 'Public Sector Information' as follows: 'information, including information products and services, generated, created, collected, processed, preserved, maintained, disseminated, or funded by or for the government or public institutions, taking into account [relevant] legal requirements and restrictions'³⁴.

The Taskforce summarised its main recommendations concerning PSI licensing (Recommendations 6.1-6.6) as follows (footnotes omitted):

We also need clear, strong and simple policies to deliver the aspiration of the Freedom of Information Amendment (Reform) Bill 2009 for public sector information (PSI) to be released by default with secrecy being maintained only where there is good reason to do so. In addition the information must be truly open. This means that unless there are good reasons to the contrary, information should be: free; easily discoverable; based on open standards and therefore machine-readable; properly documented and therefore understandable; licensed to permit free re-use and transformation by others.

The need for the licensing itself to be machine readable means that the licence should conform to some international standard such as Creative Commons. The taskforce proposes Creative Commons BY as the default licence. Where third parties are involved, agencies should contract to ensure that government is able to license their work under the default licence. ... There should also be a process of providing more open licensing to the stock of existing PSI which has been more restrictively licensed in the past.

³² GOVERNMENT 2.0 TASKFORCE, *Engage: Getting on with Government 2.0*, Department of Finance and Deregulation, 2009, available at <http://www.finance.gov.au/publications/gov20taskforcereport/>.

³³ AUSTRALIAN GOVERNMENT, *Government Response to the Report of the Government 2.0 Taskforce*, May 2010, available at <http://www.finance.gov.au/publications/govresponse20report/doc/Government-Response-to-Gov-2-0-Report.pdf>.

³⁴ GOVERNMENT 2.0 TASKFORCE, above n. 32, Chapt. 5.



The government has accepted all of these recommendations in principle, with the Attorney-General's Department (AGD) required to ensure that its IP Guidelines to government agencies do not impede the default open licensing position recommended by the Taskforce. This means that the default position is that any works published by the Australian government should be published under a Creative Commons BY licence, the most liberal Creative Commons licence allowing any re-use or transformation of the material licensed. The AGD *Statement of IP Principles*, Principle 11(b) (discussed below) has now been amended to implement this.

The Australian government has therefore moved to a fundamentally different position in relation to public rights to use public sector information from where it was only a few years earlier, and a position at the advanced end of the spectrum of acceptable positions advocated by the OECD. The government's position also indicates the extent to which Creative Commons licensing has been accepted within the Australian public sector. The federal position could be expected to have a considerable influence on the States and Territories, particularly those such as Victoria already leaning in the direction of Creative Commons PSI licensing.

There is much more of importance in the details of the Taskforce's Recommendation. By 'free' is meant at no cost, unless there are substantial marginal costs of dissemination. By 'free re-use and transformation' they mean that will be no limitations on derivative uses, as provided by a Creative Commons BY licence³⁵, which they support as the default licence. This means that 'Use of more restrictive licensing arrangements should be reserved for special circumstances only, and such use is to be in accordance with general guidance or specific advice provided by the proposed OIC'³⁶. The Government has agreed in principle, and AGD is to ensure its IP Guidelines do not impede this. The AGD *Statement of IP Principles* (discussed below) does not impede this, but does not yet explicitly implement it.

To maximise the re-use of PSI already published, the Taskforce recommends that 'rules could be adopted' whereby large categories of such documents would be designated as published under a Creative Commons BY licence³⁷. The Government has agreed in principle, and AGD is to ensure its IP Guidelines do not impede this. However, it will take pro-active action

³⁵ See *Creative Commons Attribution 2.5 Australia licence*, available at <http://creativecommons.org/licenses/by/2.5/au/>.

³⁶ GOVERNMENT 2.0 TASKFORCE, above n. 32, Recommendation 6.4.

³⁷ *Ibidem*, Recommendation 6.5.



by agencies (and perhaps prodding from OAIC guidelines) to ensure that it occurs. It is difficult to see such 'retrospective' granting of a licence would not be effective, and it could have a major effect provided prospective re-publishers had effective means of finding data so designated. The Taskforce also recommends that this apply to Crown copyright records when they become available under the Archives Act³⁸, and the Government: has agreed, subject to appropriate licence being assessed case-by-case by agencies, that than the application of a Creative Commons BY licence in default. Principle 11(c) of the AGD *Statement of IP Principles* (discussed below) has also been amended to implement the Taskforce recommendation concerning materials becoming available under the *Archives Act 1983*, and requires automatic licensing under an 'appropriate open content licence'.

Under the Taskforce's proposals (and the new FOI reforms), it would still be within the discretion of an agency not to publish categories of data, or to do so using a more restrictive licence than the CC:BY licence that the Taskforce proposes. However, it is further suggested that any such discretionary 'decision to withhold the release of PSI ... should only be made with the agreement of, or in conformity with policies endorsed by the proposed OIC and consistent with the government's FOI policy'³⁹. This would give the new AOIC a more determinative role in what agencies release (and the licences, if any, under which they release it) that the current FOI legislation and proposed issuing of guidelines envisages. The government says this will be addressed by OAIC's IPS guidelines.

The Taskforce also recommended that the functions of the Commonwealth Copyright Administration (CCA) unit (currently within the Attorney-General's Department) relating to pre- and post-licensing of copyright material should be transferred to either the proposed OIC or AGIMO⁴⁰, but the government has rejected this and CCA will remain with AGD.

The Taskforce also recommended an Australia-wide portal to enable discovery and downloading of published PSI, and this has already been established. The data.australia.gov.au site offers 200 datasets of PSI from most Australian governments, with licences explaining what can be done with the data⁴¹. For example, a dataset of crime incident data from the Australian In-

³⁸ *Ibidem*, Recommendation 6.7.

³⁹ *Ibidem*, Recommendation 6.8.

⁴⁰ *Ibidem*, Recommendation 7.2.

⁴¹ As at 29 December 2009 <http://data.australia.gov.au> offered 200 datasets.



stitute of Criminology is available under a Creative Commons Attribution 2.5 Australian (CC-BY) licence.

Another important Taskforce recommendation is likely to encourage both compliance and evidence-based policy-making in relation to the value of open PSI: 'Within the first year of its establishment the proposed OIC, in consultation with the lead agency, should develop and agree a common methodology to inform government on the social and economic value generated from published PSI'. Major agencies would be required to report their PSI release performance in their annual reports, based on the methodology agreed with the AOIC, with a 'lite' version subsequently developed for other agencies, and the AOIC would also provide a consolidated annual 'whole of government' assessment⁴². The government has agreed, and OAIC is to advise the Cabinet Secretary of implementation options by 1 November 2011. How this will be implemented therefore still remains to be seen. Policies based on evidence rather than anecdotes are still a rarity in relation to intellectual property changes⁴³, so any attempts to institutionalise such assessments are desirable innovations.

In July 2010 the Australian Government issued its *Declaration of Open Government*, which included a commitment to 'making government information more accessible and usable' and stated that the Department of Finance and Deregulation will report annually to the government on implementation progress of the Government 2.0 Taskforce recommendations, presumably via AGIMO⁴⁴.

Significant practical developments such as the data.australia.gov.au site are occurring, following the Government's endorsement of the Government 2.0 Taskforce recommendations.

2.4. *Implementation in Federal Government Licensing Practice, and Their Problems*

The Australian Federal government's previous Intellectual Property *Principles for Australian Government agencies* (also called the 'Statement of IP

⁴² GOVERNMENT 2.0 TASKFORCE, above n. 32, Recommendation 6.11 – 6.14.

⁴³ J. BOYLE, *The Public Domain: Enclosing the Commons of the Mind*, Yale University Press, 2008, Chapt. 9 "An Evidence-Free Zone".

⁴⁴ DEPARTMENT OF FINANCE AND DEREGULATION, *Declaration of Open Government*, undated, available at <http://www.finance.gov.au/e-government/strategy-and-governance/gov2/declaration-of-open-government.html>.



Principles'), issued by the Attorney-General's Department, referred to the 'desirability' of PSI being available to create commercial opportunities, and that non-exclusive provision is preferable, but little more. The *Statement of IP Principles* was amended⁴⁵ on 1 October 2010, following the government response to the Government 2.0 Report. Principle 11(b) now implements the new policy by stating 'Consistent with the need for free and open re-use and adaptation, public sector information should be licensed by agencies under the Creative Commons BY standard as the default'. It goes on to say by way of explanation that agencies should first consider CC licences 'or other open content licences', and licence their information 'following a process of due diligence and on a case by case basis'.

A Creative Commons BY licence is therefore now the default condition when an agency is 'determining how to licence' its PSI. However, this is not identical to saying that an agency should always consider such licensing whenever it makes PSI available to the public. This is the clear implication of Taskforce recommendation 6.3 and the government's acceptance of it: 'PSI released should be licensed under the Creative Commons BY standard as the default'. The new FOI reforms, with their requirement for agencies to develop an Information Publication Scheme (IPS), should ensure that much more PSI is in fact published or 'released'. But there is nothing explicit in the IP Principles to tell agencies that whenever they 'release' information they must also issue a licence to go with it.

As a result, the extent which CC:BY licences will be used, or required to be used, is still not clear. The key issue is whether agencies will, or must, use a licence at all when releasing PSI to the public. If an agency simply publishes government information as text, sound or video, whether online, in print, or on disc, then the default position is that it is shackled by Crown copyright. That is why the Taskforce Recommendation 6.5 that 'rules could be adopted whereby a large amount of PSI that has already been published could be automatically designated Creative Commons BY' is important. It is not only a 'legacy' issue but will be an ongoing issue unless agencies always publish PSI with a licence.

⁴⁵ ATTORNEY-GENERAL'S DEPARTMENT, *Intellectual Property Principles for Australian Government Agencies*, 1 Oct. 2010, available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(22D92C3251275720C801B3314F7A9BA2\)~Statement+of+IP+Principles+for+Australian+Government+Agencies-t.pdf/\\$file/Statement+of+IP+Principles+for+Australian+Government+Agencies-t.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(22D92C3251275720C801B3314F7A9BA2)~Statement+of+IP+Principles+for+Australian+Government+Agencies-t.pdf/$file/Statement+of+IP+Principles+for+Australian+Government+Agencies-t.pdf).

In January 2011 the Attorney-General's Department issued Guidelines⁴⁶ to agencies on licensing PSI, to supplement the 'Intellectual Property Principles' because as of January 2011 the Department has ceased the administration of Commonwealth copyright, the responsibility for which has been delegated to each agency. The Guidelines make it clear that, in the Department's view, agencies 'are now required to make licensing decisions about whether to use Creative Commons licences (or other open content licences) when publicly releasing their PSI' for the first time, and should also make such decisions when requests are received concerning republication of previously published PSI. But the Guidelines do not at any point state clearly that agencies must not simply publish material for free access without any licence decision, or do anything to change copyright notices on previously published materials. Nor is the OAIC apparently willing to be more explicit in their January 2011 draft 'Open PSI Principles'⁴⁷. They merely recommend to agencies that they do use a licence (preferably CC:BY) when publishing Commonwealth material⁴⁸. This is said to reflect government policy that the final decision whether to use any licence at all is to rest with the agencies concerned. Neither document says anything about proactive designation of previously published PSI as CC:BY.

The Government left it to either the Attorney-Generals Department or OAIC to 'join up the dots' to ensure that CC:BY does in reality become the default licence for all published Commonwealth PSI. But the present position is that the extent to which CC:BY licences will in fact be used by Commonwealth agencies cannot be guessed, as it will depend on decisions yet to be made by each individual agency, not only as to whether which licence is used but whether any licence is used. It still may be that there will be two 'default positions' for publication of Commonwealth PSI, with opposite results in relation to the right to republish: Creative Commons CC:BY licence (where a licence is used) and Crown Copyright (where there is no licence but there is free access). It is a missed opportunity.

⁴⁶ ATTORNEY-GENERAL'S DEPARTMENT, *Guidelines on Licensing Public Sector Information for Australian Government Agencies*, 28 January 2011, available at <http://agimo.govspace.gov.au/files/2011/02/Draft-Guidelines-on-Licensing-Public-Sector-Information-for-Australian-Government-Agencies.pdf>.

⁴⁷ OAIC Draft 'Open PSI Principles', 25 January 2011 in blog at <http://oaic.govspace.gov.au/category/open-psi-principles/>; see Draft Principle 9 'Clear reuse rights'.

⁴⁸ Personal communication from J. Popple, FOI Commissioner, 4 March 2011.



The result in relation to Commonwealth PSI, is on the one hand commendable and desirable compared with the pre-2008 position, and on the other hand disappointing in the remaining uncertainty and discretionary nature of what will be covered by CC:BY. It would be a great deal more simple, and better policy, if the Australian government simply legislated to provide that (a) all PSI published in future by any government agency would be subject to a Creative Commons BY licence, unless it was published subject to some other licence; and (b) after one year, all PSI previously published by any agency would be subject to a Creative Commons BY licence, unless an agency lodged a declaration in the Federal Register of Legislative Instruments (FRLI) stating that a particular category of published PSI was only available under some other licence. That would be a real default provision, similar in many ways to the provisions by which old legislative instruments became unenforceable unless they were lodged in the Federal Register of Legislative Instruments (FRLI) by a particular date⁴⁹.

3. STATE GOVERNMENT DEVELOPMENTS

Because the default position in Australia is that all PSI is subject to Crown copyright, and most government information is produced by State and Territory governments, an understanding of public rights in PSI in Australia must take into account the separate positions of each of the eight States and Territories. The federal Government 2.0 Taskforce recommends that the Australian Government 'should engage other members of the Council of Australian Governments, to extend these principles into a national information policy'⁵⁰. The federal government, while agreeing in principle to this, has not indicated how or when it will take the issue to COAG. There are some significant developments at State level in Australia, but it is likely to take some time before they result in a uniform national policy on re-use of PSI.

⁴⁹ The *Legislative Instruments Act 2003* (Cth) requires all written instruments 'of a legislative character' made under a power delegated by Parliament and the explanatory statements for them, to be registered in the Federal Register of Legislative Instruments (FRLI). Failure to register such a 'legislative instrument' (LI) makes it unenforceable (s31). The combined effect of ss28-29 of the Act is that all LIs must also have been registered by 1/1/2008 or they are no longer enforceable.

⁵⁰ GOVERNMENT 2.0 TASKFORCE, above n. 32, Recommendation 6.9.

3.1. Queensland and the GILF Project

An Information Commission and Right to Information Commissioner have been appointed under Queensland's Right to Information Act 2009, with a Privacy Commissioner comprising the third member of the Office of the Information Commissioner Queensland (OICQ). The Queensland legislation includes equivalents to the federal legislation's 'pro-active FOI', including pro-active agency publication schemes and disclosure logs.

Since 2004 the Queensland Spatial Information Council (QSIC) has been developing a Government Information Licensing Framework (GILF), in conjunction with Queensland University of Technology (QUT) Faculty of Law. In 2005 QSIC obtained advice from the Queensland Government's Crown Law office on the acceptability of Creative Commons licences for licensing public sector information. QSIC approved in principle the recommendations of the Crown Law report which later become known as the GILF Stage 1 Report. In 2006 QSIC's GILF Stage 2 Report⁵¹ recommended that the State Government further investigate the adoption a single open content information licensing model, based on the Creative Commons approach. A toolkit was developed for pilot projects, and agencies identified to carry them out in the next stage⁵². In 2007 Queensland's ICT Innovation Fund Board provided funding for GILF to be piloted by the Queensland Office of Economic and Statistical Research (OESR). The Western Australian Government also commenced a trial of the framework via Landgate. There are seven GILF licences: six open content (Creative Commons) licences and a GILF Restrictive Licence. The GILF website provides a Licence Review facility to assist agencies from an Australian jurisdiction to choose the licence appropriate to their content.

In March 2010 the Queensland Government Chief Information Officer (CIO) released the GILF Government Enterprise Architecture⁵³, which includes CIO's policy, position and guidelines concerning GILF. 'Queensland Government Agencies must follow the GEA GILF policy, position and guidelines when licensing information products. Approval must be sought

⁵¹ *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.gilf.gov.au/resources-gilf-stage-2-report>.

⁵² *Ibidem*.

⁵³ *Queensland CIO GILF GEA* (under CC Attribution 2.5 Australia licence, attributable to Queensland Department of Public Works), available at <http://www.qgcio.qld.gov.au/qgcio/architectureandstandards/qgea2.0/Pages/azqgeadocs.aspx#g>.



with the Chief Information Officer for exemptions or extensions on implementation'. 'As a minimum, agencies must: ensure that new information products are licensed with one of the GILF licences; apply the broadest or least restrictive use rights that are legally and operationally applicable to information products; ensure that employees in information management roles are provided with information and training to license information products; ensure that information about licensing is accessible to all employees'⁵⁴. The GILF website claims that GILF use will 'be a key enabler in the new Right to Information "push" policy'⁵⁵.

It seems, therefore, that the Queensland position, after half a decade's work by the QSIC's GILF project assisted by QUT experts, is similar to that recently reached by the federal government: the default position for licensing of Queensland PSI is the most permissive Creative Commons licence suitable to the data, subject to the exceptions specified in GILF concerning when the GILF Restrictive Licence is appropriate. This is a considerable achievement, and the work of the GILF project and QUT has also been influential in the federal change of policy, and the change of policy in Victoria proposed in Victoria (discussed below).

The GILF GEA Policy states that it 'applies to government information which is made publicly available' and in which the State of Queensland holds copyright. 'Policy requirement 1' states that Departments must 'ensure that government information to be released is licensed'. These statements mean that the lacuna that seems to apply at the federal level (because there is still nothing to prevent agencies releasing information on their website or in print for free access, in which case Crown copyright will still apply) has been avoided in Queensland. All releases of Queensland information must be licensed, and the license to be applied is the least restrictive available via GILF or consistent with GILF. 'Policy requirement 2', to 'make explicit to users the legal uses that can be made of government information', further strengthens this position.

Furthermore s21 of the *Right to Information Act 2009* provides that an agency's publication scheme must as well as listing 'the classes of information that the agency has available' also list 'the terms on which it will make the information available, including any charges'. It seems logical that the GILF-compliant licence under which the information will be made avail-

⁵⁴ GOVERNMENT INFORMATION LICENSING FRAMEWORK, *GILF Policy*, available at <http://www.gilf.gov.au/gilf-policy>.

⁵⁵ *Ibidem*.



able would be one of the 'terms' that must be published, but yet the otherwise exhaustive OICQ's Guidelines to the operation of the Act do not mention licensing conditions as a requirement of the publication scheme⁵⁶. Agencies must ensure that their publication scheme complies with the Ministerial Guidelines published by the Department of Premier and Cabinet. The Information Commissioner Queensland does not approve publication schemes, and does not have the explicit role that the OAIC has been given to issue guidelines in relation to re-use licensing of PSI, but 'can monitor compliance with publication scheme requirements as part of the performance monitoring and reporting function in relation to the agency's compliance with the RTI legislation'⁵⁷. However, it does seem that the GILF requirements and the RTI requirements have not yet quite coalesced at the administrative level, even if they have in theory.

One minor missing element is that the *Queensland Public Sector Intellectual Property Principles*⁵⁸ do not yet reflect this change of policy and are still mainly about commercialisation of information assets, but this seems irrelevant given the requirements coming from other directions. Queensland's adoption of default open content licensing seems complete in policy and administrative requirements, though not required by law, and it only remains to be seen whether it works in practice and is continued by successive governments.

3.2. Victoria in Flux

The previous Victorian government responded in 2010 to the 46 recommendations of a Victorian Parliamentary enquiry made in 2009⁵⁹. However, while the government supported almost all the committee's recommenda-

⁵⁶ OFFICE OF THE INFORMATION COMMISSIONER, *Queensland Right to Information and Privacy Guidelines*, 1 December 2009, available at <http://www.oic.qld.gov.au/information-resources>.

⁵⁷ *Ibidem*.

⁵⁸ *Queensland Public Sector Intellectual Property Principles*, available at <http://www.dtrdi.qld.gov.au/dsdweb/v4/apps/web/content.cfm?id=8581>; see also *Queensland Public Sector Intellectual Property Guidelines (V2)* (2007), available at <http://www.dtrdi.qld.gov.au/dsdweb/v4/apps/web/content.cfm?id=6775>.

⁵⁹ *Victorian Government Response to Improving Access to Victorian Public Sector Information and Data*, 9 February 2010, available at http://www.dbi.vic.gov.au/__data/assets/pdf_file/0009/149958/Response-to-the-EDIC-Inquiry-into-Improving-Access-to-Victorian-PSI-and-Data.pdf; ECONOMIC DEVELOPMENT AND INFRASTRUCTURE COMMITTEE (VICTORIA), *Final Report – Inquiry into improving access to Victorian public sector*



tions in general principle, its actual commitment was only to start the development of a whole of government Information Management Framework in 2010, with an interim report due in 2011 and no fixed end date. Since the change of government in December 2010 the status of the committee's recommendations is in flux.

However, the one area of clear government acceptance of recommendations was that when (one might add 'and if') an Information Management Framework was developed, it would 'adopt the Creative Commons licensing model as the default licensing system', plus 'a tailored suite of licences for restricted materials'. No particular Creative Commons licence was specified as the default, nor any other details given equivalent to the Government 2.0 Recommendations. The Committee made a finding that it 'is likely' that Creative Commons licences can be appropriately applied to around 85% of Victorian PSI. Although not as significant as the genuine commitment to implementation at the federal level, it is notable that yet another Australian jurisdiction has found Creative Commons licences the best default basis for licensing PSI.

From both the Parliamentary report and the government response, there is clearly considerable concern with the prospect of loss of revenues depending on the extent that no cost or marginal cost recovery for PSI provision is adopted⁶⁰. Fitzgerald identifies potential loss of PSI revenues as an 'ongoing tension' within Australian governments⁶¹.

3.3. *New South Wales in Gridlock*

The *Government Information (Public Access) Act 2009* (GIPA Act) reforms FOI law in New South Wales, creating an Information Commissioner, and the *Privacy and Government Information Legislation Amendment Act 2010* clarifies her relationship with the NSW Privacy Commissioner. The GIPA Act includes provisions for proactive disclosure of government information. However, neither the Office of Information Commissioner (NSW) or the

information and data, June 2009, available at <http://www.parliament.vic.gov.au/edic/inquiries/article/1019>.

⁶⁰ *Ibidem*, Recommendations 16-18 and the Government Responses to these Recommendations, available at <http://www.dbi.vic.gov.au/corporate-governance/access-to-public-sector-information>.

⁶¹ A. FITZGERALD, *Open Access and Public Sector Information: Policy Developments in Australia and Key Jurisdictions*, in Fitzgerald B. (ed.), "Access to Public Sector Information; Law, Technology and Policy", cit., p. 57.

NSW Chief Information Officer appear to be involved in any initiatives concern open content licensing of PSI.

Five years ago, the NSW Government moved towards a more permissive stance on the reproduction of Crown copyright-protected materials. In 2006 the New South Wales Attorney-General's Department developed the *Copyright Management Toolkit*, providing guidance to government agencies on copyright issues ranging from website copyright notices to interaction with collecting societies such as CAL⁶². The templates provided in the toolkit were permissive in nature, and it was noted that such an open policy would be appropriate for the majority of government-produced materials. A circular was released by the NSW Government Department of Premier and Cabinet encouraging agencies to adopt the policies outlined in the toolkit⁶³. NSW does not since then seem to have developed further licensing initiative since then. There has been a change of State government in March 2011.

3.4. Other States and Territories

There have not been major initiatives in other States and Territories, but Tasmania has a reformed *Right to Information Act 2009* which promotes a proactive approach by agencies to publication of PSI.

4. CONCLUSIONS AND REFORM PROPOSALS

4.1. Is Creative Commons Licensing Enough?

Brian Fitzgerald is justified in stating that open PSI is 'an idea whose time has come' in Australia as elsewhere⁶⁴. But although it is on the agenda of governments across Australia, the idea has not yet developed into consistently implemented practices in any Australian jurisdiction. The exceptions are the federal government where the picture is almost but not quite complete in relation to comprehensive Creative Commons (CC) licensing,

⁶² ATTORNEY-GENERAL'S DEPARTMENT, *Copyright Management Toolkit* (2006), available at http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0019/11791/CopyrightManagementToolkit.pdf.

⁶³ NEW SOUTH WALES GOVERNMENT, DEPARTMENT OF PREMIER AND CABINET, *Effective Copyright Management - Publications and Websites*, C2006-53, 15 Dec 2006, available at http://www.dpc.nsw.gov.au/publications/memos_and_circulars/circulars/2006/c2006-53.

⁶⁴ B. FITZGERALD, *Preface*, in Fitzgerald B. (ed.), "Access to Public Sector Information; Law, Technology and Policy", cit., p. ix ff.



and Queensland where it does appear to be complete. But in both jurisdictions the policies are too recent for their effectiveness to be assessed. In Victoria a positive approach has also been taken to the use of CC licences, but has not yet matured into a whole-of-government policy, and there has been a change of government. In addition, individual agencies from most Australian jurisdictions are making use of CC licensing, as shown by the data.australia.gov.au website.

As yet we can only say that Australia has no coherent approach to public rights in PSI across all governments, but there is a possibility that some Australia-wide use of CC licensing for PSI may emerge in time, particularly if it is coupled with the development of proactive FOI (in itself a major advance in public rights in PSI). It remains to be seen whether the federal government, presumably supported by the Queensland government, can push in the Council of Australian Governments (COAG) for a consistent Australia-wide adoption of a similar approach based on Creative Commons licensing of PSI as the default.

However, there are some limitations and dangers in relying solely on voluntary licensing, some of which we have already mentioned, in comparison with complete removal of Crown copyright for some information. Our conclusion is that there is no reason to have only one approach (CC licensing) to expanding public rights in PSI. We accept that there is no likelihood, and it would be bad policy, for Crown ownership to be abolished for all categories of government information. While applauding the progress of CC licensing of PSI, we suggest four reforms requiring legislation that should proceed concurrently: abolition of copyright in legal and related information; extending this abolition to some other classes of PSI, by regulations; reducing the duration of copyright for all published PSI; and ending perpetual protection for unpublished PSI.

4.2. Abolish Copyright in Legal and Related Information

The Crown prerogative means that the Commonwealth, States and Territories have exclusive property rights in the legislation created in that jurisdiction, and this is not affected by the *Copyright Act 1968*⁶⁵. The position with respect to copyright in judicial decisions and executive opinions is less clear,

⁶⁵ COPYRIGHT LAW REVIEW COMMITTEE, *Crown Copyright*, cit., above n. 3, par. 6.34-6.36; *Copyright Act 1968* s 8A(1); *Attorney General for New South Wales v Butterworth & Co (Australia)* (1938) 38 NSWSR 195; *Copyright Act 1968* s 8A(1).

although the Copyright Law Review Committee believed that the Crown prerogative extended to judgments⁶⁶.

The Copyright Law Review Committee recommended⁶⁷ that copyright be abolished for the following classes of materials, whether published or unpublished, in relation to all Australian governments.

The Committee recommends that copyright in certain materials produced by the judicial, legislative and executive arms of government be abolished. Those materials are:

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

The CLRC said that ‘many submissions’ had called for such abolition, and noted that ‘in many countries there is no copyright in such works’⁶⁸, as we have earlier documented.

In other countries, courts have taken steps to assert the importance of the public’s rights to access legal information. The US Supreme Court has held that copyright does not subsist in primary legal materials⁶⁹, and a New Zealand court has asserted that the Crown has a common law duty to make legislation available to the public⁷⁰.

⁶⁶ COPYRIGHT LAW REVIEW COMMITTEE, *Crown Copyright*, cit., above n. 3, par. 5.21-5.25.

⁶⁷ *Ibidem*, Recommendation 4, par. 9.38.

⁶⁸ *Ibidem*, p. xxvi.

⁶⁹ For example, *Banks v Manchester* 128 US 244 (1888), concerning judgments.

⁷⁰ *VUWSA v Government Printer* [1973] 2 NZLR 21 at 23, per Wild CJ; as discussed by the COPYRIGHT LAW REVIEW COMMITTEE, *Crown Copyright*, cit., above n. 3, par. 3.45.



4.3. *Extend this Abolition to Some Other Classes of PSI*

The CLRC's recommendation for abolition of copyright included 'other categories of materials prescribed by regulations'⁷¹. This approach recognises that it is possible for the class of materials that are exempt from copyright to be expanded over time in light of experience, and no doubt after consultation with the States and Territories. The CLRC does not discuss what documents might be brought within this provision. The Law Council of Australia went further in its submission to the CLRC proposed that all 'material on official websites of the executive, legislative or judicial arms of government' should be exempt from copyright (presumably intended to be limited to government-produced materials on such websites), plus 'government and parliamentary press notices and promotional materials', official forms, and 'texts of ministerial and parliamentary speeches, articles and papers'⁷². No definitive list of categories needs to be developed at the outset, the important thing is to enact the mechanism so that it is possible to expand the abolition of copyright in the light of experience.

Queensland's GILF Project has done a lot of work to identify those categories of government documents which may safely be licensed under a CC BY licence⁷³. This categorisation may be a good starting point for development of an initial list of categories for which copyright may be abolished. The appropriate body to give periodic advice to the federal government on desirable categories for inclusion in a regulation would be the AOIC, as they will have the experience in the day-to-day operation of PSI publication and licensing. No doubt AGD would also give advice.

Such a regulation-making power would be a gradual and conservative way to take up 'the Berne invitation'. It would help dispose of the problem of PSI being published without a licence, including materials published some time ago, for which the Government 2.0 Taskforce did not have a clear answer beyond suggesting some rules could be made.

⁷¹ COPYRIGHT LAW REVIEW COMMITTEE, *Crown Copyright*, cit., above n. 3, par. 9.38.

⁷² As cited by the COPYRIGHT LAW REVIEW COMMITTEE, *Crown Copyright*, cit., par. 9.33.

⁷³ See above n. 51.



4.4. Reduce the Duration of Copyright for All Published PSI

The status quo of duration of copyright for published PSI is 50 years from publication (ss180 and 181) and the CLRC's recommendations would not have changed that. However, Berne does not impose limitations on the duration of copyright in this instance. Provided we bear in mind that we are only talking about published PSI, so questions of confidentiality and privacy do not arise (the special situation of case law aside), it is hard to see why government information which is already public needs 50 years copyright protection, particularly when licensing allowing re-use is becoming the norm. If unpublished Cabinet documents are now going to be made public after 30 years, pursuant to the recommendations made in the recent Government 2.0 report and the current Parliament's agreement (with modification) of this recommendation, surely the duration of published PSI copyright can be reduced at least to that period, if not shorter.

As the Berne Convention, TRIPs and the AUSFTA do not require the Federal Government to maintain its own copyright (and that of the States and Territories) for any specific period of time, it would be up to the Parliament to determine an appropriate period, both for published and unpublished PSI.

4.5. End Perpetual Protection for Unpublished PSI

Perpetual protection for unpublished PSI should also be abolished, and replaced with copyright for a limited duration. Pursuant to section 180(1)(a) of the 1968 Act copyright in a literary, dramatic or musical work owned by the Commonwealth or a State 'continues to subsist so long as the work remains unpublished'. Copyright expires 50 years after publication occurs. Section 180(3) creates the same situation for engravings and photographs, while section 181 provides that copyright that is owned by the Crown in sound recordings or cinematograph films subsists until 50 years after the 'calendar year in which the recording or film is first published.' Perpetual protection is therefore available to Crown copyright-owned unpublished literary, dramatic or musical works; engravings; photographs; cinematograph films; and sound recordings.

Irrespective of whether perpetual copyright continues for unpublished literary, dramatic and musical works produced by private individuals, the considerations are not the same for government works. Copyright in indi-

vidual's unpublished works protects their privacy, and also serves to protect the confidentiality of business and other dealings, and is therefore justifiable at least while authors are alive, and perhaps longer. Identical considerations are not relevant to government and PSI.

How should a period be decided? One obvious alternative is to measure duration from the time that the work or other subject matter is created. Should the sensitivity of the information could have some bearing on the period of copyright protection? Unpublished government works of the highest level of sensitivity, such as Cabinet documents, are now routinely made available under the Archives Act after 30 years. As already discussed, following the federal government's response to the Government 2.0 Taskforce recommendations, the AGD *Statement of IP Principles Principle 11(c)* has also been amended to implement the Taskforce recommendation concerning materials becoming available under the *Archives Act 1983*, and now requires automatic licensing under an 'appropriate open content licence', but not necessarily a CC BY licence.

It would seem safe to say that, a further decade after materials have become available for public access under the Archives Act (or its State or Territory equivalent), copyright could be abolished. For any unpublished PSI that is not covered by archives legislation, there could be a fixed term of copyright from the time that the work or other subject matter is created. It is hard to see why it would need to be longer than 50 years, and perhaps should only be as long (from the creation of the document) as the period for non-disclosure of Cabinet documents (30 years), on the basis that Cabinet documents are a high-water mark for non-disclosure. Other analogies might also be used to set appropriate periods.

One consequence of such reforms is that governments would not be able to misuse copyright in an attempt to suppress or censor the publication of government documents from many years ago. If there is national security, confidentially, criminal law or privacy law provisions that are applicable, those remedies will still be available to government. But the sledgehammer of copyright law will not.

