



AUSTRALIAN
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COUNCIL



Response to Government 2.0 Taskforce Issues Paper

August 2009

Australian Copyright Council

1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free preliminary advice about copyright, particularly to individual creators, conducts research, and represents the interests of creators and other copyright owners in relation to policy.
2. Some of the organisations affiliated with the Australian Copyright Council have made separate responses to the Taskforce.
3. Our response relates principally to statements and recommendations in the Report that raise copyright issues. After summarising our concerns, we comment first in general terms on issues raised in the *Issues Paper* and then respond to some of the questions raised by the Taskforce.

Summary of our submission

4. Our principle concerns are that the Taskforce:
 - clearly distinguish “information” from copyright material in which information may be embodied;
 - clearly distinguish the separate activities of “access” and “re-use”;
 - note that access to material may be given without the need to license its re-use;
 - consider the recommendations of the Copyright Law Review Committee in its report, *Crown Copyright*, both in relation to how copyright should apply to Crown copyright materials and when government should own copyright; and
 - consider how different licensing considerations may apply to different types of copyright material and to material created by different types of people; and
 - consider how government can devise licences that take into account, for example, how long permissions should be granted, how the integrity, accuracy and currency of material may be maintained, and how information on re-use of material under licence may be obtained for the purpose of assessing whether relevant public benefits are being achieved.
5. We also particularly draw the attention of the Taskforce to two resources not referred to in its *Issues Paper*:
 - Copyright Law Review Committee, *Crown Copyright* (Canberra, Commonwealth of Australia, 2005), available at <http://www.ag.gov.au/clrc>; and
 - Attorney-General's Department (Cth), *Statement of IP Principles for Australian Government Agencies*, available at <http://www.ag.gov.au/cca>.

General comments on matters raised by the Issues Paper

“Public sector information”

6. The Terms of Reference for the Taskforce require it to report, among other matters, on issues relating to “government information” and to “non-sensitive public sector information”.
7. It is not in our view clear that, to the extent the Terms of Reference deal with public sector information (PSI), the Taskforce is required to report on copyright material or whether it is required to focus on data (that is, information *per se*).
8. The Issues Paper indicates that the Taskforce takes the former view. The distinction is nonetheless important.
9. As members of the Taskforce would be aware, copyright, as such, does not protect information. Rather, copyright protects the way information is expressed or described – for example, in a document, a diagram or a film. Anyone can use another person’s information or ideas without infringing copyright, and anyone can produce something new based on another person’s information or ideas. Copyright only comes into play if someone wishes, for example, to copy or disseminate material such as a document, photograph, diagram or film in which someone else owns copyright.
10. The issues that surround access to and re-use of information are thus fundamentally different to the issues that surround access to and re-use of copyright material.
11. In our view, a careful analysis and definition of what constitutes PSI will assist the Taskforce devise appropriate recommendations for access and use both in relation to information and to copyright material.
12. In our view, there are important distinctions between the following categories of copyright material:
 - material in which the principal value lies in the information itself (for example, a brief information pamphlet on a health issue or a table that sets out information); and
 - material where value resides in how the information it contains is expressed (for example, a piece of fiction, a scholarly publication, a photo, a film or an illustration).
13. There are also, in our view, important distinctions to be drawn from analysing who created the material and how it came to be created – for example:
 - whether it was created by a government employee or official; or
 - whether it was created by someone outside government under commission; or
 - whether material was created as the result of funding or a grant.

Access & Re-use

14. In our view, the concepts of “access” and of “re-use” should not be conflated, and we submit that the Taskforce should consider the issue of how to make PSI accessible separately from the issue of the extent to which PSI that consists of copyright material should be licensed for re-use.

Access

15. We support giving greater public access to PSI, and believe that the internet can play an important role in connecting citizens with government and government with citizens.
16. We therefore support moves for government to publish PSI proactively, especially on its websites, so the public has greater access to that material.
17. We also suggest that the Taskforce recommend that government widely advertise, for example:
 - the types of information it publishes; and
 - the URLs of where that information may be accessed.
18. In our view, the Taskforce should recommend that government engage in advertising both in new and old media, and engage in promoting such information in online social media.
19. We further suggest that, while in our view a copyright “permission to link” is not likely to be required under current Australian law, government should make it widely known that it encourages people to link to its websites when discussing government policies and programs (for example, in blogs, bulletin boards and other social media forums), so people can access copies of the relevant PSI in its original form.
20. It may be that government can also provide greater access to PSI through public servants and other staff taking a greater role in contributing to blogs, Twitter, on-line discussion groups and other social media, particularly by providing comment on how people can get more information on particular topics, and how people can contribute to policies and programs.
21. We believe, therefore, that PSI can be made both more accessible and more widely known whether or not government also decides to make copyright material available for “re-use” (for example, under licence).

Re-use

22. We do not believe that giving people access to PSI necessarily means that government should also allow the re-use of that material, particularly where re-use involves changing or modifying the material.
23. We also do not think that making PSI widely available for re-use will necessarily lead to greater engagement with government. Indeed, in some cases it may have the opposite effect, as it may uncouple the use of the material from any ongoing discussion or interaction with government (unlike the case, for example, where the material is accessible only on a government website).
24. Similarly, we do not believe that allowing re-use of material will necessarily, of itself, lead to innovative and beneficial uses of that material.
25. We submit that whether or not re-use of PSI should be permitted should be assessed by reference to the particular case rather than any blanket rule.

Copyright, access & re-use

26. The Copyright Act creates an ecology of rights and obligations, in which the sometimes competing claims of different sections of society are balanced against the overall benefit to society that a copyright system creates.

27. There are several features of copyright law that should not be over-looked in the context of access and re-use of PSI:
- copyright does not protect information;
 - permission is not needed to access material that has been put onto an open website (that is, a website that is not access protected in some way);
 - copyright material that is accessible may be used for a range of fair dealing purposes, (including for research or study, for reporting news and for criticism and review);
 - parts of accessible copyright material may be re-used without permission (where the part is not a “substantial part”);
 - libraries, educational institutions and governments have broad rights to use copyright material without permission; and
 - to the extent that someone wishing to re-use copyright material requires permission, copyright can provide an important mechanism for controlling how it is used, including that the integrity of the material is maintained.

The connection between innovation & copyright

28. There is a view that copyright is a block to innovation. We believe, however, that this view is erroneous.
29. First, copyright provides a stimulus to innovation by creating a legal environment in which people are provided with an incentive to invest their time, talent and resources to create materials of benefit to society, with the knowledge that they will be able to obtain a return from that investment in the event that they create something that society finds useful.¹
30. Second, innovation often results from the development and spread of ideas. As noted, copyright does not protect ideas or information; these may be freely adapted.

The connection between access, re-use & innovation

31. Merely making something accessible is no guarantee that the information it contains will be used in a way that is innovative.
32. Further, the fact that something is re-used does not, of itself, provide any guarantee that that re-use is innovative. In our view, in order to be classed as innovative, the use of PSI should be substantially transformative and not merely a re-contextualisation or re-publication of the material.
33. Similarly, where innovation does occur, this may or may not be beneficial to Australia. Whether or not a re-use of copyright material is beneficial to Australia may depend on factors such as who is making the innovation, and where that innovation occurs.
34. At best, contrary views are merely speculative and anecdotal. As the Victorian Parliament’s Economic Development and Infrastructure Committee noted in its report of June 2009:²

Recently a number of jurisdictions have introduced measures to improve access to and re-use of PSI, on the premise that doing so will produce economic and social

¹ As we note below, different considerations may apply in relation to some types of PSI.

² *Inquiry into Improving Access to Victorian Public Sector Information and Data*, Parliamentary Paper No 198 Session 2006-2009, (Victorian Government Printer, Melbourne, 2009) at xvii.

benefits and returns. Quantitative data about economic benefits arising from increased commercial exploitation of PSI does not currently provide clear guidance for policy, but there is a growing view that new commercial enterprises will emerge as access to PSI improves.

35. The limited benefits governments have been able to quantify from other people and organisations re-using their material may result from several factors, but it appears that there is not enough hard data available to make a proper assessment.
36. There may be several possibilities as to why innovation has not been clearly identifiable. It may, for example, be that innovative re-use of material has not occurred to the extent that had been hoped because:
 - the material is indeed not accessible and no one has thought to assess whether or not it might exist to be used innovatively; or
 - the material is accessible, but current licensing terms are not attractive enough or cheap enough or open enough to stimulate innovation; or
 - the material is accessible, but the culture of relevant government departments and agencies has been averse to licensing creative re-use, whether for free or otherwise.
37. In other words, if it cannot be identified with certainty why material is not being used innovatively, perhaps the Taskforce should recommend that the government approach the issue in stages: that it look first at making sure that material is accessible, and then in, say, 5 years time, undertake qualitative and quantitative analyses as to whether or not any further stimulus to innovation is required through, for example, a review of licensing practices. (As discussed below, government best practice guidelines in relation to copyright material are quite recent.)
38. It would in any case appear necessary for government departments and agencies to be placed in a position where they are better able to collect data on innovative uses of PSI and to periodically analyse and report on those uses. Such analysis and reporting would assist in ensuring that PSI assets are being used and developed to the benefit of the Australian community and would assist in fine-tuning future licensing practices.

The Copyright Law Review Committee review into Crown copyright

39. In 2005 the Copyright Law Review Committee (CLRC) report on Crown Copyright was published.
40. The CLRC's recommendations included that:
 - the Crown ownership provisions in the Act (sections 176-179) be repealed;
 - copyright in certain materials produced by the judicial, executive and legislative arms of government be abolished;
 - the Commonwealth, States and Territories be under a statutory duty to disseminate legislation and judgments;
 - prerogative rights in the nature of copyright in the right of the Commonwealth, States be abolished by amendment to the Copyright Act or, in the alternative, materials currently covered by the prerogative be covered by statutory provisions and that there be a statutory waiver of copyright in them;
 - each State and Territory that has not already done so, consider giving a central agency responsibility for managing Crown copyright;
 - uniformity in the management of Crown copyright across State and Territory governments be referred to the Standing Committee of Attorneys-General for consideration; and

- the Commonwealth government develop and implement comprehensive intellectual property management guidelines to promote best practice and assist agencies to meet their responsibilities.
41. We understand that consultations concerning the recommendations made by the CLRC have taken place, or are taking place, within the Commonwealth government and between the Australian governments. To date, however, none of the legislative changes recommended by the CLRC have been implemented.
 42. We urge the Taskforce as part of its enquiry to consider the recommendations of the CLRC, and consider the extent to which their implementation may assist make PSI more accessible.

Best practice guidelines within government

43. We draw the attention of the Taskforce to the various “best practice” guidelines and policies that have been developed over the past decade by Australian governments, and particularly the Commonwealth’s *Intellectual Property Principles for Australian Government Agencies*, which “covers principles relevant to IP management, including procurement, record keeping, industry development and broader innovation policy, and public access”.³
44. An important recognition within many of these documents is that government is not always well placed to use material created for it in innovative ways or in ways that stimulate the economy in the jurisdiction of the relevant government.
45. A further important recognition is that there may be significant cost-savings from not acquiring all rights from contractors. For example, the Commonwealth *Intellectual Property Principles for Australian Government Agencies* state:

Agencies should ensure that IP rights secured are appropriate to identified needs and objectives and should only obtain those rights required taking into account questions of the efficient, effective, and ethical use of agency resources.⁴
46. In some of the guidelines, there is also a recognition that the people and organisations contracted to create material for government may be better placed than government to use the material they have created and that leaving the copyright with the commissioned party may provide benefits to the relevant jurisdiction’s economy and help develop relevant industries.⁵
47. We also note that the guidelines generally include principles obliging relevant departments and agents properly to document the creation of material subject to intellectual property rights, and to assess how that material can most beneficially be licensed.

³ Commonwealth of Australia, *Intellectual Property Principles for Australian Government Agencies*, at 1, available at www.ag.gov.au/cca; the Western Australian *Government Intellectual Property Policy and Best Practice Guidelines*, (2003), available via www.commerce.wa.gov.au.; the Queensland *Public Sector Intellectual Property Principles* (2005) available via www.dtrdi.qld.gov.au; and the South Australian *Intellectual Property Policy* (2006) available via www.premcab.sa.gov.au..

⁴ Commonwealth of Australia, *Intellectual Property Principles for Australian Government Agencies*, at 1, available at www.ag.gov.au/cca at 4.

⁵ See the comments to this effect from the Department of Communications, Information Technology and the Arts (as it then was) in its submission to the CLRC enquiry into Crown copyright: CLRC, *Crown Copyright* (CLRC, Canberra, 2005) at 61. See also, for example, the Western Australian *Government Intellectual Property Policy and Best Practice Guidelines* at 13; the Queensland *Public Sector Intellectual Property Principles* at 6; and the South Australian *Intellectual Property Policy* at 5-6.

Responses to questions raised in the Issues Paper

Q1: How widely should policy to optimise the openness of public sector information be applied? Should it be applied beyond government departments and, if so, to which bodies, for instance government business enterprises or statutory authorities?

48. The type of body holding PSI may affect the extent to which access and re-use policies apply – particularly where the body is a business enterprise which must of necessity consider matters from a much more commercial point of view than a government department.
49. In many cases, however, the nature of the PSI may be more important than the identity of the body that controls the PSI or has custody of it.

Material held by cultural institutions

50. As a general principle, we think it important to ensure that the collections of cultural institutions are accessible to the Australian public.
51. However, we submit that collecting institutions, more than other agencies or departments, should be given greater scope to work on a case-by-case basis to determine the extent to which they will make materials accessible online and the extent to which they will authorise re-use.
52. Importantly, in many cases, a collecting institution may not own copyright in materials in its collection. In our view, these materials should not properly be regarded as PSI, and the Taskforce should leave these outside the scope of any recommendations it makes.
53. However, even in cases where copyright has expired or where the copyright resides with the institution or government (for example, in a photographic image of a public domain work),⁶ we submit that the Taskforce should recommend that collecting institutions not be required to license the re-use of images of items in their collection unless the institution is satisfied that to do so will not damage the reputation of the institution or the relationships the institution has with its stakeholders, including curators, academic communities and donors. We add that this issue will be of particular concern where the relevant material embodies or touches on Indigenous cultural material or knowledge.
54. We further note that, in many cases, digitising items in a collection and storing the images is costly, and the collecting institution will have borne or will bear the cost of digitisation from its recurrent budget and not from any special grant or funding allocation.
55. We therefore further submit that the Taskforce should recommend that collecting institutions not be required to license the re-use of images of items in their collection unless the institution is satisfied that it is fiscally responsible to do so, in light of its business plan, and in light of any ability it may have to exploit the relevant copyrights.

⁶ We note that it is not clear under Australian law whether photographic images of two-dimensional items such as painting and drawings are protected by copyright: for arguments that they may be protected, see the comments by, for example Simon Stokes, *Art & Copyright*, rev paperback ed (Hart Publishing, Oxford, 2003) at 110ff.

Q3: What government information would you like to see made more freely available?

56. As discussed in our general comments, there are important differences between making material available (that is, accessible) and licensing that material for “re-use”.
57. As also discussed in our general comments, in our view, different considerations will apply to different categories of material.

PSI in which the principal value lies in the information itself

58. In our view, government should be obliged to ensure that certain materials are freely and easily available to the public.
59. For example, the following categories of material, drawn from a list identified by the CLRC in its report on Crown copyright (recommendation 4), might be considered within the scope of this category:
- 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; and
 - reports of commissions of inquiry, including royal commissions and ministerial and statutory inquiries.
60. We also agree with Principle 11 in the Commonwealth’s *Intellectual Property Principles for Government Agencies* – that departments and agencies should generally encourage the free access and public use of material published for the following purposes:
- informing and advising the public of government policy and activities;
 - providing information that will enable the public and organisations to understand their own obligations and responsibilities to Government;
 - enabling the public and organisations to understand their entitlements to government assistance;
 - facilitating access to government services; or
 - complying with public accountability requirements.⁷
61. There should be no need to provide an incentive to produce these materials. Rather, governments have a duty to produce them and ensure that they are made available to the public. In addition, it is difficult to argue that such materials are an appropriate source of revenue for governments.

Material where value resides in how the information it contains is expressed

62. In many cases, PSI may consist of copyright material in which the real value resides in how the information is expressed rather than in the information, *per se*. Examples include photographs, software programs, and illustrations, but may also include scholarly, educational and coffee-table publications from collecting institutions. It may also include audio-visual material.
63. In our view, there may in many of these cases be fewer compelling reasons for making this material either as accessible or as re-usable as materials that fall into the first category discussed

⁷ Commonwealth’s *Intellectual Property Principles for Government Agencies* at 5.

above. This is because – particularly with images – this type of material may often be only ancillary to information that must be conveyed to the public. Alternatively, this material may not be essentially “governmental” in nature, useful or interesting though it may be.

64. In our view, the Taskforce should recommend that government deal with this category of material much more strategically and commercially than material where the information it contains is of primary importance.
65. For example, departments and agencies often commission photographs. Often, these photographs may have commercial potential (either on their own or as part of stock libraries). In these cases, departments and agencies might reduce their costs over time by either:
 - commercially licensing photographs in which they own copyright; or
 - only acquiring from the photographer the licence they need, leaving the photographer free to commercially exploit the photographs.
66. In each case, the application of a “user pays” principle may assist recover or reduce the initial public expenditure, while ensuring that access and re-use issues were competitively neutral.
67. In this respect, we note that Principle 9 (“Competition”) of the *OECD Principles for public sector information* states that access and re-use strategies should pursue competitive neutrality and that public bodies should be required to treat their own downstream/value-added activities on the same basis as their competitors for comparable purposes, including pricing.
68. Similar considerations, in our view, apply to software. If a computer program is useful to one government, it may have the ability to be licensed to other governments or to businesses or other organisations. Again, we see no reason why general public access and (free) re-use should assume a high priority here.
69. As indicated, in some cases, materials falling into this category may be created within government by government employees or officials; in other cases they may be created by contractors for particular projects or for particular purposes.
70. In our view, for the reasons discussed in our general comments under the heading *Best practice guidelines within government*, it is appropriate for government to consider that copyright in commissioned material be retained by the creator.
71. We also note Principle 14 from the Commonwealth’s *Intellectual Property Principles* that:

Unless commercial activities are required as an integral part of an agency’s objectives, commercialisation of IP by an agency should be no more than an ancillary part of its activities and should not become a core business activity.

Where agencies consider opportunities to engage in commercialisation, they should be mindful of the resources, including expertise required. Where IP is identified as suitable for commercialisation, the private or other sectors should be considered. Agencies should consider whether exposure to commercial risk is consistent with corporate objectives.
72. Given that, in many cases, there will not be a compelling argument for government to acquire all rights or to focus its attention on running a business by commercialising assets that fall within this category of PSI, we submit that the Taskforce should recommend the repeal of sections 176 to 179 of the Copyright Act.
73. We draw the Taskforce’s attention to the fact that repeal of these provisions was also recommended by the Intellectual Property and Competition Review Committee in its *Review of Intellectual Property Legislation under the Copyright Act* (September 2000).⁸

⁸ Available at www.ipaustralia.gov.au/about/ipcr.shtml.

74. We note also that in many cases government funds the creation of material that falls within this category of material – particularly through film and TV funding and through funding of the arts.
75. In our view, copyright material that is created as a result of such funding should not be classified as “public sector” information, and should not be within the scope of any recommendations by the Taskforce.
76. In particular, we note that government funding for cultural materials is usually predicated on the funded organisation also paying its own way and contributing to its own costs, including by exercising its copyright rights in relation to the material created as a result of the funding.

Q4: What are the possible privacy, security, confidentiality or other implications that might arise in making public sector information available? What options are there for mitigating any potential risks?
.....

77. It appears that this question is drawn in part from Principle 1, “Openness”, of the OECD Principles for Public Sector Information. If so, it is disappointing that an important part of the Principle – “the preservation of private interests for example where protected by copyright” – has been omitted from the Taskforce’s question.
78. We submit that an important implication that might arise in making PSI “available” (in the sense, of available for re-use) is prejudice to the interests of creators. There are three aspects to this concern, which we have touched on in our response to Question 3, but re-iterate here.

Third party copyright material held by government

79. It will often be the case that government holds material in which someone else owns copyright. The collections of cultural institutions are a particular example of this.
80. It is also the case that government is often licensed by a copyright owner to use material in something that government has produced.
81. We submit that the Taskforce should take care to exclude such material from any recommendations that would prejudice the interests of relevant copyright owners.
82. In our view, where government holds third party copyright material, it should work with relevant copyright owners and collecting societies to reach agreements under which that material may be accessed.
83. Government should also make sure that, where such third-party material is to be re-used, the person seeking to use the material should be directed to the relevant copyright owner.
84. To assist in this, we submit that the Taskforce should include in its report a recommendation to government that cultural institutions be given greater funding to document the copyright status of material in their collections and to be able to work more closely with collecting societies to provide greater opportunities for access to material in their collections.
85. In this regard, we note that Principle 6 of the *OECD Principles for public sector information*, “New technologies and long-term preservation”, draws attention to how new ways for the digitisation of material should be explored “where market mechanisms do not foster effective digitisation” – presumably, these market mechanisms include licences from collecting societies and copyright owners.

Material in which copyright held by government was acquired as a result of the government's privileged position when commissioning material or when it is the first to "publish" material

86. In our view, the government should not use its privileged position under sections 176 to 179 of the Copyright Act to obtain, at a competitive advantage, ownership of copyright in commissioned material or in material which it first publishes.
87. We believe that to entrench this practice under the guise of making PSI available would be to the significant detriment of the community; it may well significantly raise costs or may act as a disincentive for people to create material for government or to authorise the first publication of material by government.
88. We submit that the Taskforce should recommend the repeal of sections 176 to 179 of the Act.

Situations where government funds the creation of copyright material

89. Through its funding bodies, government enables the creation of a great deal of copyright material. The film industry in Australia and the arts and publishing sectors to various extents exist because of the way government is able to provide financial assistance.
90. However, funding of the creative sectors is only partial, and there is a strong expectation that once works are created, commercial exploitation of the relevant material will cover the funding gap. In these cases, copyright provides a tool for the relevant creator or group of creators to be less reliant on government money.
91. Again, in our view, the Taskforce should not recommend that government use its funding power to acquire copyright in such material, or to require that the funded material be made freely available and re-usable.
92. In our view, prejudice to individual copyright owners created by the adoption of such a position would prejudice the health and on-going viability of the cultural sectors within which those Australian creators work.

Q5: ... How might the licensing of on-line information be improved to facilitate greater re-use where appropriate?
.....

93. In our view, the Taskforce should be cautious in recommending that government widely and indiscriminately license material for "re-use" unless the relevant department or agency can identify a clear, strategic, "business" case that takes into account the nature of the material (as discussed in our response to Question 3); both short and longer term objectives; and the efficient allocation of resources.
94. We further submit that the Taskforce could fruitfully consider the Commonwealth's current *Intellectual Property Principles* in light of the various principles set out in the *OECD Principles* for public sector information, including:
 - "the preservation of private interests for example where protected by copyright" in Principle 1 (including where government relies upon the Crown copyright ownership provisions to acquire copyright from contractors without proper recompense to the relevant creator);
 - that curation practices should enhance the quality and reliability of PSI (Principle 3);
 - maximising the integrity of the material (Principle 4);
 - respecting intellectual property rights (Principle 7), including third-party rights acquired under licence; and

- respecting the principle of competitive neutrality (Principle 9) – including by not relying on the Crown’s privileged position under the Crown copyright ownership provisions, to acquire copyright in situations where other entities would not.

Comments on the suitability of Creative Commons licences for PSI

95. The *Issues Paper* refers to the potential applicability of Creative Commons licences for PSI. We draw the Taskforce’s attention to the following aspects of those licences:

- they are not revocable;
- where licences incorporate a “non-commercial” component, it is unclear as to what type of activities may be permitted or prohibited;
- there are hundreds of different versions of the licences, each worded differently and most running to several pages in length (the *Attribution 2.5 Australia* licence, for example, currently prints out at 5 pages in length);
- it is not clear that most people relying on a Creative Commons licence read the licence conditions, particularly as the licence conditions are divorced from the relevant “icon” and “human readable summary”, and, as noted above, are very long and legalistic;
- the licence conditions are hosted on sites outside government, that may or may not remain accessible over the period of time government material remains in copyright long time (for literary works, for 50 years from publication);⁹
- licences are granted to the world, whether or not reliance on a licence will benefit Australia;
- licences cannot be limited to where re-use of material will be innovative or transformative;
- the licences require linking back or referring to the URL of the relevant Creative Commons licence, but do not impose any obligation to provide the URL of the originating website (where material was originally made available over the internet) or proper bibliographic information (other than author and title); and
- the licences are not designed to be changed or modified and may not be fine-tuned to meet particular needs or circumstances.

96. We note that the Creative Commons organisations themselves recognise that people or organisations that are considering using their licences should take into account the irrevocability of the licences. We note also that there has been considerable discussion within the Creative Commons community as to what uses are commercial and what uses are non-commercial.¹⁰

97. In light of their irrevocability, before licensing PSI under a Creative Commons licence, a government department or agency would need to take into account that:

- it would forego the ability to fine-tune or re-think the licence in future once it had released PSI under a Creative Commons licence;
- it would not be able to recall documents that become out-of-date or superseded; and
- users seeking information and finding a Creative Commons licensed document (either online or offline) may be confused as to the extent to which it contains information that is current or reliable.

98. Insofar as they are not designed to be amended or changed, a government department or agency considering licensing PSI under a Creative Commons licence would also need to take into account the fact that it could not impose terms or conditions such as the following:

⁹ We note that this aspect of the licences may not satisfy Principle 2 (“Access and transparent conditions for re-use”) and Principle 3 (“Asset lists”) of the *OECD Principles for public sector information*, which states that conditions for re-use must be transparent and that it is desirable for there to be a “clear presentation of conditions to access and re-use at access points to the information”.

¹⁰ See, for example, wiki.creativecommons.org/DiscussionDraftNonCommercial_Guidelines.

- that licensees report back to government on use (in order, for example, that government may assess the effectiveness or otherwise of using the licences and of making material available for re-use);
- that licensees not purport that the version they are making available or using is an authoritative version (a term to this effect is set out in the current NSW waiver of copyright in legislation and judgments);
- that only transformative or innovative re-use is permitted;
- that only Australian citizens or residents may rely on the licence; or
- that licensees link back to or cite the authoritative version of the PSI (again, this may make it difficult for users to know how to locate the original version or to track amendments to versions or to know when information has been superseded).¹¹

Licensing by government of material for use by schools

99. Where there is a concern that educational institutions may have to pay for material created by or for government, we suggest that the Taskforce recommend the use of the “National Education Access Licence Scheme” (NEALS), developed by the Ministerial Council for Education, Training and Youth Affairs (MCETYA). The NEALS licence clearly identifies who are to be the beneficiaries of the licence and in our view is better suited to the purpose for which it was created than the Creative Commons licences.

100. We should add that we are under the strong impression that in a number of cases, monies from both Copyright Agency Limited (CAL) and the direct licensing of government-produced materials for education provide a valuable revenue stream for the authoring department or agency.

101. We further understand that in some cases, these monies may represent an important incentive for departments and agencies to create innovative materials that may suit not only their own needs but also the needs of other segments of the education sector (both public and private) both in Australia and overseas.

Q6: How does government ensure that people, business, industry and other potential users of government information know about, and can readily find, information they want to use, for example the use of a consolidated directory or repository for public sector information?
.....

102. Strategies the Taskforce may wish to recommend to government might include:

- the wide advertising of short memorable URLs in both new and old media;
- broad and clearly stated “permissions” for people to link;
- stable URLs; and
- consistent meta-data to ensure material can be easily found and sorted by search engines.

¹¹ There is provision in the Creative Commons deeds for providing the Uniform Resource Identifier of material, but only to the extent that this refers to the copyright notice or to licensing information: see, for example, clause 4(b), lines 12-15 of the “Attribution 2.5 Australia” licence, available from www.creativecommons.org.au.

Q13: How does government manage the costs and risks of publication of inaccurate information?

103. We submit that the Taskforce should recommend that, particularly where accuracy of information is of concern, government should include in its licences conditions such as the following:

- that no changes, modifications or additions be made to the material;
- that material be reproduced in its entirety;
- that the copy not purport to be an official copy;
- that the user is obliged to include a link to the authoring department or agency's website and to where the "original" copy of the particular material resides; and
- that the licence expires after a certain period of time.

104. We note that a government department or agency considering licensing PSI under a Creative Commons licence would need to take into account the fact that it could not impose conditions such as these under such a licence.

Q17: What sort of public sector information should be released under what form of copyright license? When should government continue to utilise its intellectual property rights?

105. See our responses to Questions 3, 5 and 13.

106. In addition, we submit that the Taskforce should recommend that section 182A of the Copyright Act be amended to operate more widely. In particular we think section 182A:

- should allow any number of copies, not just a single copy;
- should apply irrespective of whether or not the copy is sold;
- should not be limited to reproduction (and, in particular, should allow communication); and
- should contain a proviso to the effect that material published or distributed in reliance on the section must not be published in a way that suggests that it is the official version; and
- should contain conditions relating to accuracy and integrity.

107. It may be desirable that s182A also cover materials other than legislation and judgments which are governmental in nature and should be easily available to the public, such as those covered by guidelines in the United Kingdom:

- Public Records;
- Court Forms;
- Birth, Death and Marriage Certificates;
- National Curriculum Material, and Literacy and Numeracy Strategy Documents; and
- Government Press Notices.

Q18: When should agencies charge for access to information? Should agencies charge when they are providing value-added services? What might constitute ‘value added services ‘ (eg customisation of information)? In what circumstances should agencies be able to recover the costs of obtaining the information or providing access? A common model in the private sector is ‘freemium’ distribution whereby many, often most, users are supplied with some product or service for free whilst others pay for use in large scale commercial enterprise(for instance AVG anti-virus) .. or for some premium product (for instance Word Web). Are there similar models for public sector information and/or do they merit further consideration?
.....

108. See generally our responses to Questions 3 and 5.

109. In addition, in formulating pricing policies, departments and agencies should be encouraged to consider factors such as:

- the nature of the person or organisation wanting to use the material;
- the net social benefit from the proposed use;
- whether or not the individual or organisation is intending to profit from the re-use of the PSI;
- the cost of providing the material and any on-going costs of digitisation and storage; and
- how similar material is licensed in the private sector (in order to preserve competitive neutrality).

110. In our view, in these cases, the question is one that relates to the best and most efficient allocation of resources on a case-by-case basis. In this regard, we draw the Taskforce’s attention to the *Australian Government Cost Recovery Guidelines*.¹²

Ian McDonald
Acting Executive Officer
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¹² Available from www.finance.gov.au.