

Dr Nicholas Gruen  
Government 2.0 Taskforce Secretariat  
Department of Finance and Deregulation  
John Gorton Building  
King Edward Terrace  
PARKES ACT 2600

[submissions@gov2.net.au](mailto:submissions@gov2.net.au)

27 August 2009

## Towards Government 2.0: An Issues Paper

Dear Dr Gruen

The NSW Young Lawyers Communications, Entertainment & Technology Law Committee, is pleased to submit the **attached** response to *Towards Government 2.0: An Issues Paper*.

NSW Young Lawyers is a division of the Law Society of New South Wales. Membership of NSW Young Lawyers is free and automatic for all NSW lawyers under 36 years and/or in their first five years of practice, and law students. Membership of its committees is voluntary.

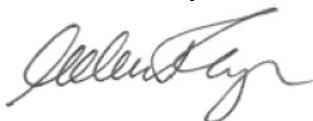
The Communications, Entertainment & Technology Law (CET) aims to serve the interests of lawyers, law students and other members of the community concerned with areas of law relating to:

- information and communication technology (including technology affecting legal practice);
- intellectual property;
- advertising and consumer protection;
- confidential information and privacy;
- entertainment; and
- the media.

As innovation inevitably challenges custom, CET promotes forward thinking, particularly about the shape of the law and the legal profession as a whole.

Contributors to our submission included Adam Flynn and Mitch Kelly. If you have any questions about our submission, please contact Adam Flynn (Chair) and Tyrilly Bolton (Vice Chair): [cet.chair@younglawyers.com.au](mailto:cet.chair@younglawyers.com.au).

Yours sincerely



Adam Flynn  
Chair



Tyrilly Bolton  
Vice Chair  
Communications, Entertainment & Technology Law Committee

Communications, Entertainment  
& Technology Law Committee

Towards Government 2.0: An Issues Paper

**27 August 2009**

**Submission to Government 2.0 Taskforce Secretariat**

## Introduction

We thank the Government 2.0 Taskforce for the opportunity to respond to *Towards Government 2.0: An Issues Paper*.

Our submission briefly addresses each of the key questions in the issues paper and draws attention to model examples of open online environments which generally follow the OECD principles for public sector information (PSI).

## Public Sector Information (PSI)

We note that, partly by reference to the OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information, the issues paper relies on this definition of PSI:

“information, including information products and services, generated, created, collected, processed, preserved, maintained, disseminated, or funded by or for the Government or public institution,’ taking into account ‘legal requirements and restrictions, including intellectual property rights and trade secrets, effective and secure management of personal information, confidentiality and national security concerns, and fundamental principles including democracy, human rights and freedom of information” but “public sector information is taken to exclude personal information that would not be available for publication or reuse under Australian privacy laws, or other legislation. It might include such information if it were adequately transformed to address any concern, for instance by anonymising it.”<sup>1</sup>

A definition is essential for exploring the first key question in particular. It is unclear why the issues paper does not refine the definition of PSI, with references to examples of PSI. Read literally, the definition of PSI provided could exclude the contents of material that is not already public knowledge or freely available for public use, whereas the purpose of the issues paper is to explore if and how such material should be made available.

We interpret PSI broadly to cover government information of public interest, including information in material intended for use by and/or controlled by the executive, the legislature or the judiciary.

## On public sector information

### How can we build a culture which favours the disclosure of public sector information within government?

### What government information should be more freely available and what might be made of it?

We acknowledge that Government 2.0 is concerned with maximising public access to information and encouraging expression of public opinion, consistent with The Australian Constitution, the nation’s liberal democratic tradition and current (and future) expectations of the public as consumers of information about civil society.

Fostering a culture that favours the disclosure of public sector information within government requires the active commitment of government (at all levels) to become

---

<sup>1</sup> Towards Government 2.0: An Issues Paper, p 9, citing OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information, adopted 30 June 2008, p 4.

proactively involved in regulating information disclosure and actively disclosing that information.

We recognise that restrictions on disclosure, access and usage will usually be due to:

- the law regulating PSI (e.g. privacy law) and material it is contained within (e.g. copyright law);
- lack of will by a decision maker (e.g. a judge) or a rights holder (e.g. government) with control over the access to and use of PSI; and/or
- technical and resource limitations.

The last point is addressed in the second half of this submission. The first two points correspond with a pertinent point in the preamble to the OECD recommendation on which the PSI definition in the issues paper is based. It acknowledges that the legal requirements and restrictions surrounding PSI are such that, "certain principles [contained in the Recommendation] regarding in particular openness and re-use, can be applied to a different extent to different categories of public sector information."<sup>2</sup>

This points to restrictions on access to and use of PSI tends to emanate more from regulation than from cultural values. Evidence of this is the abundance of freely accessible PSI on the internet, available in material in which Australian governments maintain ownership of copyright. Any cultural barriers to making more PSI available, we believe, may be due to a poor understanding about the regulation of PSI and suboptimal management of PSI.

By world standards, we believe that the Australian public already enjoys a reasonably high level of access to information pertaining to the three arms of government and the decisions they are empowered to make. However, ultimately the nature of PSI and the purpose of making it public will determine one's attitude towards its disclosure, access and use.

Examples of publicly accessible government generated information and content include:

**Parliament of Australia**

<http://www.aph.gov.au/>

**Australasian Legal Information Institute (AustLII)**

<http://www.austlii.edu.au>

**Commonwealth Law of Australia (ComLaw)**

<http://www.comlaw.gov.au/>

**High Court of Australia**

<http://www.highcourt.gov.au>

**New South Wales Courts and Tribunals**

[http://www.lawlink.nsw.gov.au/lawlink/caselaw/ll\\_caselaw.nsf/pages/cl\\_index](http://www.lawlink.nsw.gov.au/lawlink/caselaw/ll_caselaw.nsf/pages/cl_index)

There are also some notable access restrictions to legal information generated by government. It is access to decisions of Local Courts (limited to decisions providing

---

<sup>2</sup> OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information, adopted 30 June 2008, p 4.

interpretations of legislation and legal principles) and of District Courts (published at the discretion of each individual judge) that is most noticeable. Further, while many published decisions are available via AustLII, many (especially historical decisions) are only available in hardcopy form. We note that there are also many historical legislative documents (in addition to documents still being migrated from SCALEPlus to ComLaw) that are not centrally available online. These observations highlight areas for improvement of (online) access to legal information to make regulations and legal precedents public in a society where knowledge of the law is assumed.

The issue is whether the current situation is sufficient. The answers to the key questions by an innovator with commercial interests in government research will differ to those of a citizen concerned about his or her right to know about how taxation revenue is being spent on government research. We believe that there are additional dimensions to this issue that should not be underestimated, especially in regards to international benefits of maximising access to PSI about governance in Australia. For example, it could influence local *and* international perceptions of Australia as a country with a high level of transparency; Australia was ranked 9th out of 180 countries in Transparency International's Corruption Perception Index in 2008.<sup>3</sup> We would expect that increased access to PSI would maintain or improve Australia's position in this regard.

The above examples of online access granted to a wide range of legal information are perhaps standout exceptions to the observation made in *Venturous Australia*, the 2008 report by Mr Terry Cutler, to Senator the Hon Kim Carr Minister for Innovation, Industry, Science and Research, on the Review of the National Innovation System ("Cutler Review"), that "Australia is behind many other advanced countries in establishing institutional frameworks to maximise the flow of government generated information and content."<sup>4</sup> This is understandable given that the focus of the Cutler Review was on the regulation of information and content of interest to stakeholders in Australia's innovation system. We provide comments on a recommendation by the Cutler Review below.

We believe that the only acceptable justifications for restricting access to PSI are for privacy or security reasons or to limit commercial uses that are not in the public interest (e.g. which limit free access). We believe that the issue of increasing access to PSI for the purposes of promoting innovation or any other purpose is an important but separate issue to that of making PSI available purely as public knowledge.

Many state and territory governments utilise the role of an Information Commissioner which operates to promote access to government held information and the protection of personal and other sensitive information held by governments. However, such a role appears reactionary – ensuring compliance with laws by government departments and monitoring and reporting on the performance of government agencies. In order for government to better administer access to PSI and overcome any perceived cultural challenges around disclosure of PSI, government could utilise the office of the Information Commissioner to take a more proactive step in the identification of information to be made available, and the appropriate disclosure and maintenance of such information, according to national (or international) standards.

The identification of what information should be more freely disclosed should be governed by the key aims of what open disclosure is attempting to achieve. Commonly, the disclosure of government information should seek to focus on ensuring the transparency of the government and departments, as well as the collaborative nature and

---

<sup>3</sup> Corruption Perception Index 2009, Transparency International, accessed 24 August 2009, [http://www.transparency.org/news\\_room/in\\_focus/2008/cpi2008/cpi\\_2008\\_table](http://www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table). It is interesting to note that Transparency International has identified the potential of internet-based social media to fight corruption and promote development; for information on its Anti-Corruption 2.0 campaign see [http://www.transparency.org/news\\_room/in\\_focus/2009/your\\_say\\_on\\_corruption](http://www.transparency.org/news_room/in_focus/2009/your_say_on_corruption)

<sup>4</sup> *Venturous Australia Report*, 29 August 2008, <http://www.innovation.gov.au/innovationreview/Pages/home.aspx>, accessed 25 August 2009, p 94.

ability for the community to participate in the government process. This is vital for any government in order to foster trust and confidence with the general community.

We support the suggestion in the Cutler Review that Australia could benefit from having an Australian National Information Policy,<sup>5</sup> if it addresses the social benefits of public access to PSI mentioned in the issues paper; we hold the view that the main premise of making PSI available is not to provide content as such but rather to inform, to educate and for the government to discharge its obligations to the public. The Policy could be administered by a National Information Commissioner.

As noted above, while in some cases public access to PSI is restricted at the discretion of a judicial officer to detail and release information, or by the technical capacity to make documents available in electronic form, at other times it is the management of rights, particularly copyright, that determines how information in a document may be accessed. A key question for the National Information Commissioner or the Australian National Information Policy makers would be – how should copyright in PSI be managed?

We refer again to the Cutler Review as a case in point. The report recommended:

#### Recommendation 7.8

*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.*<sup>6</sup>

This recommendation is referring to the licensing of copyright material by copyright owners, allowing other parties to enjoy the right to access and potentially share the material online.<sup>7</sup>

The owner of copyright in a written document, for example, will be determined by the circumstances in which it was created, not by its relevance to the public. Under the *Copyright Act 1968 (Cth)*, where a written document is:<sup>8</sup>

- the subject of a copyright assignment or agreement, copyright ownership will be determined by the assignment or the agreement;<sup>9</sup>
- made or first published by or under the direction of the Commonwealth, a State or a Territory (but not a local) government, the relevant government owns copyright;<sup>10</sup>
- made under an author's contract of service with a newspaper, magazine or periodical publisher, the author owns rights for book publication and hard copy reproduction while the publisher owns all other rights;<sup>11</sup>

---

<sup>5</sup> Venturous Australia Report, 29 August 2008, <http://www.innovation.gov.au/innovationreview/Pages/home.aspx>, accessed 25 August 2009, p 94.

<sup>6</sup> Venturous Australia Report, 29 August 2008, <http://www.innovation.gov.au/innovationreview/Pages/home.aspx>, accessed 25 August 2009, p 95.

<sup>7</sup> ss 13(2), 31 *Copyright Act 1968 (Cth)*.

<sup>8</sup> Note that these rules apply to "literary works", which most PSI documents are. Where other "works" and "subject matter other than works" are concerned, attention should be paid to the relevant sections: s 35 (literary, artistic, musical and dramatic works); s 97 (sound recordings); s 98 (cinematograph films); s 99 (broadcasts); s 100 (published editions).

<sup>9</sup> ss 35(3), 179, 196(1) *Copyright Act 1968 (Cth)*.

<sup>10</sup> ss 176-177 *Copyright Act 1968 (Cth)*.

<sup>11</sup> s 35(4) *Copyright Act 1968 (Cth)*

- otherwise made under an author's employment contract, the employer owns copyright;<sup>12</sup>
- otherwise made (e.g. by an independent contractor or a volunteer), the author owns copyright.<sup>13</sup>

The copyright owner has the exclusive right to "reproduce" and "communicate" material on the internet and to licence others to do so. Under the various licences devised and publicly promoted by the non-profit organisation known as Creative Commons since 2002, subject to the conditions of each licence, content is freely licensed forever in the public domain.<sup>14</sup> One of the conditions may include that material is licensed for "non-commercial" use only, although the meaning of that expression within the context of Creative Commons licences is the subject of debate.<sup>15</sup>

Somewhat ironically, the Cutler Review document, produced for the government, was made publicly available online but was not licensed under a Creative Commons licence until some time after its online publication.<sup>16</sup> While the report states that copyright is owned by Cutler & Company Pty Ltd and licensed royalty free to the Commonwealth for non-commercial use, the website states that the report is licensed by the Commonwealth under a Creative Commons Attribution-Noncommercial-No Derivative Works 2.5 Australia License, "to enable public dissemination of the report in accordance with the Chair's wishes" but with disclaimers about the licence. The Copyright Disclaimer states:

"Both the Report and the use of the Creative Commons license do not necessarily reflect the views of or have the endorsement of the Commonwealth or of the Minister, or indicate the Commonwealth's commitment to a particular course of action."

Through the application of the Creative Commons licence, the material is arguably more freely available because it may be shared and copied without users facing repercussions for infringing copyright. However, it is doubtful that the will to allow the intended uses ever changed from the outset, or that, subject to resolution of the meaning of "non-commercial use", the Creative Commons licence will change how the material will be used. In fact, it is arguable that the Creative Commons licence conditions imposed are actually more onerous on a user than if the material were simply made the subject of an implied licence on the government website.

It will be for the government to determine how it manages copyright in what we hope will be a uniform approach to disclosing more PSI. In doing so, we recommend that the government promote understanding of copyright along with the government's detailed position on open access. In selecting a licensing option, the government could identify and use a Creative Commons licence or develop a user-friendly licence that meets with the government's approval, without lengthy disclaimers.

Alternatively, before delegating powers to PSI managers, the government could revisit the regulation of existing Crown copyright and, more generally, copyright in materials which contain PSI.<sup>17</sup> In doing this, serious consideration should be given to adopting the approach of the US government to regulating Crown copyright. In the US, "a work prepared by an officer or employee of the [federal] government as part of that person's

---

<sup>12</sup> s 35(6) *Copyright Act 1968* (Cth)

<sup>13</sup> s 35(1) *Copyright Act 1968* (Cth)

<sup>14</sup> Creative Commons, About Licenses, <http://creativecommons.org/about/licenses>, accessed 26 August 2009.

<sup>15</sup> Creative Commons Launches Study of "Noncommercial Use", 18 September 2008, <http://creativecommons.org/weblog/entry/9557>, accessed 26 August 2009.

<sup>16</sup> Venturous Australia Copyright Disclaimer, last reviewed 2 October 2008, <http://www.innovation.gov.au/innovationreview/Pages/Venturous.aspx>, accessed 26 August 2009.

<sup>17</sup> Note that third parties such as independent contractors can own copyright in PSI documents, by operation of the *Copyright Act 1968* (Cth) or by agreement or assignment, as appears to be the case with the Cutler Review.

official duties” is not protected by US federal copyright law.<sup>18</sup> Mirroring this in Australia could at least remove one layer of regulation that hinders the free flow of PSI and avoid the need to consider licensing options.

The example in the issues paper of Data.gov is another reminder that the purpose of making PSI available is all important in determining how material containing PSI is to be made available. We note that the information at Data.gov and on referring websites has many potential commercial and non-commercial uses, but may be subject to terms of use. A system like the Creative Commons licence suite, but with the endorsement of the government, could address the PSI management and usability issues we have identified and avoid the need for ad hoc reactionary statements about the integrity of information and how it may be used. We question the legal status of such statements.<sup>19</sup>

## On digital engagement

**What are the major obstacles to fostering a culture of online engagement within government and how can they be tackled?**

**How can government capture the imagination of citizens to encourage participation in policy development and interactive consultation with government?**

We believe that the major obstacles facing a culture of online engagement are summarised into two key areas: information identification and technology.

In the first instance, it is understood that federal, state and local governments maintain a wealth of information – such information may or may not be readily accessible, and further may or may not be in a form easily distributed electronically. There is no doubt that the development of an open government model will entail the use of limited resources, accordingly, greater emphasis needs to be placed on what information can be easily accessed and distributed when considering in light of available resources or funding. Failure to take a proactive approach to ensure information is stored in formats which are easily obtainable and distributed, and ensuring procedures for properly preserving information in appropriate electronic formats can have a greater impact. The further limitation is, as stated above, going to be to determine which information is able to be distributed in light of available resources and will fulfil the central aims targeted as a result of an open government model.

In the second instance, the ability to easily identify and distribute available information could be enhanced by the appropriate selection and utilisation of available, or indeed future, technologies. In this sense, government could benefit from greater use of collaborative technologies, as well as internet feeds and generic email notifications. Unfortunately the ability for governments to utilise such technologies may be constrained by existing service contracts in place with technology vendors. In that instance there is an argument to state that governments should increase their use of freely available, open source platforms – however such use is fraught with its own difficulties including insufficient functionality and obtaining necessary support. Additionally, various departments (not to mention those departments at state and local levels) quite possibly utilise different technology platforms and applications – which results in a lack of uniformity on delivery platforms for information disclosure. In order to overcome this

---

<sup>18</sup> 17 U.S.C. § 105 Subject matter of copyright: United States Government works.

<sup>19</sup> For an example, see the Terms of Use provided with PSI released by the District of Columbia: <http://data.octo.dc.gov/TermsOfUse.aspx>, accessed via Data.gov.

obstacle, government should be focused on identifying appropriate technologies (not those that are required under existing contractual arrangements), ensure uniform policies and procedures across all government levels and maintain an arrangement for relatively easy access for community participants.

In order to capture the imagination of citizens to encourage participation, we would emphasise recent points made by Teresa Nasif, the acting deputy associate administrator for the Office of Citizen Services at the US General Services Administration. She advocates establishing appropriate technologies so that the public can:

- easily find relevant, accurate and up-to-date information;
- understand information the first time they read it;
- complete common tasks efficiently;
- get the same answer whether using the web, phone, email, live chat, reading a brochure or visiting in person;
- provide feedback and ideas and hear what the government will do for them; and
- access critical information if they have a disability or aren't proficient in English.

The following are examples of websites which have captured the imaginations of Australian and American citizens and engaged them to participate collaboratively in policy development:

#### **Open Congress**

<http://www.opencongress.org/>

#### **GetUp**

<http://www.getup.org.au/>

## **Conclusion**

We have no doubt that improving and increasing access to PSI will offer many benefits for Australian citizens and their governments. We commend you on your efforts to identify the ways and the means for governments to do this. We look forward to opportunities to engage more in policy development and interactive discussion with government through the means that are ultimately devised.