

OPEN GOVERNMENT: FROM CROWN COPYRIGHT TO THE CREATIVE COMMONS AND CULTURE CHANGE

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I INTRODUCTION

Open government has long been advocated as an antidote to corruption and as an essential element in democracy.¹ The concept of open government can be used in various contexts and has a variety of meanings. It is perhaps unwise to randomly ‘Google’ the phrase because that is likely to lead to infinite discussions about conspiracies and failure to release UFO files. In the legal and political science literature, openness and transparency are often discussed in relation to broad concepts of accountability and the responsiveness of governments to public participation in decision-making. Public participation in government may involve a range of levels of involvement from transparency (the supply of information to the public), or invitations to the public to supply information and be involved in consultation, through to full participation in the decision-making process with televoting.² In this article I will focus my discussion upon access to documents that record government activity and a broader range of information created, collected, received, held or funded by government, which is referred to as public sector information.³

Transparency, which in this context means open access to information, is important for accountability in the legislative, judicial and executive arms of

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1 In the 19th century Jeremy Bentham campaigned for publication of parliamentary proceedings arguing that ‘secrecy is an instrument of conspiracy; it ought not, therefore, to be the system of a regular government’: Jeremy Bentham, *The Works of Jeremy Bentham, Published Under the Superintendence of His Executor, John Bowring* (William Taite, 1843) vol 2, 315.

2 See discussion in Patrick Bishop and Glyn Davis, ‘Mapping Public Participation in Policy Choices’ (2002) 61 *Australian Journal of Public Administration* 14.

3 The Organisation for Economic Co-operation and Development (‘OECD’) Council defines public sector information as “‘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 the [relevant] legal requirements and restrictions ...’: OECD, ‘OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information’ (Recommendation, OECD, 17–18 June 2008) 4 n 1
<<http://www.oecd.org/dataoecd/0/27/40826024.pdf>>.

government. The publication of parliamentary proceedings opened up the British House of Commons to public scrutiny in the late 18th century and 19th century, first in the newspapers and then in official reports.⁴ The requirement that court proceedings be conducted ‘publicly and in open view’⁵ has long been recognised as a fundamental principle of the common law,⁶ and the maxim that ignorance of the law is no excuse is founded upon the principle that the whole of our law (legislation and case law) is accessible to the public.⁷ Openness in the executive arm of government has a somewhat more recent history. While freedom of information can trace very early roots in Scandinavia, open access to information held by executive government was essentially a 20th century phenomenon emerging in the United States in the 1960s, in Australia, New Zealand and Canada in the 1980s, and in the United Kingdom as recently as 2000.⁸ In his 2008 international survey Toby Mendel noted that, while in 1990 only 13 countries had introduced freedom of information laws, by 2008 that had increased to around 70, and 20 to 30 more countries were considering implementation.⁹

Reservations remain about the implementation of these laws that open up executive government to public scrutiny when faced with political and bureaucratic resistance,¹⁰ but open government and the so-called ‘right to know’¹¹ currently has a high public profile. The day after Barack Obama became President he issued a memorandum to the heads of departments and agencies announcing a new era of open government within the United States administration,¹² and the United States is promoting a new international initiative for government transparency known as the Open Government Partnership.¹³ This promotion of open government principles might seem somewhat incongruous when contrasted with the United States and other governments’ panicked responses to Wikileaks;¹⁴ nevertheless open access to government information is attracting a great deal of attention from government administrations. In Australia, a second generation of freedom of information laws have been enacted by the

4 Christopher Reid, ‘Whose Parliament? Political Oratory and Print Culture in the Later 18th Century’ (2000) 9 *Language and Literature* 122.

5 *Scott v Scott* [1913] AC 417, 441.

6 For a discussion of the history of open justice see *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 50–3 (Kirby P).

7 *Blackpool Corporation v Locker* [1948] 1 KB 349, 361. Or at least at that time, that legal advisers should have access to it.

8 David Banisar, *Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws* (Privacy International, 2006) <www.freedominfo.org/documents/global_survey2006.pdf>.

9 Toby Mendel, *Freedom of Information: A Comparative Legal Survey* (UNESCO, 2nd ed, 2008) 3.

10 ‘Brisbane Declaration’ (Paper presented at UNESCO World Press Freedom Day Conference, Brisbane, 3 May 2010).

11 Irene Moss, ‘Report of the Independent Audit into the State of Free Speech in Australia’ (Report, Australia’s Right to Know Coalition, 31 October 2007).

12 Barack Obama, ‘Memorandum for the Heads of Executive Departments and Agencies: Freedom of Information Act’ (Presidential Memorandum, 21 January 2009).

13 US Department of State, *The Open Government Partnership* <www.state.gov/g/ogp/index.htm>.

14 Micah L Sify, *Wikileaks and the Age of Transparency* (Scribe Publications, 2011) 126–30.

Commonwealth and (some) states and these reforms have promised a new focus on openness.¹⁵ The Commonwealth Government has issued a declaration of open government,¹⁶ an Information Commissioner has been appointed,¹⁷ and new approaches to licensing public sector information are being introduced. While government ‘ownership’ of official information once supported secrecy, governments are now seen as the custodians of public sector information for the benefit of the public. It remains to be seen whether these reforms result in real ‘culture change’¹⁸ with bureaucrats fully committed to disclosure, but the appearance of disclosure logs,¹⁹ and creative commons licence notices,²⁰ on the websites of some Australian government departments already evinces significant changes.

In modern systems of public administration open access to government information invariably means access to documentary records. Whether paper based or digital, the information will be recorded in a material form. This is why copyright and associated licensing should be central to any discussion about open access to government information. Copyright law grants exclusive rights of control over reproduction and publication of works,²¹ and the copying of other subject matter,²² that records government information and so underpins the control exercised over its distribution. Governments and a wide variety of private individuals and corporations own copyright in this material. Disclosure invariably involves reproduction of documents and so exceptions to copyright infringement or licensing arrangements are essential for full public access.

The new approach to open government in Australia is focusing a good deal upon the possibilities offered by the innovative use of internet-based technologies²³ and open content licensing using Creative Commons licences.²⁴ Creative Commons licences provide a standardised infrastructure for licensing copyright protected material with a set of ready-made licences and tools that

15 *Freedom of Information Act 1982* (Cth); *Right to Information Act 2009* (Qld); *Government Information (Public Access) Act 2009* (NSW); *Right to Information Act 2009* (Tas).

16 Lindsay Tanner, *Declaration of Open Government* (16 July 2010) Australian Government Department of Finance and Deregulation <<http://agimo.govspace.gov.au/2010/07/16/declaration-of-open-government/>>.

17 The current Australian Information Commissioner is Professor John McMillan, see Office of the Australian Information Commissioner <www.oaic.gov.au>.

18 John McMillan, ‘Freedom of Information Reforms and Cultural Change’ (Paper presented at UNESCO World Press Freedom Day Conference, Brisbane, 2 May 2010) <http://www.oaic.gov.au/news/speeches/freedom_of_information_reforms_and_cultural_change.pdf>.

19 Under *Freedom of Information Act 1982* (Cth) s 11C. See, eg, Australian Government Department of Foreign Affairs and Trade, *FOI Disclosure Log* <www.dfat.gov.au/foi/disclosure-log.html>; Australian Government Department of Climate Change and Energy Efficiency, *Freedom of Information Disclosure Log* <www.climatechange.gov.au/about/foi-disclosure-log.aspx>.

20 See, eg, Australian Government Department of Foreign Affairs and Trade, *Copyright* <www.dfat.gov.au/copyright.html>; Australian Government, *Copyright* <<http://data.gov.au/about/copyright/>>.

21 *Copyright Act 1968* (Cth) s 31.

22 *Copyright Act 1968* (Cth) ss 85–8.

23 See, eg, Tanner, above n 16.

24 Government 2.0 Taskforce, ‘Engage: Getting on with Government 2.0’ (Report, Government 2.0 Taskforce, 22 December 2009) xix.

allow certain uses of the works.²⁵ Owners retain copyright and reserve certain rights,²⁶ and so this can be seen as a rather conservative approach operating within traditional copyright constraints.²⁷ However, the default position of open access can have an important practical effect because the free uses that can be made of the material are clearly stated to the general public. There is no doubt that Creative Commons licensing and electronic publishing on the Internet enables far greater efficiencies in distribution of government information and, in recent years this has undermined the user pays approach once associated with paper based publishing for government publications.²⁸

While the government media releases are reporting a new era of online open government, it is important to look in detail at what exactly is being opened up. Open access to government information requires more than digital technology and a creative approach to licensing; a strong commitment to disclosure is required. A commitment to disclosure in the abstract does not take into account the wide variety of information sources held by governments and the underlying rationales for their creation and control. In this article I will identify categories of government information that pose specific challenges for open access. Some information products are created with the expectation or purpose of publication, while other material is a record of administrative processes and is only released, if at all, to fulfil statutory obligations. I will consider various rationales for open access to government information ranging from democratic accountability to commercial re-use as an economic stimulus. I will argue that for material always intended for publication, a shift from user pays to open content licensing on the Internet has been a significant development as far as public access is concerned. However, the real test of openness is whether the documentary record of public administration that is the traditional focus of freedom of information legislation is released. An expectation of publication is a fundamental shift in disposition for authors and information sources of this kind of material. It is the information that has traditionally been kept secret, shielded by Crown copyright and broadly interpreted exemptions from freedom of information laws, which will be the front line of open government.

Focusing on the Australian Commonwealth Government, in Part II of this article I will consider various uses of the terms 'government information' and the broader concept 'public sector information' in open government discourse. I will argue that two matters need to be resolved: (1) is the information being considered confined to records of government activities or does it extend to all information products funded by government?; and (2) is it confined to published

25 See generally Creative Commons, *About* <<http://creativecommons.org/about>>. For a history, see James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press, 2008) ch 8.

26 See Part V below.

27 Susan Corbett, 'Creative Commons Licences, the Copyright Regime and the Online Community: Is There a Fatal Disconnect?' (2011) 74 *Modern Law Review* 503.

28 Australia. Prices Surveillance Authority, *Inquiry into the Publications Pricing Policy of the Australian Government Publishing Service: Issues and Information Paper* (Prices Surveillance Authority, Report No 47, 1992) 57.

material, or is unpublished material also included? The scope of the terminology being used will be influenced by the rationales underlying the open access objectives. In Part III, I will review the various rationales underlying the concepts of open government and open access to public sector information. The dominant rationales are: improved decision-making; democratic accountability; public participation in the democratic process; and value adding to a national resource. I will argue that different priorities emerge depending upon how open access is perceived. This has an impact upon how copyright owned by government, and the associated policies on open content licensing, are administered. In Parts IV and V, I consider the administration of Crown copyright and Creative Commons licensing. I argue that the choice and scope of a licence is likely to reflect existing practices of information control within government agencies unless a strong commitment to publication is inculcated. Creative Commons licensing is the tool, but culture change will be essential if open access to government is to be improved.

II OFFICIAL, GOVERNMENT OR PUBLIC SECTOR INFORMATION

The terminology in this field has varied over the years. Once referred to as ‘official information’,²⁹ which suggested close connections with official secrets,³⁰ the term ‘government information’ has been more closely associated with public access through freedom of information,³¹ and recent discussions focusing upon data re-use and open content licensing tend to refer to ‘public sector information’ (‘PSI’). From official secrets through to creative commons licensing of PSI, this could be represented as a slow evolution toward ever increasing openness, and there are policy documents that certainly suggest that objective,³² but the range of material covered and the inconsistent usage of these terms makes any broad claims to greater openness imprudent, or at least premature. When considering definitions, an important point of differentiation is whether the material was created with publication in mind. If the new open content licensing of PSI is only covering material that has always been published, then we may not have come quite as far as the media releases might suggest in relation to increased openness, although greater accessibility for the published material will have been achieved. An expectation of publication for previously unpublished material is a far more fundamental shift.

29 Paul Finn, *Official Information* (Australian National University, 1991).

30 Harry Gibbs, RS Watson and ACC Menzies, *Review of Commonwealth Criminal Law: Final Report* (1991) 231ff (Part V: Disclosure of Official Information); *Osland v The Queen* (2008) 234 CLR 275, 302 (Kirby J).

31 Australian Law Reform Commission and Administrative Review Council, ‘Open Government: A Review of the Federal Freedom of Information Act 1982’ (Report No 77, Australian Law Reform Commission, 20 January 1996).

32 See, eg, Tanner, above n 16.

When improvements in public access to PSI are being discussed, what, as far as the Commonwealth Government is concerned, is meant by PSI? The term is used differently in a range of policy documents. Four recent publications discussed below show that there is no one agreed definition.³³ PSI may be confined to published information concerning core public functions or may extend to a much wider range of government information.

In its 2009 report,³⁴ the Commonwealth Government's 2.0 Taskforce adopted the following broad definition of PSI used by the Organisation for Economic Cooperation and Development (OECD) Council:

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.³⁵

The Commonwealth Government's 2010 revised Statement of Intellectual Property Principles categorises the following kinds of materials as 'public sector information' based upon published information:

Agencies should encourage public use and easy access to material that has been published for the purpose of:

- informing and advising the public of government policy and activities;
- providing information that will enable the public and 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.

This includes all materials which agencies are generally obliged to publish or otherwise allow free public access to.³⁶

The Statement of Intellectual Property Principles covers information voluntarily published by government, and information disclosed in compliance with statutory obligations. The emphasis is upon information that discloses government activities, whereas the OECD definition extends to a broader range of information products created or funded by public institutions.

The Commonwealth Attorney-General's Department Guidelines state: 'PSI can be thought of as material with the essential purpose of providing [g]overnment information to the public'.³⁷ This begs the question: what is

33 Government 2.0 Taskforce, above n 24; Commonwealth Attorney-General's Department, 'Statement of Intellectual Property Principles for Australian Government Agencies' (Attorney General's Department, October 2010); Commonwealth Attorney-General's Department, 'Guidelines on Licensing Public Sector Information for Australian Government Agencies' (Commonwealth Copyright Section, Business Law Branch, Attorney-General's Department, 28 January 2011); Australian Government Office of the Australian Information Commissioner, 'Principles on Open Public Sector Information' (Report, Office of the Australian Information Commissioner, May 2011).

34 Government 2.0 Taskforce, above n 24, 4.

35 Ibid quoting OECD, above n 3.

36 Commonwealth Attorney-General's Department, 'Statement of Intellectual Property Principles', above n 33, 11(a). Also all material available for public access under the Archives Act: *ibid* 11(c).

37 Commonwealth Attorney-General's Department, 'Guidelines on Licensing', above n 33, 1.

government information? The examples listed make it clear that this is intended to cover more than material that provides information about core government activities, for instance spatial data, statistics and maps are included. This is material the government has invested in. However, material that has national security implications, contains personal information, or is commercially or culturally sensitive is excluded. The guidelines also note that when the essential purpose of material is artistic expression it is unlikely to be PSI,³⁸ suggesting that some material the government is investing in will not be opened up. It is not clear whether this is because of a need to recoup some of the investment through commercialisation, or other considerations related to the artistic nature of the work, for instance to protect the moral rights of the authors.³⁹

The principles on open PSI issued by the Office of the Australian Information Commissioner ('OAIC') in 2011 refer to information 'held' by Australian government agencies.⁴⁰ This adopts a traditional freedom of information approach,⁴¹ and will include some material created by third parties that the government agency has not invested in beyond perhaps the investment in its collection and maintenance. The OAIC addresses the need to decide about publication, which should be determined when the information is created.⁴² The default position is proactive publication 'if there is no legal need to protect the information'.⁴³ Third party interests, such as privacy, commercial confidentiality and intellectual property rights, are legal needs that may alter the presumption of publication.

Government reports and media releases from politicians might talk generally about open access to government information, but at some point it becomes necessary to ask: what exactly is being opened up? The various approaches that emerge from the Commonwealth policies and guidelines discussed above show that two matters need to be resolved when defining government or public sector information: (1) is it confined to information about government activities or does it extend to all information products funded by government?; and (2) is it confined to previously published material, or is unpublished material included?

There is a wide range of material produced by governments that is intended for publication and for which public access has never been problematic. Government forms, information brochures, pamphlets, annual and other reports, legislation and media releases. Modern governments produce vast quantities of such material ranging from public education programmes to 'spin'. Governments also strategically manage information using carefully timed releases.⁴⁴ This

38 Ibid.

39 See *Copyright Act 1968* (Cth) pt IX.

40 Australian Government Office of the Australian Information Commissioner, above n 33, 33.

41 *Freedom of Information Act 1982* (Cth) s 4 (definition of 'document of an agency').

42 See Australian Government Office of the Australian Information Commissioner, above n 33, 34 (Principle 4).

43 Ibid 33 (Principle 1).

44 For a discussion of the strategic management of information by government see Greg Terrill, *Secrecy and Openness: The Federal Government from Menzies to Whitlam and Beyond* (Melbourne University Press, 2000) 196.

material may be produced with the intention of ‘giving’ it away, or in the past governments may have charged for copies.⁴⁵ Quite different issues arise when information about government activities is produced as a by-product of administrative processes with no intention to publish. Material of this kind includes manuals, memos, emails, internal briefing documents, and so forth. This material is evidence of communications, decisions and actions: what is done by governments and why. Although this information may be publicly disclosed at some point, for instance, as a result of freedom of information applications or in the archives, the communication of this information to the public is not its *raison d’être*. Indeed, threats of compelled disclosure of this kind of material from unwilling sources⁴⁶ are sometimes met with the response that records will not be made.⁴⁷

Other information collated and produced by governments, for instance statistical and spatial data, does not directly concern the functioning of government. This material is usually produced with the express purpose of publication and the open access issues focus upon pricing rather publication. The inclusion of this kind of material in any definition of open access PSI on the basis of public funding raises particular problems for government agencies engaged in what is effectively commercial production. For instance, during the review by the OAIC of open PSI, the National Film and Sound Archive argued that cultural institutions need to impose access charges in order to fulfil their functions.⁴⁸ The Australian Commonwealth Government’s Statement of Intellectual Property Principles distinguishes between agencies that create material for public distribution and agencies that have a more commercial focus and may be involved in intellectual property commercialisation.⁴⁹ Open access advocates argue not just for free access, but for re-use and value adding by the community under open content licences, thereby undermining commercialisation by governments. Whether open access is confined to published information about government activities, or extends to a wide range of published and unpublished information products funded by government, will be influenced by the rationales underlying the open access objectives.

45 Australia. Prices Surveillance Authority, above n 28.

46 *XYZ v Victoria Police* [2010] VCAT 255 (16 March 2010) [547] (President Justice Bell).

47 The so called ‘post-it note effect’ when temporary records are made but not preserved: Brian Wheeler, *Post-It Notes and the End of Written History* (2 July 2010) BBC News UK Politics <<http://www.bbc.co.uk/news/10338038>>.

48 Australian Government Office of the Australian Information Commissioner, above n 33, 26.

49 Commonwealth Attorney-General’s Department, ‘Statement of Intellectual Property Principles’, above n 33, 11(a).

III OPEN GOVERNMENT AND OPEN ACCESS: THE RATIONALES

Open access to information can also have a range of meanings and applications. From a traditional freedom of information ('FOI') perspective, it is access to documents, or more broadly records,⁵⁰ held by government agencies. With the recent FOI reforms in Australia this can include proactive publication⁵¹ of documents, as well as disclosure in response to specific FOI applications.⁵² FOI gives the applicant, and potentially the public at large, access to the documents but gives no right of re-use.⁵³ However, open access to PSI can go further by making information available for re-use and value adding by the community, and may include commercial re-use. To work out which kinds of material, and which kinds of access, are intended to be covered when wide-ranging statements about open access and open government are made in public discourse and government policy documents, it is essential to establish which rationales underpin the particular debate. The following rationales for open access dominate: improved decision-making; democratic accountability; public participation in the democratic process; and value adding to a national resource. The democratic and enhanced decision making rationales underpin the freedom of information discourse, whereas open content licensing of PSI is often promoted using both democratic and national resource arguments.

A Democracy and Enhanced Decision-making

In the last two decades of the 20th century, 'open government' was synonymous with FOI legislation.⁵⁴ Australia's first FOI laws⁵⁵ were introduced after long deliberation,⁵⁶ with great optimism and high ideals.⁵⁷ It was a radical reform because Australia had inherited a long history and strong culture of government secrecy.⁵⁸ In the first annual report on the operation of the 1982

50 Covering a range of digital and analogue formats.

51 *Freedom of Information Act 1982* (Cth) pt II.

52 *Ibid* s 11.

53 *Ibid* s 91(2).

54 Australian Law Reform Commission and Administrative Review Council, above n 31, [1.2], [2.2].

55 *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1989* (NSW) (now *Government Information (Public Access) Act 2009* (NSW)); *Freedom of Information Act 1989* (ACT); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1991* (Tas) (now *Right to Information Act 2009* (Tas)); *Freedom of Information Act 1992* (Qld) (now *Right to Information Act 2009* (Qld)); *Freedom of Information Act 1992* (WA); *Information Act 2002* (NT).

56 Greg Terrill, 'The Rise and Decline of Freedom of Information in Australia' in Andrew McDonald and Greg Terrill (eds), *Open Government; Freedom of Information and Privacy* (Macmillan, 1998) 89. See also Terrill, above n 44.

57 Commonwealth Attorney-General, 'Annual Report on the Operation of the Freedom of Information Act 1982 for the period 1 December 1982 to 30 June 1983'; ('Report, Commonwealth Attorney General, 1983') xi.

58 *Osland v The Queen* (2008) 234 CLR 275, 303 (Kirby J).

Commonwealth Act,⁵⁹ the Commonwealth Attorney-General listed the following basic purposes and benefits that the FOI legislation was intended to confer:

- to improve the quality of decision-making by government agencies in both policy and administrative matters by removing unnecessary secrecy surrounding the decision-making process;
- to enable groups and individuals to be kept informed of the functioning of the decision-making process as it affects them and to know the kinds of criteria that will be applied by government agencies in making those decisions;
- to develop further the quality of political democracy by giving the opportunity to all Australians to participate fully in the political process;
- to enable individuals, except in very limited and exceptional circumstances, to have access to information about them held on government files, so that they may know the basis on which decision that can fundamentally affect their lives are made and may have the opportunity of correcting information that is untrue or misleading.⁶⁰

Opening up the decision-making processes of government departments and agencies to public scrutiny by allowing access to the documentary record of those decisions would, it was hoped, improve the quality of decision-making. The reference to the removal of ‘unnecessary secrecy’ made it clear that it was never intended that openness would be absolute. FOI was also intended to give members of the public an insight into the rules and procedures that are applied when government decisions are made, including decisions affecting their individual interests. It improved transparent decision-making and public participation in the democratic process, at least through information disclosure, that were the primary objectives of the first FOI laws.⁶¹ It was not entirely clear how information disclosure would enable members of the public to fully participate in the political process, beyond demanding access to information which would inform public debate. FOI legislation did allow individuals to amend or annotate their own personal records,⁶² but that was the extent of their direct contribution to the official documentary record. FOI was generally intended to counteract the natural tendency of the record keepers to control and limit information flows and to improve decision-making processes by exposing them to public scrutiny. New approaches to open content licensing that allow re-use⁶³ may enable active public participation in the democratic process in a way that was anticipated by the early open government initiatives but was never really achieved.

The practical application of FOI did not meet the original ideals and these ‘first generation’ laws were widely criticised for failing to meet their democratic

59 *Freedom of Information Act 1982* (Cth).

60 Attorney-General’s Department, *Overview of the Proceeds of Crime Act 2002*, above n 56, xi.

61 Access by individuals to information about themselves was the other objective. Access to personal files has been extensively used and is one of the least controversial parts of the FOI schemes: see, e.g. Australian Law Reform Commission and Administrative Review Council, above n 31 [2.2], [2.10].

62 FOI allows individuals to seek correction of their personal information held by governments if they believe that information is incomplete, incorrect, and out of date or misleading. *Freedom of Information Act 1982* (Cth) pt V.

63 Discussed in Part V below.

objectives.⁶⁴ Only five years after commencement of the Commonwealth Act, the Senate Standing Committee on Legal and Constitutional Affairs reported complaints about the ‘attitude’ of government agencies towards disclosure.⁶⁵ In 1995, the Australian Law Reform Commission and Administrative Review Council recommended reform of the Commonwealth Act to ensure a pro-disclosure approach to interpretation of the provisions,⁶⁶ and there have been numerous reviews across Australia’s other FOI jurisdictions that have also proposed reforms since then.⁶⁷

Australia’s ‘second generation’ FOI laws⁶⁸ are intended to address what was perceived as an entrenched culture of secrecy within the executive government. The objectives of the new FOI laws have been restated and emphasised, but are consistent with the ideals of the original laws. They include: to improve democratic government by increasing the accountability of the executive; to increase scrutiny, discussion, comment and review of government activities; as far as possible, to facilitate and promote public access to the maximum amount of official information, promptly and at the lowest reasonable cost; and to give a right of access to government information unless, on balance, there is an overriding public interest against disclosure.⁶⁹

These open government ideals of public participation and improved government decision-making have been supplemented by a new approach to government information that characterises it as a valuable national resource. The OAIC recently described open government as:

an ideal and a practice. As a democratic essential it enables members of the community to participate in government, hold government accountable, and draw knowledge and value from the information resources held by government in the service of the public.⁷⁰

This was said with reference to open access to PSI. What is new is the reference to drawing value from government information as a national resource. A further step will be public participation by contributing to the stock of

64 Sir Anthony Mason described the implementation of freedom of information as a ‘substantial disappointment’: Sir Anthony Mason, ‘The 30th Anniversary: A Judicial Perspective’ (2007) 58 *Admin Review* 13, 14.

65 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Freedom of Information Act 1982; Report on the Operation and Administration of the Freedom of Information Legislation* (1987) 11–2.

66 Australian Law Reform Commission and Administrative Review Council, above n 31, [4.2] (Recommendations 1 and 2).

67 For some recent examples see David Solomon, FOI Independent Review Panel, ‘The Right to Information: Reviewing Queensland’s Freedom of Information Act’ (Report, 10 June 2008); NSW Ombudsman, ‘Opening up Government: Review of the Freedom of Information Act 1989’ (Report, NSW Ombudsman, February 2009); Tasmanian Department of Justice, ‘Strengthening Trust in Government: Everyone’s Right to Know’ (Directions Paper, Tasmanian Department of Justice, 2009).

68 *Freedom of Information Act 1982* (Cth); *Right to Information Act 2009* (Qld); *Government Information (Public Access) Act 2009* (NSW); *Right to Information Act 2009* (Tas).

69 See objects sections: *Freedom of Information Act 1982* (Cth) s 3; *Right to Information Act 2009* (Qld) s 3; *Government Information (Public Access) Act 2009* (NSW) s 3; *Right to Information Act 2009* (Tas) s 3.

70 Australian Government Office of the Australian Information Commissioner, above n 33, i.

information resources. This is where licensing allowing re-use comes into its own.⁷¹

B A National Resource Available for Re-use and Expansion

In the last year or so the Commonwealth Government has produced a number of reports, principles and guidelines advocating open content licensing of PSI.⁷² Open access to PSI is promoted for its potential to inform the democratic process with rationales familiar from the freedom of information literature. Licensing re-use in new value added products can also facilitate public participation by allowing the public to contribute information. The other justification proffered for open access and re-use of PSI is that governments have invested in its production and so it ‘belongs’ to the public.⁷³ It is a national resource that has been collected by public authorities for and on behalf of the people. Re-use of this publicly owned resource is promoted as an economic stimulus.⁷⁴

One of the aims behind the OECD Council recommendations on access to PSI is stated to be increased returns on public investments,⁷⁵ for instance publicly funded research data. The guidelines on Licensing PSI recently published by the Commonwealth Attorney-General's Department explain that the Australian Government is encouraging greater open access to information to ‘afford industry and the wider community greater opportunities to facilitate value-added transformation of the material – that is, the creation of new products and services – with social and economic value to the community’.⁷⁶

This new policy approach⁷⁷ is in response to the report of the Government 2.0 Taskforce released in 2009.⁷⁸ The Government 2.0 Taskforce promoted the re-use of PSI citing both economic and democratic benefits ‘releasing as much [PSI] ... on as permissive terms as possible will maximise its economic and social value to Australians and reinforce its contribution to a healthy democracy.’⁷⁹

The Taskforce saw free open re-use of PSI such as spatial data as having significant economic value with benefits to the economy and to tax revenues that far outweigh any income derived directly for charging for access,⁸⁰ while in other

71 Discussed below in Part V.

72 Government 2.0 Taskforce, above n 24, 4; Commonwealth Attorney-General's Department, ‘Guidelines on Licensing’, above n 33, 1; Australian Government Office of the Australian Information Commissioner, above n 33.

73 Australian Government Office of the Australian Information Commissioner, above n 33, 6.

74 Marc de Vries, ‘Integrating Europe’s PSI Re-use Rules: Demystifying the Maze’ (2011) 27 *Computer Law & Security Review* 68. For an Australian overview see Anne Fitzgerald, *European Public Sector Information Platform Topic Report No 13 – State of Play: PSI Reuse in Australia* (22 July 2010) Queensland University of Technology ePrints <<http://eprints.qut.edu.au/33206/>>

75 OECD, above n 3.

76 Commonwealth Attorney-General's Department, ‘Guidelines on Licensing’, above n 33, 1.

77 Although, not a new concept, in 1992 the Prices Surveillance Authority said: ‘it is information produced using public money to facilitate government. Such information should be freely available’: Australia. Prices Surveillance Authority, above n 28, 91.

78 Government 2.0 Taskforce, above n 24.

79 Ibid 22.

80 Ibid 43.

contexts re-use and value adding can enhance democratic accountability by providing flexible and enhanced access to published information, for instance from Hansard.⁸¹

The Advisory Group on Reform of Australian Government Administration that reported in 2010 also had a public participation vision for open government that captures ideas and expertise directly from the community.⁸² Allowing the public to access and re-use government information, the Advisory Group argued, would enable the community to create and distribute more useful information. ‘Citizens become active participants involved in government, rather than being passive recipients of services and policies.’⁸³ Re-use goes beyond providing enhanced access to published PSI to the generation of new information resources.

C A ‘Right’ to Know

The last of the major categories of rationales for open access that I have identified in the literature is based upon a positive ‘right’ to information, but this is not so prominent in the various Commonwealth Government reports and guidelines reviewed above. A rhetorical claim to a ‘right to know’ is sometimes made in relation to freedom of information.⁸⁴ Internationally, a rights discourse is evolving in relation to open access to government information. The United Nations Human Rights Committee recently issued guidance on the interpretation of article 19 paragraph 2 of the *International Covenant on Civil and Political Rights*.⁸⁵ The right to ‘to seek, receive and impart information and ideas of all kinds’ is interpreted by the Committee to embrace a right of access to information held by public bodies.⁸⁶ The Committee has instructed states that are party to the Convention to proactively put government information of public interest into the public domain as well as establish freedom of information procedures for specific access requests. This incorporates a right to access government information into the broader right to freedom of expression.

In Australia, a rights discourse has not emerged to any great extent in the Commonwealth Government’s publications on open access, although the declaration of open government does refer to ‘strengthening citizen’s rights of access to information’⁸⁷ and in the recent review by the OAIC of principles on open public sector information, the Public Interest Advocacy Centre (‘PIAC’)

81 Ibid 42. The Taskforce also envisaged a social value to some PSI in national collections, such as the Australian War Memorial and the National Library of Australia: at 46.

82 Terry Moran et al, ‘Ahead of the Game: Blueprint for the Reform of Australian Government Administration’ (Report, Advisory Group on Reform of Australian Government Administration, March 2010) 38 http://www.dpmc.gov.au/publications/aga_reform/aga_reform_blueprint/docs/APS_reform_blueprint.pdf>. See also Australian Government Office of the Australian Information Commissioner, above n 33, 30.

83 Moran et al, above n 82, 38.

84 Solomon, above n 67.

85 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

86 United Nations Human Rights Committee, *General Comment No 34: Article 19: Freedoms of Opinion and Expression*, 102nd sess, UN Doc CCPR/C/GC/34 (11–29 July 2011) [11], [18].

87 Tanner, above n 16.

argued that access to government information is a democratic right.⁸⁸ The Freedom of Information Acts have always referred to a legally enforceable right to obtain access,⁸⁹ but this is a ‘starting-point’ that the applicant has a statutory right of access to non-exempt documents,⁹⁰ and is not the right being discussed in the human rights literature. The relationship between freedom of expression and freedom of information⁹¹ will need to be considered in those Australian jurisdictions that have adopted a Charter of Rights.⁹²

The emergence of a positive right to access government information is an interesting development that is likely to attract attention in the future,⁹³ but for the purposes of this current discussion the rationales of improved decision-making, democratic accountability, public participation in the democratic process, and value adding to a national resource, appear to dominate.⁹⁴ Licensing of government owned copyright can be influenced by which of these democratic or national resource rationales are being propounded.

IV CROWN AND PRIVATELY OWNED COPYRIGHT

Along with democratic rationales, the literature on open access to PSI uses the language of investment and ownership. Ownership is a familiar concept in discussions of Crown copyright, but in the PSI literature this is reconfigured as government investment and public ownership. When designated as a national resource, public sector information is considered to be ‘owned’ by the public,⁹⁵ where governments are the custodians.⁹⁶ From a copyright perspective it is interesting to see the language of ‘ownership’ being used in this way. In the freedom of information case *Osland v The Queen*,⁹⁷ Kirby J told a very different history of ownership of what was once referred to as ‘official’ information:

88 The PIAC raised concerns about social equity in relation to access to the internet for access to public sector information. Australian Government Office of the Australian Information Commissioner, above n 33, 7.

89 *Freedom of Information Act 1982* (Cth) s 11.

90 *Victoria Police v Marke* (2008) 23 VR 223, 230 [22].

91 Sir Anthony Mason, ‘The Relationship Between Freedom of Expression and Freedom of Information’ in Jack Beatson and Yvonne Cripps (eds), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press, 2000) 225.

92 *XYZ v Victoria Police* [2010] VCAT 255 (Unreported, President Justice Bell, 16 March 2010).

93 In the copyright law literature, there has been a comparable ‘user’s rights’ debate focusing on public access to information and engaging with the public domain literature. For a recent analysis, see Hugh Breakey, ‘User’s Rights and the Public Domain’ [2010] *Intellectual Property Quarterly* 312.

94 Mireille van Eechoud has warned that problems may emerge if the economic and democratic dimensions collide, especially if the economic interests prevail: Mireille van Eechoud, ‘The Commercialization of Public Sector Information: Delineating the Issues’ in Lucie Guibault and P Bernt Hugenholtz (eds), *The Future of the Public Domain; Identifying the Commons in Information Law* (Kluwer Law International, 2006) 279, 300.

95 Australian Government Office of the Australian Information Commissioner, above n 33, 6.

96 ‘The idea that public bodies hold information not for themselves but as custodians of the public good is now firmly lodged in the minds of people all over the world’: Mendel, above n 9, 4.

97 *Osland v The Queen* (2008) 234 CLR 275.

A pervasive attitude developed ‘that government “owned” official information’. This found reflection in a strong public service convention of secrecy. The attitude behind this convention was caricatured in the popular television series *Yes Minister* in an aphorism ascribed to the fictitious Cabinet Secretary, Sir Arnold Robinson: ‘Open Government is a contradiction in terms. You can be open – or you can have government.’⁹⁸

Australian governments do indeed claim ownership, if not in government information as such, then certainly in the copyright in the works that express that information.⁹⁹ Governments create and commission a wide range of copyright protected material and own that copyright either as the employer of the author,¹⁰⁰ by assignment, under the special Crown copyright provisions,¹⁰¹ or as a prerogative right.¹⁰²

When governments own the copyright in their works they are entitled to control access, just as any other copyright owners would do when protecting valuable commercial assets. However, it is not just material with commercial value that is controlled, information about the functioning of government may be restrained. The Commonwealth has used copyright to protect works such as forms,¹⁰³ and leaked documents.¹⁰⁴ In those cases it was the right to withhold publication and control the form of publication that was of concern, rather than the value in the marketplace. There is the potential for owners to use copyright to suppress information by controlling reproduction, publication and electronic communication of works,¹⁰⁵ and copying other subject matter,¹⁰⁶ and that takes on a particular dimension when governments are involved and own the copyright. In theory, copyright protects creative expression and not the underlying ideas or information,¹⁰⁷ but in practice, there is a potential conflict between the property rights exercised by copyright owners and open access to information.¹⁰⁸ In the case of the leaked defence and foreign affairs documents in *Commonwealth v*

98 Ibid 302.

99 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39.

100 *Copyright Act 1968* (Cth) s 35(6).

101 *Copyright Act 1968* (Cth) ss 176–9.

102 *Copyright Act 1968* (Cth) s 8A. The Crown prerogative in the nature of copyright has been traced to early printing patents and the licensing of printing: Ann Monotti, 'Nature and Basis of Crown Copyright in Official Publications' (1992) 14 *European Intellectual Property Review* 305, 306.

103 *Baillieu v Australian Electoral Commission* (1996) 63 FCR 210.

104 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39.

105 *Copyright Act 1968* (Cth) s 31.

106 *Copyright Act 1968* (Cth) ss 85–8.

107 Known as the idea/expression dichotomy, see discussion in Staniforth Ricketson and Christopher Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Thomson Reuters, 3rd ed, 2006) [1.95].

108 There is a wealth of material that discusses potential conflict between copyright and freedom of expression. See, eg, Patricia Loughlan, 'The Marketplace of Ideas and the Idea-Expression Distinction of Copyright Law' (2002) 23 *Adelaide Law Review* 29; Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (Oxford University Press, 2005); Paul Torremans (ed), *Copyright and Human Rights: Freedom of Expression – Intellectual Property – Privacy* (Kluwer Law, 2004). For an analysis from the United Kingdom see Christina Angelopoulos, 'Freedom of Expression and Copyright: The Double Balancing Act' [2008] *Intellectual Property Quarterly* 328.

Fairfax & Sons Ltd,¹⁰⁹ the defendants were restrained from publishing the documents. They did publish another book with summaries of the information,¹¹⁰ and the information also appeared in the newspapers, but the public was denied full disclosure of the documents in their original form. The form of expression used by the author of documents may be a matter of legitimate public interest and give relevant meaning to a document, and the copyright owner can control that.

In its last enquiry before it was disbanded, the Copyright Law Review Committee ('CLRC') investigated 'the extent and appropriateness of reliance by government on copyright to control access to, and/or use of, information'¹¹¹ and looked in detail at the ownership provisions that give preferential treatment to governments.¹¹² The CLRC produced a table of 24 different types of material created by or for government that is subject to copyright control.¹¹³ This covered a wide spectrum of material from documentary records of administrative processes through to software, films and audio-visual material produced with government funding. The list included material intended for publication, either free or subject to a charge, along with unpublished papers from government departments that are never intended to be disclosed. When considering public policy issues, the Committee suggested categories based upon public interest in their dissemination.¹¹⁴

Unsurprisingly, most government departments and agencies that made submissions to the CLRC Crown copyright review supported government ownership under the existing provisions. The reasons advanced by the departments in support of Crown copyright included: protecting the integrity of government material; ensuring public access regardless of commercial considerations; that governments should be able to control dissemination of material; and that copyright royalties provide a source of revenue, or at least recovery for the cost of production.¹¹⁵ Each of these justifications is open to argument and it is equally possible to come up with a list of arguments against Crown copyright.¹¹⁶ The proposition that governments should be able to control dissemination of material raises the fundamental issue discussed throughout this paper about the decision to publish. In relation to the very different financial issue of royalties as a source of revenue, Navin Katyal reported a Canadian study in 2008 found that it cost far more to administer federal Crown copyright

109 (1980) 147 CLR 39.

110 R Walsh and G Munster, *State Secrets: A Detailed Assessment of the Book They Banned* (Walsh & Munster, 1982).

111 Copyright Law Review Committee, *Report: Crown Copyright* (2005) xii.

112 *Copyright Act 1968* (Cth) ss 176–9.

113 CLRC, above n 111, 11.

114 *Ibid* 36–7 citing John Gilchrist, 'The Role of Government as Proprietor and Disseminator of Information' (1996) 7 *Australian Journal of Corporate Law* 62, 63–4. Gilchrist considered the inherent conflict between government's role as disseminator and proprietor of information.

115 CLRC, above n 111, 36.

116 For arguments for and against see Catherine Bond, 'Reconciling Crown Copyright and Reuse of Government Information: An Analysis of the CLRC Crown Copyright Review' (2007) 12 *Media and Arts Law Review* 343, 346–50.

licensing than the income that was generated.¹¹⁷ In relation to integrity of the information, government copyright is no absolute guarantee of accuracy. During the CLRC review, the National Archives of Australia argued that the way to protect integrity is through ‘thorough recordkeeping and custodial regimes which preserve the authenticity and integrity of government material over time and ensure the availability of such material as a check against deliberate distortion’.¹¹⁸ In a recent review of the Commonwealth’s principles on open public sector information, the OAIC raised the interesting possibility that the community can provide ‘useful input regarding the quality, completeness, usefulness and accuracy of published [public sector] information.’¹¹⁹

The CLRC made a number of recommendations in its 2005 report including: repeal of the special ownership provisions¹²⁰ that vest in the Crown works made or first published by or under the direction or control of the Crown;¹²¹ prospective abolition of the Crown’s prerogative rights in the nature of copyright;¹²² and abolition of copyright in certain primary legal materials,¹²³ with a concomitant statutory duty to disseminate those legal materials.¹²⁴ None of these recommendations have been implemented and Commonwealth and State statutory copyright and prerogative rights remain unchanged. Had the CLRC recommendations been implemented Crown ownership would have been limited in some circumstances with ownership vesting in private owners instead, and copyright in some categories of material would have been abolished altogether. Under the recommendations a wide range of copyright materials would still have been owned by government, notably works produced by officers and servants of the Crown in the course of their duties,¹²⁵ and copyrights obtained by assignment.¹²⁶

The CLRC report languishes, Crown copyright remains and the Commonwealth government has entered into a new world of open content licensing of public sector information instead. Kimberlee Weatherall recently commented upon the irony that adoption of Creative Commons licensing by Australian governments may have destroyed any chance of abolishing copyright

117 Navin Katyal, ‘Reforming Crown Copyright in Canada’ (2010) 198 *Copyright World* 16, 17.

118 CLRC, above n 110, 54 quoting National Archives of Australia, Submission No 37 to CLRC, *Crown Copyright*, 2005, 10. On the role of libraries in ensuring permanent access see Roxanne Missingham, ‘Access to Australian Government Information: A Decade of Change 1997–2007’ (2008) 25 *Government Information Quarterly* 25.

119 Australian Government Office of the Australian Information Commissioner, above n 33, 31.

120 *Copyright Act 1968* (Cth) ss 176–9.

121 CLRC, above n 110, xxii (Recommendation 1).

122 *Ibid* xxvii (Recommendation 6).

123 *Ibid* xxvi (Recommendation 4).

124 *Ibid* xxvii (Recommendation 5).

125 *Ibid* xxiv (Recommendation 3).

126 The CLRC also made a series of recommendations about management of that Crown copyright: *ibid* xxxi–xxxiii (Recommendations 12–6).

on a range of government materials.¹²⁷ It does indeed seem as though the general enthusiasm for Creative Commons licensing has distracted attention from Crown copyright reform. However, under the CLRC recommendations not all Crown copyright would have been abolished, and abolishing the preferential treatment of governments,¹²⁸ would have meant that some of that material would have been owned by private individuals instead. Perhaps an even stranger irony is that retaining Crown ownership of works first published by governments may facilitate public access if open licensing is to be embraced.¹²⁹ Open content licensing is simpler when government owns the copyright and there is no need to negotiate with private owners, especially for old publications that predate the Creative Commons licences.¹³⁰

Documents submitted to government can be an important source of information about the functioning of governments. Copyright in that material may be owned by private individuals if it is not first published by government or created under its direction or control.¹³¹ In *Copyright Agency Ltd v New South Wales*,¹³² the Full Federal Court decided the phrase ‘direction and control’ related to creation of the work and did not extend to mere submission of material to government even if regulated by statutory obligations.¹³³ This interpretation of the Crown copyright provisions ensured that a good deal of copyright remained in private hands. When copyright is privately owned this can sometimes facilitate access if the owners are inclined to publish,¹³⁴ but having a variety of copyright owners can complicate open content licensing.

In the state jurisdictions, third party copyright is also emerging as a problem for some government agencies when implementing the new disclosure log obligations under freedom of information that require departments to make information available on websites.¹³⁵ In *Copyright Agency Ltd v New South Wales*,¹³⁶ the High Court rejected an implied licence that would have allowed a wide range of uses for government purposes and confined the government use in that case to the statutory licence scheme.¹³⁷ When endeavouring to comply with

127 Kimberlee Weatherall, ‘IP in a Changing Information Environment’ in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 27 fn 155.

128 CLRC, above n 110, xxii (Recommendation 1).

129 *Copyright Act 1968* (Cth) s 177.

130 Commonwealth Attorney-General’s Department, ‘Statement of Intellectual Property Principles’, above n 33, 5.

131 *Copyright Act 1968* (Cth) ss 176–9.

132 (2007) 159 FCR 213.

133 The case was appealed to the High Court on the statutory licence scheme for government use: *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279.

134 Judith Bannister, ‘Public Access to Copyright Works Submitted to Government: *Copyright Agency Ltd v New South Wales* and the Implications for Information Access’ (2008) 36 *Federal Law Review* 383, 389.

135 NSW Office of the Information Commissioner, ‘Copyright and compliance with the GIPA Act’ (Knowledge Update, April 2011) <http://www.oic.nsw.gov.au/agdbasev7wr/_assets/oic/m15000112/knowledge_update_copyright_and%20compliance_april2011.pdf>.

136 (2008) 233 CLR 279.

137 *Copyright Act 1968* (Cth) s 183.

FOI disclosure requirements, state and federal government agencies may rely upon the statutory licence for government use administered by Copyright Agency Ltd,¹³⁸ but that may not be an option open to local governments.¹³⁹

When government owns the copyright then open content licensing can improve public access. Whether Creative Commons licences will be used depends very much upon the kind of material being considered and whether it is intended for publication. Published materials are being openly licensed. The Creative Commons licensing of access to this kind of material is likely to be straightforward, although re-use for the production of derivative works may raise concerns in some cases when governments wish to exercise ongoing control.¹⁴⁰ Whatever the scope of the licences, copyright, specifically the publication right,¹⁴¹ still firmly underpins the decision about whether to disclose government documents in the first place.

V CREATIVE COMMONS LICENSING

The new approach to open government in Australia is focusing a good deal upon the possibilities offered by the innovative use of internet-based technologies,¹⁴² and open content using Creative Commons licensing.¹⁴³ Creative Commons licences provide a standardised infrastructure for licensing copyright protected material with a set of ready-made licences and tools that allow certain uses of the works.¹⁴⁴

Copyright automatically protects a range of material¹⁴⁵ as soon as it is created, because there is no requirement to register for copyright protection.¹⁴⁶ Many creators use copyright to protect their work and derive income through sale

138 Copyright Agency Ltd <www.copyright.com.au>.

139 That is the view of the NSW Crown Solicitor: NSW Office of the Information Commissioner, above n 134. However, views differ on whether local government is part of the Crown, see, eg, Andrew Stewart, Philip Griffith and Judith Bannister, *Intellectual Property in Australia* (LexisNexis Butterworths, 4th ed, 2010) 203. The CLRC considered the possibility that schools, municipal councils and land management councils might be listed amongst state government entities included as part of the Crown: CLRC, above n 110, 115.

140 Authorship and copyright ownership issues emerge with collective authorship in online media, see Matthew Rimmer, 'Wikipedia, Collective Authorship, and the Politics of Knowledge', in Christopher Arup and William Van Caenegem (eds), *Intellectual Property Policy Reform: Fostering Innovation and Development* (Edward Elgar, 2009) 172.

141 The exclusive right to make a work public for the first time *Copyright Act 1968* (Cth) s 31(1) (a)(ii), (b)(ii); *Avel v Multicoin Amusements Pty Ltd* (1990) 171 CLR 88; see also CLRC, *Report on Reference Concerning the Meaning of 'Publication' in the Copyright Act 1968* (Report, July 1984).

142 See, eg, Tanner, above n 16.

143 Government 2.0 Taskforce, above n 24, xix.

144 Creative Commons, above n 25; for a history see Boyle, above n 25, ch 8.

145 Literary, dramatic, musical and artistic works, sound recordings, films, broadcasts and published editions: *Copyright Act 1968* (Cth) ss 32, 89–92.

146 *The Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, [1978] ATS 5 (entered into force 1 August 1951) art 5 prohibits formalities including registration. See Ricketson and Creswell, above n 106, [5].

or commercial licensing, but others simply wish to ‘give’ their work away freely. For this latter group, the Creative Commons licensing movement aims to provide a standardised infrastructure for the open licensing of copyright protected material.¹⁴⁷ The philosophy behind the movement is to assist creators who wish to contribute their work to the cultural ‘commons’ to do so with simple ready to use licences, known as ‘human-readable’, that the owners and users can easily understand.¹⁴⁸ The licences also have ‘legal code’, which is the full text of the licence, and ‘machine readable’¹⁴⁹ versions. Operated by an international non-profit organisation originally founded in the United States,¹⁵⁰ Creative Commons now has affiliates throughout the world including Australia.¹⁵¹

The Australian Commonwealth Government’s new policy is to openly licence PSI and the Creative Commons standard is being used as the default.¹⁵² The introduction of Creative Commons licences makes the distribution of government material a far less complex process for users than individually negotiated licences or copyright clearances that were formerly administered by the Commonwealth Copyright Administration (‘CCA’).¹⁵³ The Commonwealth government agencies that produce the relevant material now make decisions,¹⁵⁴ about whether to publish and how to license,¹⁵⁵ and the licences are addressed to the world at large.

The most accommodating of the Creative Commons licences is the Attribution Licence (‘CC BY’).¹⁵⁶ This licence requires attribution of the authors but imposes no further restrictions. It facilitates wide dissemination and use of the material and allows users to create derivative works even for commercial purposes. Integrity and authenticity of information are likely to be of concern to government agencies and it can be important that any reworked material be clearly distinguished from the original. The Australian 3.0 Creative Commons licences have been revised to make it clear that the attribution requirement should not be interpreted to misrepresent a relationship with the original creator.¹⁵⁷

With the CC BY licence as a base, copyright owners can choose to place other restrictions upon the licence. These include ‘ShareAlike’ where the user is

147 Creative Commons, above n 25.

148 For a recent discussion on whether that is being achieved see Corbett, above n 27.

149 That allows search engines to locate Creative Commons licensed works.

150 Boyle, above n 25, ch 8.

151 Creative Commons Australia <<http://creativecommons.org.au>>.

152 Australian Government. ‘Government Response to the Report of the Government 2.0 Taskforce’ (Report, May 2010) 10; Commonwealth Attorney-General’s Department, ‘Guidelines on Licensing’, above n 33, 1; Australian Government Office of the Australian Information Commissioner, above n 33, 35.

153 Commonwealth Attorney-General’s Department, ‘Guidelines on Licensing’, above n 33, 5.

154 Referred to as decentralised custodianship: Economic Development and Infrastructure Committee, *Inquiry into Improving Access to Victorian Public Sector Information and Data* (Parliament of Victoria, 2009) xxi, 128.

155 Commonwealth Attorney-General’s Department, ‘Statement of Intellectual Property Principles’, above n 33, 1.

156 Creative Commons, *About the Licenses* <<http://creativecommons.org/licenses/>>.

157 Creative Commons, *Attribution 3.0 Unported (CC BY 3.0)* <<http://creativecommons.org/licenses/by/3.0/>>.

required to distribute derivative works under the same terms as the original licence. This can facilitate even greater dissemination of the original and derivatives. However, the other restrictions limit the adding of material to the commons. No derivatives, 'NoDerivs', allows the user to redistribute the work so long as it remains complete and unchanged: parts of the work cannot be remixed or incorporated into derivative works. NonCommercial limits any re-use of the material to non-commercial purposes. These restrictions can be combined in any way the copyright owner chooses.¹⁵⁸

The Commonwealth Government's default position for PSI is the CC BY.¹⁵⁹ Open content licensing that allows this kind of re-use may enable active participation by the public that goes beyond passive access to information and adds to the common stock of information resources. Some Commonwealth government agencies, for instance the Australian Bureau of Statistics¹⁶⁰ and Bureau of Meteorology¹⁶¹ have adopted the CC BY.

While the Commonwealth Government's default position for PSI is the CC BY, the Attorney-General's Department Guidelines on Licensing Public Sector Information state that agencies should only apply licences to material on a case by case basis and after conducting due diligence.¹⁶² Matters the guidelines suggest should be considered are whether a licence should be for a restricted period of time, the implications of third party copyright and whether there is a need for ongoing Commonwealth control over the material, including whether commercially sensitive information is included.¹⁶³ The guidelines require agencies to make licensing decisions at the time of publication (that is release).¹⁶⁴ The decision about whether or not to publish will have already been made. By contrast, the principles on open PSI issued by the OAIC require decisions about whether information should be prepared for publication to be made at the time it is created, and for that decision making process to be transparent.¹⁶⁵

The licences being adopted by some government agencies are more cautious than the recommended CC BY and do not licence derivative and commercial uses.¹⁶⁶ The Creative Commons Attribution-NonCommercial-NoDerivs 3.0

158 Ibid.

159 Commonwealth Attorney-General's Department, 'Guidelines on Licensing', above n 33, 1; Australian Government Office of the Australian Information Commissioner, above n 33, 35.

160 Australian Bureau of Statistics, *ABS Copyright* (30 June 2010) <<http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/©+Copyright?opendocument#from-banner=GB>>.

161 Australian Government, Bureau of Meteorology, *Copyright Notice* (2011) <<http://www.bom.gov.au/other/copyright.shtml>>.

162 Commonwealth Attorney-General's Department, 'Guidelines on Licensing', above n 33, 3.

163 Ibid 4–5.

164 Ibid 3.

165 Australian Government Office of the Australian Information Commissioner, above n 33, 34–5.

166 See, eg, *Copyright Notice* (20 May 2010) Australian Law Reform Commission <<http://www.alrc.gov.au/copyright-notice>>, *Copyright* (30 May 2011) *Parliament of Australia* <<http://www.aph.gov.au/legal/copyright.htm>>; guidance on selecting a licence is given by the Australian Governments Open Access and Licensing Framework, ('AusGOAL'): AusGOAL (2011) <<http://www.ausgoal.gov.au/>>.

Australia licence¹⁶⁷ does not allow use for commercial purposes and users may not alter, transform, or build upon the work. This may not be so unusual in the Creative Commons community. In her recent article on the Creative Commons, Susan Corbett reported statistics from the photo sharing website Flickr,¹⁶⁸ which showed a strong preference for non-commercial use licences and also about a third of users who prohibited derivative uses.¹⁶⁹ Corbett doubts that these Creative Commons licences are truly achieving their aim of opening up the cultural commons and facilitating creativity within a ‘remix’ culture. When government departments adopt the limited ‘NonCommercial-NoDerivs’ licences for PSI the open government objectives of making a national resource owned by the public available and expanding that resource by value-adding from the community is not being achieved. With this licence, government agencies will be left to manage individual requests for licensing of material for commercial and derivative purposes.

For government information that was always intended for free publication, such as forms, information brochures, pamphlets, reports, media releases and so forth, express or implied licences have always made access to this material relatively uncontentious. The Creative Commons licensing of this kind of material is likely to be clearer for the general public, but is unlikely to extend access much further unless re-use and value-adding is allowed.

For information that was traditionally sold, the new era of Creative Commons licensing can provide greater access by replacing cost recovery and licence fees with free open content licensing. Primary legal materials are an example of materials intended for publication that in the past have been sold but are now openly licensed. Inevitably, considering the extensive involvement of lawyers, public access to primary legal materials (legislation, case law and also Hansard) has featured prominently in the open access discourse. In its 2005 Crown Copyright report the CLRC dealt with legislation as a case study.¹⁷⁰ In the 1990s the Australian Legal Information Institute (‘AustLII’) fought a major battle with governments throughout Australia to provide free internet access to primary legal sources at a time when online databases of primary legal materials were seen by governments as being ripe for commercialisation. The public had, after all, paid for the printed copies for many years through the various government publishing services and printing offices. For the Commonwealth publisher, the Australian Government Publishing Service, the legislation sold to the public had not always been priced at full cost recovery and the short fall was funded by the government,¹⁷¹ but nevertheless free Internet access required a significant policy

167 Creative Commons, *Attribution-NonCommercial-NoDerivs 3.0 Australia (CC BY-NC-ND 3.0)* <<http://creativecommons.org/licenses/by-nc-nd/3.0/au/deed.en>>.

168 Yahoo, *Flickr* (2011) <www.flickr.com>.

169 Corbett, above n 27, 526.

170 CLRC, above n 110, 165–74.

171 Australia. Prices Surveillance Authority, above n 28, 81.

shift.¹⁷² For an independent organisation such as AustLII re-use had to be negotiated with governments in each Australian jurisdiction.¹⁷³ The Commonwealth Government's legislation website ComLaw,¹⁷⁴ currently licenses content under a Creative Commons Attribution-NonCommercial-ShareAlike Licence (the CC BY-NC-SA 3.0 licence). Users are licensed to remix and adapt the content.

If primary legal materials that have been passed by parliament can be re-used and incorporated into derivative works, then materials available on the Parliament of Australia website, including Bills and Hansard, ought to be dealt with in the same way. However, the Parliament of Australia website uses the Creative Commons Attribution-NonCommercial-NoDerivs licence (CC BY-NC-ND 3.0).¹⁷⁵ This licence facilitates open access, but it is not the unrestricted and creative re-use that the Government 2.0 Taskforce had envisaged for material such as Hansard.¹⁷⁶ The Government 2.0 Taskforce was very impressed with a project called OpenAustralia,¹⁷⁷ which combined data from a range of sources, including Hansard and the Register of Members Interests, to inform voters about their elected representatives.¹⁷⁸ Value adding can enhance democratic accountability by providing flexible access to published information from Hansard but that is not allowed with a NoDerivs licence. With the decisions about Creative Commons terms being decentralised, it seems that there may be some inconsistencies in the choice of licences. Government ought to be aiming for consistency amongst agencies holding similar categories of information.

The examples of Creative Commons licences being used by the Commonwealth Government agencies discussed above are for materials that have a long tradition of public access. When it comes to Creative Commons licences, it makes a significant difference whether the material was intended for publication when it was created. The real test will come when the range of information disclosed and licensed expands to include what was once unpublished. The OAIC will play an important role in monitoring agencies' disclosure practices. In the principles on open PSI issued by the OAIC in 2011 the default position is proactive publication 'if there is no legal need to protect the information'.¹⁷⁹ Third party interests, such as privacy, commercial confidentiality and intellectual property rights, are possible legal reasons for withholding information, but the default position is clearly publication. Decisions

172 Graham Greenleaf et al, 'Public Access to Law via the Internet: The Australasian Legal Information Institute' (1995) 6 *Journal of Law and Information Science* 49, 57–8.

173 AusLII explained in submissions to the CLRC review that for re-use to truly facilitate open access there had to be more than just open licensing, data must also be provided in open exchange formats: CLRC, above n 110, 171–2 quoting AustLII, Submission No 13 to CLRC, *Crown Copyright*, 2005, 7.

174 Australian Government Com Law, *Copyright and Related Matters* <<http://www.comlaw.gov.au/content/copyright>>.

175 Parliament of Australia, *Copyright* <<http://www.aph.gov.au/legal/copyright.htm>>.

176 Government 2.0 Taskforce, above n 24, 42.

177 Open Australia <<http://www.openaustralia.org/>>.

178 Government 2.0 Taskforce, above n 24, 42.

179 Australian Government Office of the Australian Information Commissioner, above n 33, 33 (Principle 1).

about publication are to be made at the time the information is created.¹⁸⁰ Importantly, the OAIC Principals state that agency decision making about information publication should be transparent and include enquiry and public complaints procedures.¹⁸¹

VI CONCLUSION

There is no doubt that Creative Commons licensing and electronic publishing on the internet enables far greater efficiencies in distribution of government information and is undermining user pays and cost recovery approaches once associated with paper based publishing for government documents. However, open access to government information requires more than digital technology and a creative approach to licensing. A strong commitment to disclosure is required.

At the time of writing the Creative Commons licences could not be said to be ubiquitous, but the trend is certainly towards their use by Commonwealth Government agencies. The Commonwealth's default position for PSI is to license open access using the CC BY, but some of the early adopters seem to be opting for the more cautious licences that prohibit commercial uses and re-use for the production of value added information products. The Creative Commons licensing of materials traditionally published and widely distributed should be quite straight forward. An expectation of publication for previously unpublished material is a far more fundamental shift. The test of governments' commitment to open content licensing will come when material is 'reluctantly' published to fulfil open access obligations, and when the public freely produce derivative works based upon material that is protected by Crown copyright. Unless licensing decisions by government agencies are closely monitored for open government compliance, the choice and scope of licences may reflect existing practices of information control. Creative Commons licensing is the tool, but culture change will be essential if open access to government is to be improved.

180 Ibid 34 (Principle 4).

181 Ibid 35 (Principle 8).