



COPYRIGHT AGENCY LIMITED

## Response to Engage: getting on with Government 2.0: final report of the Government 2.0 Taskforce

12 February 2010

### Copyright Agency Limited

1. Copyright Agency Limited (CAL) is a copyright collecting society – a non-profit company that manages access to, and use of, copyright content. CAL's members include more than 15,000 Australian writers, illustrators, photographers and publishers. Through agreements with similar collecting societies in other countries, CAL manages overseas content as well as Australian content. CAL is the government-authorised collecting society for collection and distribution of copyright payments for the use of text, images and notated music under Part VB of the Copyright Act (educational use) and Part VII Division 2 (for government use).
2. CAL made a submission to the Government 2.0 Taskforce in response the Taskforce's Issues Paper in August 2009, which was published on the Taskforce's website. It also made a submission in response to the Taskforce's draft report. That submission has not, as far as we are aware, been published, and we have repeated here comments from that submission that apply equally to the final report.

### Summary of CAL's position

3. CAL welcomes the opportunities provided by Web 2.0 for the development and distribution of content by its members. It also welcomes the opportunities Web 2.0 provides for engagement by CAL and its members with government, and looks forward to increased access to information collected and produced by government.
4. In CAL's view, it is useful to consider the following issues separately in terms of their public policy implications:
  - how people can find out that a particular information product, such as a document or dataset, exists (discoverability);
  - the extent (if any) to which people can read or view that information (access); and
  - if the information is contained in an information product that is protected by copyright, the extent (if any) to which it is licensed to be reproduced and communicated (re-use).
5. In CAL's experience, the issues of access and re-use are often conflated in discussions of public sector information, and this can impede clear analysis of the copyright issues and other issues, and the identification of solutions to achieve the government's policy objectives.
6. CAL's main concerns lie with the re-use of PSI, and in particular:

- the breadth of the definition of “public sector information” adopted by the Taskforce;
  - the extent to which the government should retain copyright in reliance on the provisions in the Copyright Act dealing with first ownership of copyright by Commonwealth and State governments; and
  - how the government should license PSI that is protected by copyright in order to best achieve its policy objectives.
7. CAL notes that the following developments following release of the Taskforce’s report may influence the government’s response to it:
- the Federal Court decision, in *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCA 44 (8 February 2010), that the phone directories in that case are not protected by copyright, applying the reasoning of the High Court in *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 (these decisions affect the extent, if any, to which datasets are protected by copyright); and
  - the Victorian government’s response to the Victorian Parliamentary Committee’s report *Improving Access to Victorian Public Sector Information and Data* (the response is available at [www.diird.vic.gov.au/diird-projects/access-to-public-sector-information](http://www.diird.vic.gov.au/diird-projects/access-to-public-sector-information)).
8. CAL supports the submission made by the Australian Copyright Council in response to the Report.

## Meaning of Public Sector Information (PSI)

9. The Report at p 4 says:

*In its recommendation for enhanced access and more effective use of public sector information the OECD Council defined PSI, as ‘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’. Except where otherwise indicated this is what the taskforce means in this report.*

10. Footnote 47 says:

*Taskforce defines an ‘information product’ as ‘an item that has been derived from one or more sources of information to meet a specific purpose’. This definition is derived from [http://www.walis.wa.gov.au/resources/WALIS\\_glossary](http://www.walis.wa.gov.au/resources/WALIS_glossary).<sup>1</sup>*

11. The definition adopted by the Taskforce is thus extraordinarily broad, and covers material in which the government does not own copyright, such as books in the collection of the National Library of Australia, artworks in the collection of the National Gallery of Australia, and books written and/or published with the assistance of a grant from the Australia Council for the Arts.

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<sup>1</sup> The website of the Western Australian Land Information System. The definition of “Information product” there is: **“Information Product** - An item that has been derived from spatial datasets and other information to meet a specific purpose. It is separated from spatial datasets as it doesn't necessarily have to be digital and can contain non-spatial information.”

12. Most of the discussion in the report is about datasets containing data that it is the role of governments to collect, such as meteorological data and spatial data. Both the MashupAustralia contest and the GovHack event involved datasets. CAL's concerns do not apply to datasets of this nature. In any event, we note that some datasets may not be protected by copyright at all, following the High Court decision in *IceTV v Nine Network* in 2009 and the recent Federal Court decision in *Telstra Corporation Limited v Phone Directories Company Pty Ltd*, referred to above.
13. The Taskforce, at p 60, expressly disagrees with the narrower definition of PSI adopted in the Victorian Parliament's report *Improving Access to Public Sector Information and Data*.

*In absence of good reasons to the contrary, whatever information or content has been funded by the public should, be discoverable, accessible and useable as a public asset whether it has been generated by government departments or quasi government agencies. Accordingly the taskforce's recommendations for PSI applies to PSI held by publicly funded agencies of all kinds including universities, schools, hospitals and cultural agencies.*

14. The Taskforce thus confirms its intention that its recommendations apply not only to any material *funded* by a body that receives government funding but also any material held by a body that receives government funding (whether or not copyright is owned by that body – which may or may not be part of the government – or by the government).
15. The Taskforce goes on to acknowledge, however, that “it has focused its energies on making recommendations to encourage a transformation in the use of information and data-rich PSI” and that the issues for agencies that derive income from the licensing of PSI are complex and require further investigation.
16. CAL's position is that the approach to the definition of PSI in the Victorian government's response to the Victorian Parliament's report, *Whole of Victorian Government Response to the Final report of the Economic Development and Infrastructure Committee's Inquiry into Improving Access to Victorian Public Sector Information and Data*, is preferable to that taken in the Taskforce's report, largely because it recognises that there are different considerations for different types of content.

## The UK approach

17. CAL urges the government to have regard to the UK approach to, and experience of, managing PSI.
18. In the UK, *The Re-use of Public Sector Information Regulations 2005*, which are based on the European Union Directive 2003 Directive on the re-use of public sector information, cover re-use of documents produced by public sector bodies as part of their “public task”, where the re-use is outside the public task.
19. According to the UK Office of Public Sector Information (OPSI) guide *The Re-use of Public Sector Information: A Guide to the Regulations and Best Practice* (the UK PSI Guide), at para 3.14:

*Information produced as part of the public task is likely to feature some of the following characteristics:*

- *It is essential to the business of the public sector;*
- *It explains the policy of the public sector bodies;*
- *It sets out how the law, both in the UK and EU, must be complied with;*
- *The citizen will consider the information to be key to their relationship with the public sector;*
- *There may be a statutory requirement to produce or issue such information;*
- *It enjoys an authoritative status by virtue of its issue by the public sector.*

20. Para 3.16 says:

*It is reasonable to assume that, where documents most closely relate to the “raw data” definition, they will fall firmly within a public sector body’s public task. Value-added information, however, is not automatically outside the public task, though it would be a reasonable working assumption that it was unless there are other persuasive factors arguing otherwise.<sup>2</sup>*

21. The public sector bodies to which the Regulations apply are listed in the Regulations. Documents held by the following institutions are expressly excluded from the application of the Regulations:

- public broadcasters;
- educational and research institutions; and
- cultural institutions such as museums, libraries and galleries.

22. Also excluded are:

- documents containing third party content, and
- documents whose supply is outside the public task of the public sector body.

23. The UK PSI guide, at para 3.4, gives a list of examples of public sector information:

- Primary and secondary legislation.
- Official records of the Proceedings of the UK and Scottish Parliaments, the Northern Ireland Assembly and the National Assembly for Wales.
- Departmental circulars.
- Codes of practice.
- Mapping data produced by organisations such as the Ordnance Survey and the UK Hydrographic Office.
- Meteorological data produced by the Met Office.
- Consultation and policy documents.
- Statistics produced by the Office for National Statistics.
- Annual reports published by government departments, agencies and local authorities.

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<sup>2</sup> OPSI’s review of the Regulations, *The United Kingdom Report on the Re-Use of Public Sector Information 2009: Unlocking PSI Potential*, acknowledges at page 35 that “further clarity and guidance is required in order that public sector organisations can provide a clear statement as to the scope of their individual public tasks” and that “[i]n collaboration with its legal advisers, OPSI is exploring further clarification of the term”.

- Company information made available through Companies House.
- Statutory registers such as those for birth, death and marriage and land titles.
- Patent information collected and produced by the Patent Office.
- Health and safety guidance and reports published by the Health and Safety Executive.
- Forms issued by local and central government such as tax forms.
- Press notices.
- Public Records.
- Technical reports.
- Local planning information.
- Regional economic strategies

24. Given that the UK Regulations have been in force now for four years, and that their operation was reviewed in 2009,<sup>3</sup> CAL suggests that the Taskforce use the UK approach as a starting point and provide reasons for any departures from it in its recommendations.

### Third party content

25. The Report acknowledges that PSI in which the government owns some rights may contain content in which copyright is owned by someone else. The Taskforce's recommendation, at p xv, is:

*Where third parties are involved, agencies should contract to ensure that the government is able to license their work under the default licence.*

26. Where content is produced for a government by someone who is not part of the government, or first published by the government, the government will usually own copyright as a result of the provisions in Part VII Division 1 of the Copyright Act (that is, the government will own copyright unless the content creator negotiates to retain it). If the content creator negotiates to retain copyright, the Taskforce's recommendation would require the government to negotiate with the content creator to release the content under a CC BY licence. The Taskforce's recommendation thus makes it even harder for a content creator to retain rights, irrespective of the circumstances in which the content was created (for example the amount, if any, the content creator was paid).

27. CAL notes that the Copyright Law Review Committee (CLRC), in its 2005 report *Crown Copyright*, recommended the repeal of the provisions in the Copyright Act that, by default, vest in governments the copyright in material they commission or first publish. CAL supports those recommendations, and understands that the Commonwealth, State and Territory governments are in the process of formulating a response to them.

28. PSI may also include pre-existing third party content; for example, a government department may produce an information sheet that includes a pre-existing photograph. In this case, because of VII Division 2 of the Copyright Act, the government does not need a copyright clearance to

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<sup>3</sup> Office of Public Sector Information, *The United Kingdom Report on the Re-Use of Public Sector Information 2009: Unlocking PSI Potential*.

include the pre-existing content, if it is used for government purposes. To give effect to the Taskforce's recommendation, however, the government would need to contact copyright owners to request that they release their material under a CC BY licence. Acceding to such a request affects copyright owners' opportunities to earn income from the material.

29. The application of the Taskforce's recommendation thus presents some difficulties. Elsewhere in the Report, the Taskforce does give some acknowledgement (albeit in a footnote) to the complexities that can arise from third party content:

*The Taskforce does not envisage that its recommendation for all contracts for the provision of material to government which will become PSI should [extend] to third party 'content' contracted to agencies such as the ABC and SBS.*

30. In conclusion, CAL urges the government to accept the CLRC's recommendations regarding government ownership of material commissioned and first published by governments, and to consider carefully the desirability and feasibility of applying the Taskforce's recommendation to all content.

### Options for licensing PSI to achieve the best public policy outcomes

31. In the Report, the Taskforce recommends one solution for all PSI for all uses: the Australian Creative Commons 2.5 Attribution (BY) licence. The licence is available online at <http://creativecommons.org/licenses/by/2.5/au/legalcode>. It allows any use of the material, including changes to it and commercial use of it, provided that certain information relating to the author, copyright owner and/or others with an interest in the work is included.
32. This approach is in contrast to the one adopted in the UK, where there are a variety of options depending on the type of material and the use.
33. OPSI's 2009 report on the re-use of public sector information notes (at para 7.12) the results of an online user survey on government information and its re-use. One of the key messages from the survey was that "Creative Commons licensing models are not widely known".
34. In CAL's view, the Australian Creative Commons 2.5 BY licence may not be the best mechanism in every single case to achieve the government's desired public policy outcomes.
35. In Appendix D to the Report, the Taskforce responds to some of the concerns about Creative Commons licences raised in submissions to the Taskforce's Issues Paper. In CAL's view, many of the concerns remain, and some concerns are not addressed at all. In particular, the Taskforce does not respond to the concern that the CC licence does not enable the government to add terms that may be necessary to achieve the government's desired public policy outcome. For example, there may be cases where the government wants to license documents subject to a requirement that the licensee value-add and provide the value-added product to the public in a particular way. To take another example based on the Taskforce's view that the government should release incomplete datasets, the government would reasonably want, when doing this,

to make the licence conditional upon the licensee informing people who have access to the licensee's product incorporating the data that the data is incomplete.

36. CAL accepts that in some cases, licensees require some certainty if they are to invest in value-adding to PSI, but the case for licensing on an irrevocable basis in every single situation is not made out in the Report.

### *Commonwealth Copyright Administration*

37. A centralised, properly resourced, agency that can respond quickly to requests with appropriate conditions is more likely to deliver the right public policy solution.
38. CAL is very surprised that the Taskforce recommends moving responsibility for the central administration of Crown copyright away from Commonwealth Copyright Administration (CCA) in the Attorney-General's Department, and at the absence of justification for doing so. The Attorney-General's Department has the practical and legal expertise necessary to ensure that the government's public policy objectives for use of public sector information are realised.

### *Orphan works*

39. One of the Taskforce's recommendations is that "The government should ... proceed with a review of copyright in relation to 'orphan works'".
40. Clause 22 of the Digital Economy Bill recently introduced into the UK Parliament includes an amendment to the Copyright Act that empowers the Secretary of State to make regulations to enable the licensing of orphan works by licensing bodies and others. The Bill would also make an amendment empowering the Secretary of State to make regulations allowing licensing bodies to license content outside their mandate. This approach to collective licensing, known as extended collective licensing, has been adopted successfully in other countries such as Norway, and has been proposed on a number of occasions as a solution to providing access to orphan works.
41. Both these amendments were recommended by the Digital Britain report (June 2009), and by the recent report from the UK Intellectual Property Office, "© the way ahead: a strategy for copyright in the digital age" (November 2009).
42. CAL is preparing a paper on how extending collective licensing might work in Australia, including how it might provide access to orphan works.
43. The Attorney-General's Department has the knowledge and expertise to review and make recommendations about orphan works. It is already familiar with the Australian environment (including section 200AB), solutions adopted or proposed in other countries (such as Canada, the US and the UK) and Australia's international treaty obligations. It is therefore the most appropriate government department to carry out a review of orphan works.

## Response to recommendations in Government 2.0 Taskforce Project 4: Copyright and Intellectual Property

### *Recommendation 1 – Copyright law and management practices should give effect to the government’s established policy on open access to and reuse of PSI*

44. When discussing the rationale for government ownership, it is important to distinguish the various ways by which a government may come to own copyright, and the type of material it is. The means by which a government may own copyright in a work include that:
- it was created by a public servant;
  - it was created by an employee of a body that (under its constitution) is part of the Crown;
  - it was created by an independent contractor engaged by a body that is part of the Crown;
  - it was first published by a body that is part of the Crown; and
  - copyright was initially owned by someone other than a government and assigned to a government.
45. Whether or not a body is a government agency for the purposes of these provisions can be notoriously difficult to ascertain. A person whose work is produced for, or first published by, a body that turns out to be a government agency can find that, contrary to their expectations, they do not, or no longer, own copyright in it.
46. The mere fact that copyright in a work is owned by a government does not indicate anything about the nature of the work, or the purpose for which it was produced.
47. The discussion in the Project Report appears to be based on an assumption that material in which governments own copyright is necessarily “governmental” in nature: that is, material of the sort that governments produce. That is not necessarily the case, and public policy about the use of material in which governments own copyright should be affected by the nature of the material, the purpose for which it was produced, and possibly the means by which the government came to own copyright in it.
48. The provisions that vest copyright in governments (ss 176–179 of the Copyright Act) were reviewed extensively by the Copyright Law Review Committee (CLRC) which, in its 2005 report *Crown Copyright*, recommended their repeal.
49. The CLRC also discussed the vast range of material in which governments may own copyright, recognising that some materials are more closely aligned to the core functions of government than others.
50. This recognition is lacking in both the Project Report and the Taskforce Report. CAL agrees that copyright law and the management of copyright in PSI materials should be consistent with government policy on access to and use of PSI, but takes the view that government policy on PSI must recognise differences in the nature and purpose of material that may be regarded as PSI.
51. CAL also agrees that copyright law and management should not impede access to information, and that policies relating to access to information (such as those implemented by Freedom of



Information legislation) must be clearly distinguished from those relating to use and re-use for other purposes (such as commercial innovation).

***Recommendation 3 – Government ownership of copyright should not be relied on to justify other restrictions on access to and reuse of PSI***

52. CAL agrees that copyright should not be exercised for purposes other than those associated with the objectives of copyright. Having said that, CAL takes the view that imposing conditions on use that are intended to preserve the integrity of a work is a proper exercise of copyright. The extent to which preserving the integrity of a work forms part of PSI policy is a separate matter, but if the policy is to preserve the integrity of the work, then copyright can be used to give effect to that policy. For example, the Creative Commons No Derivative Works licence essentially does this.

***Recommendation 4 – Copyright law and management practices should facilitate complex flows of information within the public sector, between the public sector and non-government parties; and between non-government parties***

53. CAL agrees that licence terms should be clear and consistent, whether for government material or other material. CAL's view is that governments will be best able to meet their policy objectives for the use of PSI, and other material in which governments own copyright which may not be PSI, if they can adopt licence terms that reflect the nature of the material, the nature of the user and the nature of the use.
54. It is important to bear in mind that Creative Commons licences are not the only way to provide material under "open" licences. CAL questions, however, whether the solution proposed in the Project Report and in the Taskforce Report – the use of the Australian Creative Commons BY licence – is the best way for governments to meet their objectives for the use of PSI. For example, a government that wants to foster innovation by enabling use of PSI may want to require a commercial user to value-add to PSI, but none of the CC licences enable it to do so (the ShareAlike licence requires the licensees to share any value-add under a CC licence, but does not require the licensee to value-add).

***Provisions relating to public administration in the UK and New Zealand***

55. The Project Report, at pages 20–23, discusses provisions in UK and New Zealand legislation that allow certain uses of third party material. This includes material that is open to public inspection and material that is communicated to a government in the course of public business. The Project Report recommends the introduction of similar exceptions into Australian law.
56. These provisions appear to apply to both uses by the government and uses by people outside government.
57. Australian governments are already entitled to use third party material for government purposes under section 183. The UK and New Zealand provisions would not enable Australian governments to do anything with third party material that they are not already entitled to do under section 183.

58. The purpose of the recommendation, then, appears to relate to payments by the government for their use of third party material. Governments pay equitable remuneration to CAL, and to Screenrights for audiovisual material, for uses of third party material. The amount of remuneration is determined by agreement between the government and the collecting society or, in the absence of agreement, by the Copyright Tribunal. It is open to the parties to agree, and the Copyright Tribunal to determine, that certain types of material and/or certain types of uses are paid at different rates or not paid at all.
59. This issue was given some prominence by the High Court decision in *Copyright Agency Limited v State of NSW* [2008] HCA 35. This litigation was prompted by the State of NSW providing copies of surveyors' plans, for a fee, to information brokers to on-sell, and to members of the public. The case concerned copyright uses of the plans *after* they had been registered (registration being the purpose for which they had been produced by the surveyors for their clients).
60. In that case, CAL acknowledged that some uses will not result in payment of remuneration. This was noted by the High Court in *Copyright Agency Limited v State of New South Wales* [2008] HCA 35 said, at [93]:

*It is possible, as ventured in the submissions by CAL, that some uses, such as the making of a "back-up" copy of the survey plans after registration, will not attract any remuneration.*

#### ***Recommendation 8 – Include guidance on copyright law and practice in digitisation strategies***

61. CAL fully supports this recommendation, and is actively investigating ways it may be able to assist cultural institutions with their digitisation strategies.

#### ***Recommendation 9 – Clarify the meaning of “publication” in ss 33 and 34 to give certainty to the duration of copyright and avoid impracticality and set statutory limits to copyright protection for unpublished works***

62. In CAL's view, the decision of the Full Court of the Federal Court in *Copyright Agency Limited v New South Wales* [2007] FCAC 80 did not change the law in relation to whether or not a work has been published. The Court discusses the law at [128]–[131]. At [146] it says:

*However, the question is whether that is the first publication of the Relevant Plans. An artistic work is first published when it is made available to the public. Publication occurs when reproductions of the work are made available to the public. Publication occurs when a reproduction is put on offer to the public, where the person who makes the offer is prepared to supply on demand, whether or not the offer is advertised.*

63. This statement reflects the law as it stood.
64. The Court's application of the law to the facts was, in some respects, surprising, but CAL notes the explanation for this finding by David Catterns QC before the High Court in its consideration of the case (see <http://www.austlii.edu.au/au/other/HCATrans/2008/174.html>).

65. Having said this, CAL agrees that the term of protection for unpublished works should be reviewed. In its response to the Taskforce's draft report, CAL said, at [38]:

*CAL agrees that the rationale for this provision should be reviewed. We note that section 52 of the Copyright Act allows publication of old unpublished works held in cultural institutions and in libraries and archives. The definition of "archives" in section 10(4) of the Copyright Act covers collections of documents and other materials "of historical significance or public interest", and would thus cover collections held by government departments and agencies as well as the Australian Archives collection. It is arguable, but not entirely clear, that section 52 allows online publication of old unpublished works held in cultural institutions, libraries and archives.*

66. CAL is very willing to discuss this issue further with cultural institutions and the government.

### ***Recommendation 10 – Develop guidance on “special cases” and uses permitted under s 200AB***

67. There are already a number of practical guides to the application of s 200AB. These include:

- *A User's Guide to the Flexible Dealing Provision for Libraries, Educational Institutions and Cultural Institutions*, published by the Australian Libraries Copyright Committee (ALCC) and the Australian Digital Alliance (ADA), available from <http://www.digital.org.au/news.htm#FDH>;
- *Flexible Dealing*, published by the Copyright Advisory Group, Ministerial Council for Education, Early Childhood Development and Youth Affairs (MCEECDYA), available at <http://www.smartcopying.edu.au/scw/go/pid/542>;
- Information on the Australian Copyright Council's website at <http://www.copyright.org.au/wp0030> and on its Q&A webpages; and
- *Special case exception: education, libraries, collections*, published by Australian Copyright Council .

68. There is a high level of consistency in these three guides about when, in practice, s 200AB applies.

69. In addition, research into the application of s 200AB to cultural institutions was conducted by Dr Andrew Christie as part of the Centre for Communication Law's Linkage Project, *Cultural Collections, Creators and Copyright: Museums, Galleries, Libraries and Archives and Australia's Digital Heritage* (see [www.law.unimelb.edu.au/cmcl/projects/cultural%20collections.html](http://www.law.unimelb.edu.au/cmcl/projects/cultural%20collections.html)).

### ***Recommendation 11 – Ensure access to legal advice and guidance about copyright law and practice***

70. In CAL's experience, the Attorney-General's Department has extensive knowledge about copyright law and its application in practice. Vesting the Attorney-General's Department with responsibility for providing advice and guidance about copyright law and practice means expert and consistent advice and guidance; it does not mean that departments have no say in the terms of use, including pricing, for their information products. Ensuring centralised, expert advice means that departments can be better, and consistently, informed about licensing options,

including the implications of various approaches to open licences. For example, it is important that government departments considering using Creative Commons licences understand that those licences are irrevocable, as this appears to be a feature of the licences that is commonly misunderstood. It is also important that government departments know that there are different options for open licensing, and that different approaches can be adopted, depending on factors such as the type of material and how the government may want different people to use it.

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