The Role of Content and Public Sector Information in the National Broadband Network

submission of the
ARC Centre of Excellence for Creative Industries and Innovation
Legal Research Program
Queensland University of Technology

to the
Senate Select Committee on the National Broadband Network

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This submission addresses issues relating to the following investigation topics as outlined in the Committee's Terms of Reference:

(a) any economic and cost/benefit analysis underpinning the NBN;

(h) any technical, economic, commercial, regulatory, social or other barriers that may impede attaining the Government's stated goal for broadband availability and performance in the specified timeframe;

(i) the appropriate public policy goals for communications in Australia and the nature of any necessary regulatory settings to continue to develop competitive market conditions, improved services, lower prices and innovation.

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Introduction

Much of the public debate relating to the National Broadband Network to date has focused on issues of infrastructure and technology. However, infrastructure alone is not enough to turn Australia into a world leader in the digital economy. A comprehensive national broadband development plan must include strategies to deliver content and services that will enable people to make full use of the new tools available to them. Without sufficient content, a digital pipe is just a pipe.

This submission focuses on the importance of content services and delivery to the National Broadband Network strategy, and in particular the role copyright and information management policy can play as either an enabler or a barrier to the innovation, cultural and economic benefits that a world-class communications infrastructure could provide.

I. The role of public sector information in encouraging innovation

A fundamental part of the broadband revolution and the benefits it provides to society is the way in which it is re-shaping content handling and creation. Advances in information and communication technologies have brought about a revolution in the way information is collected and generated, shared and distributed. As a result, linear models of knowledge and cultural production and commercialisation are rapidly being supplanted by more distributed, collaborative, user-generated and open networking models. An ability to access and reuse knowledge, data, content and culture (especially that which is digitised) is nowadays a key factor in finding new ways of doing things for social, cultural and economic purposes.

In this environment, the ability to remix, reuse and recycle digital content is integral to education, innovation and creation. Yet Australians have great difficulty gaining access to quality online content about their own society, culture and history. Unlike countries such as the US and UK, which have led the digital revolution and dominate online content, it is very difficult to locate Australian-specific broadband content that can be legally and safely viewed and re-used. This presents a significant barrier to achieving the full benefits that a National Broadband Network could bring.

Public Sector Information (PSI) – that is, information that is created, owned or held by the government - has the capacity to address this gap. Government organisations such as the Australian Bureau of Statistics (ABS), the Bureau of Meteorology and the CSIRO hold huge resources of data and information that could provide the seed for innovation and economic growth in Australian businesses. At the same time, cultural institutions such as the ABC, SBS, the National Film and Sound Archive (NFSA) and the National Library of Australia (NLA) create and preserve large quantities of Australian creative content, much of which is funded and owned by the government, or has fallen into the public domain.

While noting that considerable progress in making PSI accessible has recently been made by agencies including the ABS,[1] in general Australian governments have yet to grasp the

[1] The Australian Bureau of Statistics has made all material on their website available for reuse by Australian businesses and consumers under a Creative Commons Attribution 2.5 Australia licence.

potential of web 2.0 digital technologies, and the importance of open access to information in utilising these technologies. The value of using web 2.0 technologies in combination with publicly available information was demonstrated during the February 2009 Victorian bushfires when, without delay, Google uploaded Country Fire Authority data into Google Maps to deliver online, real-time mapping of the location and intensity of the fires. However, this same event demonstrated the barriers that outdated information management policies can present to collaboration and innovation, with Google experiencing such difficulty obtaining permission to use other government data that it was not incorporated into the resource.[2]

Furthermore, there is an increasing view that an open information policy, which takes full advantage of web 2.0 for generating and distributing content, is an essential part of modern and responsible governance. For example, in the US, immediately upon coming to office in January 2009, President Obama issued a Directive encouraging transparency in government and instructing US government agencies to err on the side of making information public.[3] This directive is one of the key features of President Obama's technology policy, which aims to create "a transparent and connected democracy" with the following objectives:

- **Open Up Government to its Citizens:** Use cutting-edge technologies to create a new level of transparency, accountability, and participation for America's citizens.

- **Bring Government into the 21st Century:** Use technology to reform government and improve the exchange of information between the federal government and citizens while ensuring the security of our networks.[4]

There is a broad consensus across the world that for the full benefits of Web 2.0 technologies to be realised the default rule should be that publicly funded knowledge, data, content and culture should be available for open access. If the government wants the National Broadband Network to provide its full economic and cultural benefits, it must provide content and services that will allow the Australian public to take advantage of the tools it provides. By making resources that are funded and owned by the Australian people available for access and reuse on equitable terms, the government will vastly increase the capacity for Australian business, educators and consumers to make the most of the technological capacity of the new broadband network.

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http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/%C2%A9+Copyright?opendocument?utm_id=GB. For a full explanation of the ABS's licensing decision, see Australia Bureau of Statistics, *Informing the Nation - Open Access to Statistical Information in Australia* (2009-06-29) written as a submission to the Conference of European Statisticians run by the United Nations Statistical Commission and the Economic Commission for Europe (http://www.unece.org/stats/documents/ece/ces/ge.45/2009/wp.11.e.pdf).

[2] For a description of the bushfire-tracking service on Google Maps, see http://www.zdnet.com.au/news/software/soa/Google-map-tracks-deadly-bushfires-in-Victoria/0,130061733,339294842,00.htm. For comment, see Nicholas Gruen, *Copyright, exclusive ownership, Web 2.0 and fighting bushfires*, The Age, 14 February 2009; also posted at Club Troppo at http://clubtroppo.com.au/2009/02/13/copyright-exclusive-ownership-web-20-and-fighting-bushfires/

[3] Barack Obama, *Transparency and Open Government*, Memorandum for the Heads of Executive and Agencies, Office of the Press Secretary, The White House, 21 January 2009, http://s3.amazonaws.com/propublica/assets/docs/transparencymemo.pdf.

[4] See the Technology Policy on the White House web site at http://www.whitehouse.gov/agenda/technology/.

II. Economic and social benefits of open access to PSI

Economic research has highlighted the importance of information flows and the availability of information for access and reuse to national economic development. Information is crucial to the efficiency of markets, with enhanced information flows promoting creativity, innovation and productivity. There is a rapidly expanding body of literature which supports the economic and social benefits of enabling access to and reuse of public sector information.[5] (Note that a substantial research project associated with QUT's Intellectual Property: Knowledge, Culture and Economy (IPKCE) Research Program is engaged in a comprehensive study and analysis of the literature on the economics of access to PSI.)

There is now broad consensus internationally on the important role governments can play in fostering this flow by ensuring that PSI can be accessed, used and reused. This is increasingly apparent in policy documents and practical initiatives worldwide; notably, the OECD's 2008 Seoul Declaration on the Future of the Internet Economy and supporting policy framework,[6] the 2003 European Council and European Union's Directive on the Re-use of Public Sector Information,[7] and the 2007 UK Power of Information Review.[8] This consensus is also supported by submissions to the 2008 Review of the National Innovation System, several of which raised the importance of improving the Australian environment for accessing and reusing PSI.[9]

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[5] Note in particular: Houghton, J., Steele, C. and Sheehan, P., *Research Communication Costs in Australia: Emerging Opportunities and Benefits.* DEST. 2006, at http://dest.gov.au/NR/rdonlyres/0ACB271F-EA7D-4FAFB3F7-0381F441B175/13935/DEST_Research_Communications_Cost_Report_Sept2006.pdf. Houghton, Steele and Sheehan concluded in their 2006 report that open access models of scholarly communication have the potential to increase the economic and social returns from public investment in R&D. See also Newbery, D, et al., *Models of public sector information provision via trading funds*, Department for Business, Enterprise and Regulatory Reform and HM Treasury, London, 2008, at http://www.opsi.gov.uk/advice/poi/models-psi-via-trading-funds.pdf. See also Kirsti Nilsen, *Economic Theory as it Applies to Statistics Canada: A Review of the Literature*, Submitted to Statistics Canada, 7 May 2007, pp iii – iv, at http://www.chass.utoronto.ca/datalib/misc/Nilsen%20Economics%20Paper%202007%20final%20version.pdf, accessed on 22 December 2008. See also, presentations at OECD Working Party on the Information Economy workshop on public sector information, *The Socioeconomic Effects of Public Sector Information on Digital Networks: Toward a Better Understanding of Different Access and Reuse Policies*, Paris, 4-5 February 2008, available at http://www.oecd.org/document/48/0,3343,en_2649_34223_40046832_1_1_1_1,00.html .

[6] OECD (2008) The Seoul Declaration for the Future of the Internet Economy and the shaping policies for the future of the internet economy, noting in particular the annexed including the Recommendation concerning Access to Research Data from Public Funding and the Recommendation for Enhanced Access and More Effective Use of Public Sector Information, available at http://www.oecd.org/site/0,3407,en_21571361_38415463_1_1_1_1_1,00.html.

[7] European Council and European Parliament Directive on the Re-use of Public Sector Information (2003) available on the European Commission's website at http://ec.europa.eu/information_society/policy/psi/library/index_en.htm#Key_documents_(PDF_files).

[8] The Power of Information: an independent review by Ed Mayo and Tom Steinberg (2007), commissioned by the Cabinet Office, UK Government, available at http://www.opsi.gov.uk/advice/poi/index, http://www.cabinetoffice.gov.uk/newsroom/news_releases/2007/070607_power.aspx and http://www.cabinetoffice.gov.uk/reports/power_of_information.aspx.

[9] See, for example, Submission no. 307, Australian Spatial Consortium at p. 1, http://www.innovation.gov.au/innovationreview/Documents/307-Australian_Spatial_Consortium.pdf, and Submission 428, Brian Fitzgerald, http://www.innovation.gov.au/innovationreview/Documents/428-Brian_Fitzgerald.pdf.

In Australia, however, the current situation with respect to PSI access and reuse is fragmented and lacks a coherent policy foundation. This lack of coordination exists both in terms of interactions within or among the different levels of local, State/Territory and Federal government, and interactions between the government, academic and private sectors.

The issue of information access and reuse has been considered by various government agencies and in reports commissioned by governments over the last 15 years. Most relevant are the findings of the Queensland Government's *Government Information Licensing Framework*[10] and the recent report of the Victorian Government's Economic Development and Infrastructure Committee's *Inquiry into Improving Access to Victorian Public Sector Information and Data*,[11] both of which have recommended the adoption of open content licensing (such as Creative Commons) as the default licensing principle for their government agencies.[12] A number of implementation projects have also been undertaken. Among the most prominent are the ABS, Geoscience Australia, the Department of Education (DEWWR), the Department of Innovation, Industry, Science and Research (DIISR) and AGIMO. However, these initiatives have generally been limited to specific information domains (eg, the results of publicly funded research, either in the form of publications or data; patent specifications; statistical data; and spatial information) and have not been extended to a standardised policy.

While initiatives such as these provide evidence of a growing awareness of the importance of ensuring access to and reuse of PSI in a web 2.0 environment, they remain fragmented and involve relatively few Government departments and agencies. No comprehensive statement of policy, principle or practice relating to information flows has yet been developed by any tier of Australian government or for any information sector.[13]

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[10] http://www.gilf.gov.au

[11] http://www.parliament.vic.gov.au/edic/inquiries/access_to_PSI/

[12] Queensland Spatial Information Council (QSIC), Government Information Licensing Framework (GILF) project http://www.qsic.qld.gov.au/QSIC/QSIC.nsf/CPByUNID/6C31063F945CD93B4A257096000CBA1A.
CC Australia blog – "The Australian census goes CC": http://www.creativecommons.org.au/node/207; CC blog – "Australia's census going CC BY": http://creativecommons.org/weblog/entry/11313; "Creative Commons licensing is coming to the ABS!": http://www.abs.gov.au/websitedbs/D3310114.NSF/4a256353001af3ed4b2562bb00121564/8b2bdbc1d45a10b1ca25751d000d9b03!OpenDocument; ePSIplus: http://www.epsiplus.net/news/abs_sets_an_example; ABS Copyright notice: http://www.abs.gov.au/websitedbs/D3310114.nsf/home/%C2%A9%20Copyright; Dylan Bushell-Embling, "Private eyes on public data", *The Age* and *The Sydney Morning Herald*, 25 September 2008, available at http://www.theage.com.au/news/technology/private-eyes-on-publicdata/2007/09/24/1190486224755.html?page=fullpage and http://www.smh.com.au/news/technology/private-eyes-onpublic-data/2007/09/24/1190486224755.html?page=fullpage accessed on 27 August 2008.

[13] There has been little policy advancement by Australia's Federal Government on the matter of access to government information since the Office of Spatial Data Management's (OSDM) Policy on Spatial Data Access and Pricing in 2001. See Australian Government Office of Spatial Data Management, Spatial Data Access and Pricing (webpage) http://www.osdm.gov.au/OSDM/Policies+and+Guidelines/Spatial+Data+Access+and+Pricing/default.aspx and Australian Government Geoscience Australia, Commonwealth Spatial Data Policy Executive – incorporating Office of Spatial Data Management (webpage) http://www.ga.gov.au/nmd/asdi/osdm.jsp. See also the report of the Commonwealth Interdepartmental Committee on Spatial Data Access and Pricing (June 2001) A Proposal for a Commonwealth Policy on Spatial Data Access and Pricing, p2, available at http://www.osdm.gov.au/osdm/policy/accessPricing/SDAP.pdf. See Professor Anne Fitzgerald (2008, ongoing) Policies and Principles on Access To and Reuse of Public Sector Information: a review of the literature in

The establishment of such a national information policy was a key recommendation of the *Venturous Australia* report of the Review of the National Innovation System.[14] Of particular significance are the Innovation Review recommendations 7.7 and 7.14:

> **Recommendation 7.7:** Australia should establish a National Information Strategy to optimise the flow of information in the Australian economy.
>
> The fundamental aim of a National Information Strategy should be to:
>
> - utilise the principles of targeted transparency and the development of auditable standards to maximise the flow of information in private markets about product quality; and
>
> - maximise the flow of government generated information, research, and content for the benefit of users (including private sector resellers of information).
>
> **Recommendation 7.14:** To the maximum extent practicable, information, research and content funded by Australian governments – including national collections – should be made freely available over the internet as part of the global public commons. This should be done whilst the Australian Government encourages other countries to reciprocate by making their own contributions to the global digital pubic commons.

For reasons which have yet to be fully understood, Australia has largely failed to engage with the formulation of policies and principles for access to PSI that have taken place at the national (UK, US, NZ), regional (EU) and the international levels (UNESCO, OECD) over the last decade. At the international level in particular, the Australian government appears not to have played a significant role (via participation in working groups) formed by a range of international organisations (notably UNESCO, OECD and ICSU/CODATA) to advance the policy framework for access to PSI.[15] While there have been a number of occasions during the last 10 years when the opportunity arose to address the issue of access to and reuse of government information, these were either not recognised or acted upon.[16]

The National Broadband Network provides a new opportunity for Australia to establish itself as a leader rather than a follower on PSI management and dissemination. When the extent and significance of developments internationally is appreciated, it is apparent that

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Australia and selected jurisdictions, Chapter 1: Australia, esp. at pp. 10-12 and 41-50, available at http://eprints.qut.edu.au/15649/. The Australian position can be contrasted with that in New Zealand, where the government published its national information policy in 1997.

[14] *Venturous Australia: building strength in innovation* (Cutler and Co, August 2008) http://www.innovation.gov.au/innovationreview/Documents/NIS_review_Web3.pdf

[15] Australia only rejoined CODATA, one of the leading international organisations concerned with science data, in 2008 after our membership lapsed many years earlier

[16] It may be of assistance to the department to consider the research undertaken by Professor Anne Fitzgerald on access policies, principles and practices in Australia and internationally, which has been made available in the form of an annotated literature review that is being progressively published and updated at the auPSI website - Professor Anne Fitzgerald (2008, ongoing) *Policies and Principles on Access To and Reuse of Public Sector Information: a review of the literature in Australia and selected jurisdictions*, available at http://www.aupsi.org/publications/reports.jsp; Chapter 1: Australia and Chapter 2: New Zealand available at http://eprints.qut.edu.au/15649/; Chapter 6: Canada available at http://eprints.qut.edu.au/17067/.

Australia needs to work towards a more coordinated policy to facilitate better access to and reuse of PSI. The full economic, cultural and environmental value of information produced or funded by the public sector can only be realised through enabling greater access to and reuse of the information.[17]

Recommendation

We therefore recommend that Australia develop a national information policy along the lines envisaged by Paul Uhlir in his 2004 report for UNESCO, *Policy Guidelines for the Development and Promotion of Governmental Public Domain Information.*[18] Uhlir highlights the need for governments to:

- consider what information is to be made publicly available (with open access as the default);
- develop legal frameworks that provide not only for freedom of information (FOI) but also encompass a positive right of access to PSI: and
- develop a comprehensive national Information Policy Framework and detailed plans for implementation of the guiding policy, including strategies on information systems and information technology management.[19]

In addition, Australia's Information Policy Framework for the management and active dissemination of PSI should have the following characteristics:

- it should be comprehensive and integrated, although individual consideration may be required for specific areas or sectors with special information objectives and implementation requirements (such as health, environment, energy, transportation, finance and defence);
- consistency, accessibility and clarity should be major goals. Using a proven standardised legal framework such as the Creative Commons licensing suite,[20] or a similar standardised suite created by the government itself, will provide legal certainty and ensure that ordinary Australians are readily able to understand their rights and obligations with respect to the material they are accessing, maximising its usability and usefulness.
- following the examples of the Obama administration[21] and the Australian Bureau of Statistics,[22] government material should by default be made

[17] Professor Anne Fitzgerald (2008, ongoing) *Policies and Principles on Access To and Reuse of Public Sector Information: a review of the literature in Australia and selected jurisdictions,* Chapter 1: Australia, p. 8, available at http://eprints.qut.edu.au/15649/.

[18] For details, see UNESCO at http://portal.unesco.org/ci/en/ev.php-URL_ID=15862&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[19] Paul Uhlir, *Policy Guidelines for the Development and Promotion of Governmental Public Domain Information*, UNESCO, Paris, 2004, at pp vi - vii

[20] http://creativecommons.org

[21] http://www.whitehouse.gov/copyright/

[22] http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/%C2%A9+Copyright?opendocument?utm_id=GB. For a full explanation of the ABS's licensing decision, see Australia Bureau of Statistics, *Informing the Nation* -

available under a licence which permits the adaptation and remixing of the material for commercial purposes (such as the Creative Commons Attribution licence[23]). Any limitations on commercial or transformative use will, by their very nature, undermine the goals of using PSI to spur innovation and economic growth.

- Include an implementation plan which incorporates guidelines and toolkits (similar to those developed by the Open Access to Knowledge (OAK) Law project in relation to research publications and data).[24]
- in addition to dealing with government created and owned material, the policy should deal with the question of copyright ownership of, and users rights in relation to, materials such as survey plans which are produced by non-government parties but are provided to government to enable certain fundamentally governmental functions to be carried out.[25]

As recommended by the *Venturous Australia* report,[26] it would be advantageous for Australia in formulating its policy to have regard to the approaches taken over recent years in other countries and in international organisations.[27]

Open Access to Statistical Information in Australia (2009-06-29) written as a submission to the Conference of European Statisticians run by the United Nations Statistical Commission and the Economic Commission for Europe (http://www.unece.org/stats/documents/ece/ces/ge.45/2009/wp.11.e.pdf).

[23] http://creativecommons.org/licenses/by/2.5/au/

[24] For a list of OAK Law project publications, see http://www.oaklaw.qut.edu.au/reports.

[25] Of particular relevance here is the High Court's decision in Copyright Agency Ltd v The State of New South Wales [2008] HCA 35 at http://www.austlii.edu.au/au/cases/cth/HCA/2008/35.html.

[26] Recommendation 7.8 "Australian governments should adopt international standards of open publishing as far as possible. Material released for public information by Australian governments should be released under a creative commons licence." Venturous Australia: building strength in innovation (Cutler and Co, August 2008) http://www.innovation.gov.au/innovationreview/Documents/NIS_review_Web3.pdf. For more on the application of Creative Commons licences to data and PSI, see generally: Submission 428, Brian Fitzgerald at p. 8, http://www.innovation.gov.au/innovationreview/Documents/428-Brian_Fitzgerald.pdf; Fitzgerald, Fitzgerald, Middleton, Lim and Beale, *Internet and E Commerce Law* (2007) LBC/Thomson Sydney at 260-269 and references contained therein; Australian Productivity Commission, *Cost Recovery by Government Agencies Report* (2001) 24, 167, 171-2, http://www.pc.gov.au; Professor David Newbery, Professor Lionel Bently, and Rufus Pollock, *Models of Public Sector Information Provision via Trading Funds*, Cambridge University, February 26, 2008; B Fitzgerald, J Coates and S Lewis (editors) *Open Content Licensing: Cultivating the Creative Commons*, (2007) Sydney University Press, Sydney; E. Bledsoe, J. Coates and B Fitzgerald, *Unlocking the Potential Through Creative Commons: an industry engagement and action agenda*, (2007) ARC Centre of Creative Industries and Innovation, August 2007, http://creativecommons.org.au/unlockingthepotential; D. Bushell-Embling, "Private Eyes on Public Data" *Sydney Morning Herald* (25.09.07) http://www.smh.com.au/news/technology/private-eyes-on-public-data/2007/09/24/1190486224755.html?page=fullpage; Queensland Spatial Information Council, *Government Information and Open Content Licensing: An Access and Use Strategy* (2006) http://www.qsic.qld.gov.au/QSIC/QSIC.nsf/0/F82522D9F23F6F1C4A2572EA007D57A6/$FILE/Stage%202%20Final%20Report%20-%20PDF%20Format.pdf?openelement; M van Eechoud and B van der Wal, *Creative Commons Licensing for Public Sector Information: Opportunities and Pitfalls* (2007) http://www.ivir.nl/creativecommons/index-en.html.

[27] Of particular relevance are developments in Europe (with a particular focus on the UK), the United States and New Zealand, as well as in entities that form part of the United Nations system, inter-governmental organisations and international (non-government) organisations. The range of materials to be considered would

III. Access to Australia's archives

Of equal importance to the issue of public access to PSI, but often neglected in debates surrounding innovation and market development, is the question of access to and use of creative material owned by and stored within public archives.

The internet, digital recording devices and the ready availability of content production software have together drastically changed the creative landscape, making it easy for anyone, from every-day bedroom experimenters to professionals, to find and reuse content. As a result, remixing, recycling and online distribution are integral to the digital environment's creative capacity, and to the economic, educational and cultural benefits that it brings. As the *Venturous Australia* report noted:

> National collections are essential resources for researchers in all fields, from basic scientific research to the social sciences, humanities and creative arts. They play a vital role for educators (from pre-school to postgraduate) and for the broader community in building scientific, historical and artistic knowledge and literacy and in fostering cultural knowledge, identity and cohesion. Importantly, Australia has a number of unique and valuable assets, including marine, flora and fauna resources and indigenous collections that allow us to draw on the distinctive features of the Aboriginal and Torres Strait Islander traditional knowledge systems.[28]

Australia's cultural archives hold large quantities of Australian creative content, much of which is owned by the government or has fallen into the public domain. With only a minimum effort and cost, this material could be released for public reuse, creating a safe, accessible and legal resource for Australian educators, researchers and private citizens to explore the creative potential of Web 2.0. Over the last decade, a number of cultural institutions have undertaken small initiatives aimed at testing the viability of releasing material for reuse online. The ABC remix site, Pool,[29] the Powerhouse Museum[30] and the NFSA's Australian Screen Online[31] have all experimented with providing increased access to works from their collections, as have Film Australia[32] and the NLA[33] through their Zero-Fee Licensing and Click and Flick initiatives.

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include: the EU Directives on Re-use of Public Sector Information (2003) and the Directive establishing an Infrastructure for Spatial Information (INSPIRE) (2007); the US Office of Management and Budget (OMB) Circular A-130 (2000); the OECD Seoul Declaration on the Future of the Internet Economy (2008), including the Recommendation concerning Access to Research Data from Public Funding and the Recommendation for Enhanced Access and More Effective Use of Public Sector Information; and the work of international organisations such as the International Council for Science (ICSU), and its specialist science data committee CODATA, and international scientific collaborations such as the Scientific Committee on Antarctic Research (SCAR) operating under the Antarctic Treaty system. .

[28] *Venturous Australia: building strength in innovation* (Cutler and Co, August 2008) pp 97-98 http://www.innovation.gov.au/innovationreview/Documents/NIS_review_Web3.pdf .

[29] http://www.pool.org.au/genepool

[30] http://www.powerhousemuseum.com/commons

[31] http://australianscreen.com.au/

[32] http://www.filmaust.com.au/library/

[33] http://www.pictureaustralia.gov.au/contribute/individual.html

However, to date strict copyright laws, lack of funding and little policy support from above has led to an overall culture of static archiving practices, which focus on preservation but not access or use. As a result, the vast majority of Australia's 'public domain' remains locked in warehouses, searchable and retrievable only by staff librarians, making little or no contribution to Australia's cultural and economic growth. After all, people cannot seek to license, build upon or add value to material they do not know exists.

Allowing the Australian public to share, repurpose, remix and reinterpret government owned and public domain content held within our cultural institutions would stimulate Australia's creative economy and cultural identity by:

- increasing the reach and impact of Australian cultural content;
- providing a pool of 'safe' material that can be readily accessed and used by teachers and parents seeking to engage children and provide them with the skills necessary for the digital age, without risk of encountering inappropriate or illegal content;
- promoting growth and fostering innovation and skills development in the film, music, art and journalism industries, to name only a few;
- encouraging public research and life-long learning by increasing resources and information;
- assisting with the preservation of our cultural heritage by ensuring material that would otherwise deteriorate and become unusable remains accessible for future generations;
- driving growth in surrounding markets such as broadband deployment, digital technology and e-commerce; and
- promoting awareness and appreciation of the role of Australia's cultural institutions and making more effective use of the tax dollars devoted to them.

Furthermore, there is increasing evidence that opening access to government-owned and public domain material in our national collections can provide tangible promotional, collection management and economic benefits to the archives themselves. For example, when the Powerhouse Museum released over 1000 of its public domain photographs in 2008 as part of the Flickr Commons project[34] the view-rate for the material increased 20 fold over the first year, with more than 5,000 views in first day alone. At the same time, innumerable tags were added to the released photos, with several unidentified locations and persons named by members of the public. This information and the tags were then able to be integrated into museum's own metadata.[35] Most relevantly, the PHM has seen sales of the publicly available material stay steady or even increase since its release, and has seen several formal partnerships develop as a result of the project.[36]

[34] http://www.flickr.com/commons
[35] http://www.powerhousemuseum.com/dmsblog/index.php/2008/05/06/commons-on-flickr-one-month-later/
[36] See *Open Licensing and the Future for Collections*, Paula Bray, Manager Image Services, Powerhouse Museum, Sydney, Australia http://www.archimuse.com/mw2009/papers/bray/bray.html

Recommendation

We strongly endorse the *Venturous Australia* recommendation 7.14 (discussed above) that appropriate material from Australia's archives be released into the 'global public commons.'[37] We propose that this recommendation form the basis of a sector-wide policy, backed by implementation guidelines and funding initiatives, to make public domain and government-owned content which is current locked within in our national institutions available for viewing and reuse by the public.

IV. Ensuring Australia's copyright regulation enables the digital economy

To ensure that the full potential of the National Broadband Network is met, it is vital that Australia's copyright regime be reformed to better enable the free-flow of information and content. For too many years Australian copyright law has been out of step with technological developments and the reasonable expectations of ordinary Australians. Legislative amendments over the last decade, such as those introduced by the *US Free Trade Agreement Implementation Act 2004* and the *Copyright Amendment Act 2006*, only served to widen the gap between ordinary consumer behaviour and the operation of Australian copyright law. As a result, the careful balance between the rights of copyright owners and users has been tipped sharply in favour of owners.

As the Labor Party noted in its dissenting report for the Senate Committee for Legal and Constitutional Affairs *Inquiry on Provisions of the Copyright Amendment Bill 2006*, recent amendments have created "difficulties from the perspectives of both copyright holders and consumers... [and do] not solve the fundamental and ongoing problem of Australian copyright law's inability to recognise rapid changes in technology and the use of new technology by consumers". Furthermore, they have done little to address a number of fundamental inequities within our law, such as the fact that content funded by the public purse is not available for public use, or the fact that a use that is permissible if it is humorous or satirical will be illegal if it is for the purpose of serious political, social or artistic commentary. As a result, Australian citizens are at a significant disadvantage to their peers in the United States where the broad 'fair use' doctrine allows the law to adapt more flexibly, ensuring that innovative and unanticipated uses of copyright material by ordinary consumers will be permitted as long as they remain 'fair' to the copyright owner.

This lack of protection for evolving consumer behaviour, combined with a lack of clarity in our laws relating to the liability of intermediaries for actions taken by their users, creates a significant disincentive for businesses to invest in innovative or state-of-the-art content services. Many intermediaries – including universities and content service providers such as Google - are left out of the legislative safe harbour scheme designed to protect online service providers from being held liable for actions undertaken by their users.[38] Coupled with strict liability offences introduced by the *Copyright Amendment Act*

[37] *Venturous Australia: building strength in innovation* (Cutler and Co, August 2008) http://www.innovation.gov.au/innovationreview/Documents/NIS_review_Web3.pdf
[38] *Copyright Act 1968* ss116AA-AJ

2006, this means that common activities undertaken by intermediaries and their users in the digital environment will, in many cases, leave a business vulnerable for civil and criminal liability.[39]

Most importantly, the current disconnect between legal standards, consumer expectations and technological requirements fosters public disregard for the law and, as a result, promotes copyright infringement. To quote the Hon Ms Roxon MP, "if the laws are out of touch with personal practice then they do end up being treated with contempt and they do not encourage the purchase of legitimate materials and their lawful use".[40]

Recommendation

Legislative reforms that would go a long way to restoring the balance in Australian copyright law and encouraging the full exploitation of the National Broadband Network include:

1. clear rights for consumers to reuse copyright material in circumstances where the use is 'fair';
2. new exceptions that permit transformative uses of copyright material, such as in works of art or as part of political commentary;
3. expansion of the current carriage service provider safe harbour provisions to include content service providers and other digital intermediaries;
4. rights for Australians to reuse Crown copyright and publicly funded research material for, at a minimum, non-commercial purposes;
5. legislative clarification that fundamental user rights such as the fair dealing and library and archive provisions cannot be over-ruled by private contract;
6. reform of the *Copyright Act*'s criminal provisions at the very least to the point of limiting the disproportionate penalties that apply to ordinary consumer behaviour;
7. the extension of the current scheme for the compulsory deposit of all printed publications with the relevant national or state institutions to include audiovisual and electronic materials;
8. the introduction of a scheme to allow for the reasonable use of 'orphaned works' i.e. works for which permissions cannot be obtained because the author is either unidentifiable or untraceable; and
9. clarification of the application of the fair dealing exception for research and study to the publication of material online.[41]

[39] See further Gething, S. and Fitzgerald, B. "The Criminalisation of Copyright Law: Where Do Intermediaries Stand?" (forthcoming). For more information contact Steven Gething or Brian Fitzgerald at Queensland University of Technology.
[40] Hansard (House of Representatives, 1 November 2006).
[41] See generally: Fitzgerald et al Creating a Legal Framework for Copyright Management of Open Access within the Australian Academic and Research Sectors (2006) Chapter 6, at www.oaklaw.qut.edu.au.

Appendix A: Additional information

There is already an enormous amount of excellent work that has been undertaken on the issues raised in this submission. Some of this material has been highlighted in the footnotes. In particular, we would encourage the Committee to examine the following documents:

In relation to access to government material and PSI specifically –

Fitzgerald, A *Policies and Principles on Access To and Reuse of Public Sector Information: a review of the literature in Australia and selected jurisdictions* (2008, ongoing) http://www.aupsi.org/publications/reports.jsp; Chapter 1: Australia and Chapter 2: New Zealand available at http://eprints.qut.edu.au/15649/; Chapter 6: Canada available at http://eprints.qut.edu.au/17067/; Chapter 3: International available at http://eprints.qut.edu.au/17560/ (Note – please check http://www.aupsi.org/publications/reports.jsp for further chapters and new versions).

Queensland Government, Queensland Spatial Information Council (QSIC), Office of Economic and Statistical Research (OESR), Queensland Treasury *Government Information and Open Content Licensing: an Access and Use Strategy,* Government Information Licensing Framework (GILF) Project Stage 2 Final Report (2006) http://www.qsic.qld.gov.au/qsic/QSIC.nsf/CPByUNID/BFDC06236FADB6814A25727B0013C7EE

Fitzgerald, B, Fitzgerald, A, Middleton, G, Lim, Y and Beale, T (2007) *Internet and E Commerce Law* LBC/Thomson Sydney, at pp. 260-269 (and 191-192)

Fitzgerald, B et al *Open Content Licensing: Cultivating the Creative Commons* (2007) http://eprints.qut.edu.au/6677/, in particular the section on Government and Creative Commons, pp 67-92, which includes the chapters: Lavarch, L "The Government's Role in Supporting Creative Innovation" and Cunningham et al "Why Governments and Public Institutions Need to Understand Open Content Licensing"

Robinson, Yu, Zeller and Felten *Government Data and the Invisible Hand* (2008) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138083

In relation to open access generally –

These publications address open access to research publications and data. However, there is a large overlap between the open access to research initiative and open access to PSI, as a large percentage of the research produced by academic institutions is government-funded.

Fitzgerald, B et al *Creating a Legal Framework for Copyright Management of Open Access within the Australian Academic and Research Sectors* (2006) www.oaklaw.qut.edu.au.

Fitzgerald, A and Pappalardo, K *Building the Infrastructure for Data Access and Reuse in Collaborative Research: An Analysis of the Legal Context* (2007) http://eprints.qut.edu.au/8865/

Fitzgerald, A and Pappalardo, K *Practical Data Management: A Legal and Policy Guide* (2008) http://eprints.qut.edu.au/14923/

Pappalardo, K *Understanding Open Access in the Academic Environment: A Guide for Authors* (2008) http://eprints.qut.edu.au/14200/

In relation to copyright and other applicable laws –

Fitzgerald, B "Copyright 2010: The Future of Copyright" [2008] *European Intellectual Property Review* 43 http://eprints.qut.edu.au/archive/00013305

Fitzgerald, B, Fitzgerald, A, Middleton, G, Lim, Y and Beale, T (2007) *Internet and E Commerce Law* LBC/Thomson Sydney, in particular chapters 1, 4 and 12 on copyright reform, chapter 10 on privacy reform, chapters 7 and 8 on e-transactions and reform and chapter 13 on future directions.