ECONOMIC DEVELOPMENT AND INFRASTRUCTURE COMMITTEE

Inquiry into Improving Access to Victorian Public Sector Information and Data

Brisbane - 12 August 2008

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Professor Anne Fitzgerald, Professor of Law, Queensland University of Technology

The CHAIR—I welcome Professor Anne Fitzgerald to our inquiry this morning. Thank you for joining us. I will introduce the committee members. I am Christine Campbell. With me are Brian Tee, Marsha Thomson, David Davis, Peter Crisp and Evan Thornley. Also present are Yuki Simmonds, our research officer, and Vaughn Koops, our executive officer. As you would be fully aware, we are an all-party parliamentary committee. The evidence we are seeking today is on the Inquiry into Improving Access to Victorian Public Sector Information and Data. I would appreciate, please, if you could state your full name and business address and if you are attending in a private capacity or representing an organisation.

Prof. A FITZGERALD—Anne Maria Fitzgerald. I am a law professor at QUT, Law Faculty, 2 George Street, Brisbane 4000. I am appearing in a private capacity.

The CHAIR—Thank you. When your evidence is given, it is being taken down and will become public evidence in due course. Because of the nature of this inquiry, you would probably be very pleased that it will be put up on the internet. Could you please make a verbal submission and then members will have the opportunity to ask probably one question each, depending on the length of the questions and the length of the answers.

Prof. A FITZGERALD—I have come today prepared to answer questions and to perhaps do a bit of an explanation about particularly copyright—how it operates or should operate or can operate in this context. My own background is as an intellectual property law teacher. I have taught intellectual property every year since 1991. I first studied it in 1988. My professional career has actually spanned the development of digital technologies. My own area of expertise is IP in relation to digital technologies, particularly copyright and patent law. I have researched and written in the area of internet e-commerce law since the beginning of the internet. I guess you could say I am pretty much across all of these areas.

I have also worked as a government lawyer. In fact, in addition to my current role at QUT I am also an adviser to our Department of Natural Resources and Water. One of the issues that I have actually looked at for a considerable period of time and have certainly actively been engaged with since around 2003 is the issue of how copyright should or does apply to materials that are held by government, either government generated materials or materials such as survey plans that are produced to government by other parties, often under legislative requirements or as part of public sector administration.

Before I actually embark on addressing issues in the report, I want to point out to you that I think this is quite an ambitious inquiry. Your researchers, Dr Koops and Yuki Simmonds, have obviously done an amazing job of putting this issues paper together in a relatively short period of time and quite accurately identifying issues that need to be addressed. There are some things in the paper which I think are a little bit underdone but, given the time and the enormous nature of what you are actually looking at, I think that can probably be overlooked and perhaps some of those issues are the kinds of things that the people who will appear before you today will be addressing.

I would like to put this in context. Remember, I am a lawyer. I am not a technology person or an economist. I can go a little in either direction, but largely I am talking about law. I have actually been involved in law relating to digital technologies for a fairly long time. Peter Coroneos, who is the head of the Internet Industry Association, was actually one of my students at the University of Tasmania and set up one of the early teaching web sites with teams of students doing HTML code for our Australian Intellectual Property Law Locus, which Peter has archived somewhere. It is an internet artefact now.

I guess I have been around this area for long enough to actually have a sense as to where things are going. My business is to see where the technology is going with enough of an idea so that I can actually understand where we have to take the law. My brother and I have been at the forefront of following the legal responses to developments in technology and business in relation to the internet in general for the last 12 or 13 years—since about 1995.

Just two weeks ago I was at the Spatially Enabled Government Conference in Canberra and

saw representatives largely from public sector across Australia getting up and describing the kinds of web interfaces that they are actually spending a lot of money in developing, specifically in relation to making access to spatial information. The question that immediately comes to my mind is: why now, with the technology that we have, and why, in the era of Google Earth and Microsoft Virtual Earth and programs like that, would you actually bother doing all of this as a government operation? Why would you actually do it as a way of government making money when in fact that data that you collect—those data sets—can so readily just be put up on the web?

Just take an example of the Washington DC site in the United States. They have a young mayor there. He is in his late thirties. He is a guy of the internet era. He is a lawyer but he is obviously a forward-looking person. They have actually put up 250 data sets. I am actually a lawyer; I am not a techy person, but this makes sense to me. You can download them into the file you feed into Google Earth or you can download them in an ESRI file. You can put them into the program that you already have. Throughout the United States the uptake of the use of spatial technologies not only in surveying schools but across-the-board for actually doing all kinds of research is just way ahead.

One of our research projects is through the Cooperative Research Centre for Spatial Information. At their annual conference last year we had someone actually describing American developments in the use of spatial information technology throughout the university sector. The companies that produce the software make the licences available for free through the higher education sector to get everyone using the software while they are at university. I actually saw this 10 years ago at Columbia Law School, where I did my doctoral studies. People were actually using criminal statistics data doing analyses in a spatial or locational sense. That is really well established there.

The key thing to all of that is that if someone at QUT invents a software program for three dimensional modelling to assist in urban planning, they actually need real data to feed into it. If we want to model what is going to be the impact of building a new building in the river, like our government wanted to do a short while ago—if you actually want to see what the impact is going to be of the water flows, the shadows that are going to be cast across the river et cetera—you actually want access to real-life data. Essentially, a lot of people are producing this kind of software but it needs data to make it real.

The other example that has recently been blogged about is the example of the toilets database. I do not want to go into that story. Some of you may have actually seen it. I will leave that one until later. You can ask me questions about that if you want. I am rambling on too much. What I wanted to do is bring to your attention what I think is one of the most interesting papers that I have seen recently. This is essentially a prepublication paper. It is going to be published in the *Yale Journal of Law and Technology* in fall 2008—fall in the United States.

Ms THOMSON—It is our spring.

Prof. A FITZGERALD—So it is going to be published soon. This is essentially a prepublication version that was put up on SSRN. What actually struck me is that it is written by people who are not from my usual field—lawyers—but it is well written and very easy to understand by non-techy people, by a team of pretty impressive technology specialists from Princeton University including Professor Ed Felten, who is a quite famous technical, IT person. I would like to ask your permission to read this out. This, to me, encapsulates that 'what if' question that I came back from the Spatially Enabled Government Conference with. Yes, I can see WA Landgate doing all these amazing things and, yes, I can see New South Wales doing all these amazing things, but this is all people within government creating WMS/WFS interface sites. They are actually putting all the stuff up and telling us what we need when in fact I may not need that. I may just want to actually download those data sets and plug them into my Google Earth that I have loaded up in my hand-held mobile device. I think that is the way we should really be going.

Mr THORNLEY—Is this going to cost us if we republish it in the *Hansard*?

Dr A FITZGERALD—It should not. As a copyright lawyer, I would actually say that this would probably be a fair dealing and it is only a relatively short paragraph, anyway. It states:

If the next Presidential administration really wants to embrace the potential of Internet-enabled government transparency, it should follow a counter-intuitive but ultimately compelling strategy: *reduce* the federal role in presenting important government information to citizens. Today, government bodies consider their own websites to be a higher priority than technical infrastructures that open up their data for others to use. We argue that this understanding is a mistake. It would be preferable for government to understand providing reusable data, rather than providing websites, as the core of its online publishing responsibility.

In the current Presidential cycle, all three candidates have indicated that they think the federal government could make better use of the Internet. Barack Obama's platform explicitly endorses "making government data available online in universally accessible formats." ... John McCain, although expressing excitement about the Internet, has allowed that he would like to delegate the issue, possibly to a vice-president.

...

In order for public data to benefit from the same innovation and dynamism that characterize private parties' use of the Internet, the federal government must reimagine its role as an information provider. Rather than struggling, as it currently does, to design sites that meet each end-user need, it should **focus on creating a simple, reliable and publicly accessible infrastructure that "exposes" the underlying data**. Private actors, either nonprofit or commercial, are better suited to deliver government information to citizens and can constantly create and reshape the tools individuals use to find and leverage public data. The best way to ensure that the government allows private parties to compete on equal terms in the provision of government data is to **require that federal websites themselves use the same open systems for accessing the underlying data as they make available to the public at large**.

So essentially making the data available. When we look to the future, do not fall into the trap of using the thinking that has actually developed and the theories and the analysis that have developed in a completely different information dissemination context.

I want to move on from that point. Some of the issues in this paper have in fact been dealt with relatively recently in quite a thorough way as part of the Copyright Law Review Committee's Crown copyright review, which commenced in about 2003 and reported in about 2006. The CLRC inquiry was in fact heavily influenced by and drew largely from a process that had already occurred in the UK in around 1998-99, which culminated in the publication of a white paper by the UK government in 1999. That in turn was very much influenced by representations from the United States and probably international publishing companies.

The issue of copyright in materials that government handles had actually been bubbling away in Australia for much longer. It really goes back to around the mid 1990s and specifically the issue of ownership of copyright in documents that are produced by private sector parties and given to the government such as survey plans. We have seen in the last week the High Court decision in relation to survey plans.

Essentially, that could be seen as having started off in Queensland around 1994-95. When I was on the Copyright Law Review Committee's expert advisory group when it did its major review of the copyright legislation, called the simplification review, which produced reports in 1998 and 1999, a submission was made by the Queensland Government requesting that the law in relation to Crown copyright, section 176 and on of the Copyright Act, be clarified

because there were already claims emerging from surveyors in this state that they owned copyright.

The story is really one that is too complicated and too long for me to explain to you today. It does actually need a book. We will probably write a book on this. I have been researching actively in this area for five years and I think I am only now starting to get enough of the pieces of the picture to have a fairly good understanding as to what has happened.

I would actually put it out to you in summary form by saying this. When you actually look at what you can do with public sector information you really have to make a hard decision. This is a policy decision. You have to make the decision obviously in the light of what we know about the technology and where it is likely to go.

There are essentially a couple of models that are standing up. There is the one which says that all of the government material can be obtained and made the proprietary product of a commercial company. So essentially the government puts it out and beyond perhaps charging for it to be made available in the correct format or copied you give up any ongoing rights in relation to that. You are saying to private companies from here on it is yours and we are not going to take an interest in it.

You can do what we are proposing through our writings, which is create an active public domain that goes back to the original concept of Crown copyright, which is that essentially copyright is used as an indication of identity, authenticity, integrity that something has come from government. If you want to check the authority of that—whether it is legislation or a set of instruction as to how to do this or a standard—you will go back to government. We can use copyright very much in the current era. We could go back to the original concept of copyright.

Mr DAVIS—As a marker, in effect?

Prof. A FITZGERALD—As a marker. So government copyright material largely being in the public domain. We are talking here not of a public domain, which means no rights, which would probably be anarchy, but a public domain where you are actually using copyright to actively identify that this came from a certain source.

There is another option. You can actually see this not only in Australia but particularly in the United Kingdom. There are these riders that I have to put on. I am actually not an economist but I did live in the United Kingdom prior to the Thatcher government and I have a fairly good understanding as to how the economy worked.

From 1979 on there was a huge effort to free up the public sector and to create private businesses out of entities that had actually been in the public sector. In some areas of the UK we can actually see the development of the trading trust model. This is obviously influenced by Hayekian style economic thinking about creating markets for information. As we know, Hayekian style thinking has actually been a disaster and it has been challenged in terms of the way that it applies to law.

We could actually say that we can see a misfit here in relation to creating public sector markets for information. We need to understand where this thinking comes from. It is not just part of the natural order that business is good. Why have we created an information market here? In the current era the only way that you could justify those public sector monopolies over information is if you are saying we want to really transition them out to the private sector so that we essentially create from the public sector our own private sector viable information businesses.

I think that is probably where the UK have actually been travelling to although they tend not to state it very expressly. If you have any real interaction with them I think you can see that that is what the plan had been. I think that their game has actually shifted recently with the *Power of Information* review.

So what I actually wanted to draw to your attention is that other speakers today will go through these reports with you. The UK rethinking began with the *Power of Information* review which is exactly what I have just said to you in terms of the article Ed Felten has written. We need to start thinking about how we actually provide government information in this web 2.0 environment. You can see the guardians campaign that has been going since 2006 with Michael Cross and Richard Allan, the former MP, who was out here recently. These guys have actually got this message.

Since the Mayo and Steinberg power of information review they have actually got it that they have to start thinking about providing government information in this web 2.0 environment. There are lots of these web sites around the world—in the United States and Canada. Through international organisations you can see web sites where users are actually able to download the data and put it into their own computer program. Essentially, that is the way that we are moving.

Other studies that you will have come across are the Office of Fair Trading study on the commercial use of public information and the Cambridge economic study, which came out earlier this year. We have seen a lot of developments in Australia. The factor that really is missing in our environment is that, unlike the United States, the UK or Europe, we really have not addressed this issue of access to public sector information across-the-board. At a state level we tend to have certain policies but it is not really as wide ranging or as thorough as the kind of work we have actually seen done particularly in the United States, the UK, Europe and by international organisations such as the OECD. I refer not only to the articles that were included in the Seoul Declaration but the very important supporting documents, which is the recommendation in relation to access to public sector information and the recommendation in relation to access to publicly funded research data.

In Australia, we have the Productivity Commission report in 2001 which essentially gave us the way that we should move ahead in terms of the pricing. Other people will talk about that further today. There had been activity on this since around the mid 1990s in Australia. It culminated in the OSDM, the Office of Spatial Data Management, policy which was adopted in 2001. In Australia it is the most comprehensive statement of principles about access to public sector information.

We essentially got to that point and then what happened as the next step was the CLRC inquiry. It looks as if the CLRC inquiry was meant to actually open up this issue of access to government information but it largely had one agenda. It was to remove copyright. That is where I actually want to come on. We have to understand what happened with the CLRC inquiry. How are we going for time?

The CHAIR—You have until 11 o'clock but I think it is really important that the committee members have an opportunity to ask questions.

Prof. A FITZGERALD—If I could cover very briefly what I want to say about copyright and then perhaps they can ask some questions at that point.

The CHAIR—Do you want to continue and finish and then have questions from us?

Prof. A FITZGERALD—If I could.

The CHAIR—Okay.

Prof. A FITZGERALD—I am trying to condense a lot of what we know into a very short period of time. This really does need to be handled; we need a book on it.

Two things that were touched on in the CLRC's inquiry you have covered in the discussion paper. I am not quite sure whether you are actually aware of the process following the CLRC Crown copyright report's recommendations. There was a lot of consultation particularly among the states and territories. There was a Standing Committee of Attorneys-

General meeting that discussed the issue.

A report was actually produced by the states and territories addressing each of the CLRC recommendations. Some of the things that are in your discussion paper were dealt with and considered at considerable length in the discussions held by the states and territories in the process of producing that report, which was presented to SCAG in July 2006.

The issue that you raise in chapter 3 relates to what should come within the concept of the public sector. In relation to the CLRC report it was: what should come within the scope of Crown copyright materials? So what is the Crown, what is the government, what materials should any special rules relating to the Crown or government copyright apply to was considered at length in that SCAG report. It may actually be possible for you to see the thinking that the other states and territories had at that point.

You will be aware of this—again this came up in the CLRC inquiry—because of the constitutional allocation of the powers and the fact that the Commonwealth has legislated in this area, although the power in relation to intellectual property and specifically copyright is a concurrent power, across-the-board and particularly in relation to ownership and rights. This really gives the states virtually no room to move in terms of enacting their own legislation unless someone can come up with some kind of unique constitutional argument that no state Solicitor-General has been able to come up with to date. Essentially, it does require involvement from the Commonwealth if you are really going to do anything of significance with the legislative framework.

The next area that I wanted to look at was on page 43 of the discussion paper under 5.2: 'The alternative to licensing PSI'. This issue came up in Mr Thornley's questions to Brian Fitzgerald earlier about whether government should retain copyright at all. The CLRC did in fact recommend that the special category of Crown copyright should be removed. It is correct to say that they said that government should only have copyright of the materials that are produced by its own employees. Even through that exhaustive process there was actually no significant support on the part of the Commonwealth. The Commonwealth never actually came out with an official response to the CLRC recommendations. But even the CLRC, having heard the submissions, never came up with a proposal that all government copyright be repealed although it was considered.

If you go back to the first issues paper that was put out by the CLRC as part of this inquiry they actually referred to the UK green paper of 1998 and 1999. The UK green paper had set out about seven possibilities ranging from complete repeal of government copyright through to essentially retaining the status quo and maybe tweaking it a little bit. But in the middle you had options such as working with Crown copyright but introducing standardised, more transparent, more flexible, easier licensing practices.

The 1999 white paper, having surveyed opinion across what was regarded as an appropriate range of people to consult with, found that, although the publishing lobby firmly supported the repeal of government copyright so as to put the law in the same position as the United States, in fact the significantly preferred option was to retain Crown copyright but to license, as I have just said, in a much more transparent, flexible, standardised and faster manner.

When the CLRC put out its issues paper, it unfortunately, in recounting what the options were that had been considered in the UK white paper, actually left out what was in fact the preferred option in the UK. That issues paper has been taken down from the internet. I have gone back recently to try to find a copy of it and I have not been able to find it; it is no longer there. But I can remember that I went back and checked this. It actually took some research to really tie all of these bits of the picture together, but my recollection is that the preferred way ahead in the UK was omitted in a continuum of potential ways to go. It was actually left out of the issues paper in Australia.

There were other errors: for example, you could do away with copyright but you could still protect government materials by using technological protection measures. This is an

interesting theory. The reality is that you then have to have a law that enforces the prohibition on the removal of those technological protection mechanisms. The thing is that, so far, no country in the world has gone so far as to say it is an offence or an infringement of something to remove an encryption on a non-copyright document. Where those prohibitions are on the circumvention of technological measures, which are put onto materials to control access or to prevent copying, that applies only in relation to material which is in itself protected by copyright. So there is nowhere in the world that has a stand-alone law saying, 'You cannot remove a technological protection mechanism.' So essentially, there were flaws in that original issues paper that, in fact, I have to admit, were not carried through into the subsequent discussion paper. Once those flaws had been pointed out in submissions that were made to the committee, I think, for whatever reason, they kind of crept into the first issues paper.

The issue of whether removing copyright would help in obtaining access to public sector information is really debateable. The US has a position where they say, 'We have no copyright on federal materials,' but that is not the end of the story by any means. You might think, 'Hey, no copyright. Everything is going to be simple. We don't understand copyright. Therefore, why don't we just do away with it?' The situation is not that simple, and it was brought home to me just last week when I was teaching copyright law based on the Philippines IP code to a group of senior government officials whom we had visiting from the Philippines. They have codified copyright law. It is a recently written law. It postdates the TRIPS Agreement. Essentially, it is a codification of modern American copyright law without some of the add-ons that they can be expected to have to implement under their free trade agreement with the United States. But on this point of government copyright, it is a really simple statement, which is essentially a codification of the current US position. There is no copyright in their government materials, but they still exert control. If you are coming to get the material for public re-use, you have to get permission and essentially it can be subject to the payment of a fee.

Further than that, government can still own copyright in materials that it commissions from outside parties or the government can have copyright transferred to it. So the reality is that you may—and this is essentially the problem with saying, 'We will do away with copyright'—actually find yourself in a much more complex situation than you are in at the moment. Rather than saying, 'This material is copyright and we put it out under a CC licence,' you then have to hunt around and ask, 'Is there actually any copyright in this? Does the government own copyright?' If there is, I still have to go and get permission from them. You might as well have copyright, anyway. It is essentially to say, 'We will simplify it,' but it is no simpler. In fact, it could be more complex. In some way, it is easier to have a simple rule and to go back. We are actually being very traditionalist in our approach here. I think things got off the track with the economic thinking that crept in in the UK about saying, 'Governments can actually make a motza from commercialising this material. We are going to create an information market within government based on high economic thinking.'

Essentially, if we go back to what Crown copyright or government copyright was always meant to be—and, in fact, I would refer you to the significant slab in my book on internet and e-commerce law where I go through government copyright and the rationale and we actually go back there and dig up some of the historical research that had been brought to our attention by, I guess, our copyright historians Ben Atkinson, who wrote the book *The true history of copyright 1905-2005: the Australian experience*, which was published last year or early this year by the University of Sydney Press, and John Gilchrist, whose expertise over a very long period of time is in government copyright. He did his masters in it about 25 years ago and he was one of the members of the Copyright Law Review Committee that conducted the Crown copyright inquiry.

So our copyright historian colleagues, I suppose I would call them, have gone back to the archives and dug out the original materials, which hark back to English parliamentary documents of 1887. So what we have actually cited is essentially a facsimile copy of the original documents that were distributed by the then Commonwealth Solicitor-General—was

it Robert Garran? I am not quite sure. I think it would have been about 1911 or 1912 that Australia adopted the UK legislation. Australia adopted the UK Copyright Act 1911. We essentially adopted that in whole in Australia in 1912.

So in explaining to the attorneys-general of the states and territories how this Crown copyright provision worked, it made clear and referred back to UK documents of 1887 that it was really meant to be what we call now, for most categories of material, an open content licensing model. So the commercialisation was never meant to be there. So if we go back to the original meaning of Crown copyright and we can see that the modern way of doing that, where we are thinking about making individual documents or files available in a web 2.0 environment and we want to, in fact, put copyright licensing information in them to essentially say, 'It came from us. This is where it originated from. If you want to check the veracity of it, come back to us,' we have copyright law now that says it is an offence to remove that digital identifying information.

So essentially, when we piece together what we understand of what Crown copyright was meant to do, the web 2.0 environment, the way people want to access information and re-use it and the way copyright law exists now, we can see that that makes a coherent whole. So the people who are raising the objections or saying 'what if?' are essentially going back to an outmoded model. We have to look at what is going to work going ahead from here. Sorry, I think I have rambled on for long enough.

The CHAIR—I was about to say you have seven minutes to go. My question is—and if it can be answered succinctly I would appreciate it—you referred to 1887 and the UK Copyright Act 1911. I just want you, in a very summarised fashion if it is possible, to give me what you believe is the objective of copyright.

Prof. A FITZGERALD—Okay. I can do this perfectly. This is my latest *Intellectual Property* nutshell. This is the condensed version of intellectual property. This just came into my hands last week. In fact, I actually covered this. There are various reasons as to why you have intellectual property. If I can just—

The CHAIR—No, I do not want the reasons; I just want the objective of it, please.

Prof. A FITZGERALD—This is the objective. One of the objectives of copyright is—and my heading here is 'Quality control over public sector information':

A central justification for recognising intellectual property rights (especially copyright) in government materials—

and this is at page 14, *Intellectual Property*, third edition Nutshell Series—

is that they can be used as a means of retaining quality control over public sector information and how it is used. Governments at all levels—local, State and Territory, and Federal—develop, manage and distribute an array of information products ... Much of this government-generated content is protected by copyright. Government copyright material covers a vast range of sectors, activities and subjects, including geographical information ... Since much public sector information is produced by governments in the ordinary course of government administration, the operation of intellectual property rights as an incentive to produce the information to obtain revenue from its commercial exploitation is of little or no relevance in this context.

That is the usual justification for copyright protection. It goes on:

What is of greater relevance to governments is being able to ensure that the integrity of government information is maintained when it is disseminated, so that users receive it in its original, unaltered form and can rely on it.

The CHAIR—Thank you.

Mr DAVIS—Just to summarise this, your argument is that the removal of Crown copyright, as has been contemplated by a number of reviews that you have pointed to, would not necessarily achieve what it sets out to achieve, which is a simple system, but it may lose what you might call the signalling impact of government information about the quality or reliability of that information. Is that the stripped-down version of it?

Prof. A FITZGERALD—That is correct.

Mr DAVIS—But your other point is that what might be better—and this is a step back to some earlier things you said—is a much more open regime where you get to the original data rather than packaged data, as it were.

Prof. A FITZGERALD—Yes, exactly. That is right.

Mr DAVIS—And drawing on your comments about the economics, which I know you are not an expert in but you have some knowledge—

Prof. A FITZGERALD—Yes.

Mr DAVIS—It might be that some of that information can be used in ways that are not immediately apparent?

Prof. A FITZGERALD—Exactly.

Mr DAVIS—Hence, the availability of that original source data in a reliable form—

Prof. A FITZGERALD—Yes.

Mr DAVIS—is the key point?

Prof. A FITZGERALD—Yes, and some serious economic work has been done over the last 10 years. I refer you particularly to the work of Stiglitz, the Nobel prize-winning economist at Columbia University— essentially a landmark report that was published in 2000. It was commissioned by the American Computer Society, I think, which essentially looks at the role of government in the information age. I think that provides the guiding principles as to where you want to go. Obviously, we can see now more and more literature being produced. This article 'Government Data and the Invisible Hand' by Ed Felten and others really goes much further into the kind of technology and the kinds of formats in which it should be made available.

Mr DAVIS—Thank you.

Mr TEE—As I understand it, you are saying we really cannot change the law or have much impact there as a state. There is a question of the type of information that government makes available, and it is about trying to make sure that we get better quality or better sourced data and making that available. Does Creative Commons licensing achieve those outcomes or does it just put another layer of complexity on it? Ultimately, does government politically need to make a decision that it wants to make more or better information available and is that something different from Creative Commons licensing? I am just trying to see how the two intersect.

Prof. A FITZGERALD—There is definitely a demand for government material to be made more readily available so that it can be re-used. I think this was really the motive behind the CLC Crown copyright inquiry. There is a legitimate demand for government material to be made more readily available. I guess, essentially, the ways you can do that are legislatively or by licensing. While I would not at all discount the potential for there to be some legislative amendment and, in particular, clarifying the kinds of things that people in Australia can, in fact, do with this material, there are also advantages, when you think of the

international context and digital material being disseminated around the world.

I think what we are going to move increasingly towards is using the feature of copyright, which allows the copyright owner to put in there the digital identifying information and to say that digital identifying information—rights management information—has to remain with the material. Even if the rights that you are giving to the user are that they can re-use it in whatever way they like, what you are saying is, 'I want my rights management information to be retained with it for reasons of integrity so that if anyone wants to check they know where to come back to,' which is more important with government material than probably a lot of other material that people might put out.

Although you could say in the older context that it may make sense just to say, 'Why don't we just legislate and say, "Look, these materials can be used on this basis"?'—and essentially that is exactly what they did in the UK and in New Zealand—the reality is that, where you have individual digital bits of information being circulated around, if you have a standard, recognised licence included with that digital item that stays with it, someone in the United States, Canada, Europe, Spain or Kazakhstan is not going to look up Australian copyright law to see what they can do with this material. They would be flat out working out that it came from Australia. If you put the CC licence on it and you say that that stays with that item, essentially that is with it and it is recognisable. The icon images as to what you can do are recognisable for anyone around the world.

We have seen documents that are published by the Spanish Government with CC licences on them. I cannot read Spanish, but I can understand what those icons are. I can understand the basis on which we could reproduce it. We could scan it and put it up on our web site if we wanted to make available a Spanish Government document on environmental protection, or whatever. The real issue, and in fact Tom Cochrane was asked this question as well, is whether Creative Commons actually reduces or avoids uncertainty and confusion.

I think that the point of keeping your copyright or your permissions with the material is, in fact, one of the strongest things going forward in this digital age. You have made it available, you have licensed it in accordance with the law that prevails here in Australia. They do not have to come and look at our law. They just have to know the basis on which they are allowed to use it, and you have already put that into the document. Increasingly what we have are these Creative Commons licences and you have it there in icons, you have code that goes into the actual document. You have Creative Commons working with technical people to produce the code that will go into all the standard document formats. So essentially what you are really doing is getting a machine readable version, searchable on the internet. I think people from the Queensland Government may actually talk more about this when they address you today.

Essentially, you can establish much more readily what it is that you are actually allowed to re-use without fear that you are actually infringing. It promotes access and re-use rather than copyright concerns and legal concerns acting as a hindrance to the re-use of information.

Mr THORNLEY—I want to follow up something. As I understood it, the Yale article was essentially arguing that the focus of government actually should move beyond this legal discussion and focus on the creation of a better set of APIs for people to download the data, rather than putting everything up on their own web site.

Prof. A FITZGERALD—Yes.

Mr THORNLEY—I actually met with Richard Allan when he was out here. He went through some of the pros and cons of that. Part of the challenge seemed to be that you lose control of the presentation of the data in ways that can be pretty problematic, when people can make it look like they are the government when they are not. Do you think that this sort of marking is really the key to limiting that sort of abuse?

Prof. A FITZGERALD—I certainly think it probably has a more realistic potential of

being able to have some control over the material once it goes out. We have done so much research on this. When you go through the kinds of controls that government has traditionally asserted, there has actually been a desire to control the flow of information, for whatever reason. You may want to control the information itself because you do not really want it to get out very broadly. You may want to give a commercial reseller a commercial advantage, so essentially you are going to exclusive or semi-exclusive licensing arrangements with them to preserve the commercial advantage for them. You have to start thinking about why you have those controls on information.

Mr THORNLEY—We have talked about the objective you outlined for copyright, which is quality control. It is not about limiting the flow or squeezing an extra dollar; it is about quality control.

Prof. A FITZGERALD—Exactly.

Mr THORNLEY—If you have a free-flowing set of APIs, how do you ensure that quality control?

Dr A FITZGERALD—I guess the reality is that you can do a search. People can work out that it looks like someone else has copied our stuff and put their name on it or they have dodgied up our figures. This is actually copyright licensing. Copyright is essentially just about the strongest gun we have in our armoury for controlling documents or information in existence. Contract kind of pales into insignificance. With technological protection measures you still need some law to back it up. Either it has to be contract or you have to introduce some new law.

The reality is that these are copyright-based licences, so when you go beyond the terms of the licence essentially the licence comes to an end. You are actually in copyright infringement territory. As Tom Cochrane mentioned, in Australia we had our copyright legislation supplemented by an additional 70 pages of largely criminal copyright provisions. A lot of those offences are strict liability. Even with strict liability offences, essentially it is like getting a speeding ticket: 'We have caught you infringing copyright.' As to whether these provisions will ever really be enforced to the extent that someone may have envisaged they would be is another question. Even if we do look at the copyright legislation as it applied before all of those criminal provisions were put in, we still have an extensive array of civil and criminal provisions that can be used for enforcement.

Mr THORNLEY—So copyright is the best head of action for enforcement?

Prof. A FITZGERALD—I will not necessarily say that, but you have to say, 'We could use something else, so what else would it be?'

Mr DAVIS—Nothing else appears on the surface.

Prof. A FITZGERALD—You can do contract, if you have information—

Ms THOMSON—You amend the copyright as it is to fit the circumstances of an electronic and web- based age, rather than actually start all over again?

Prof. A FITZGERALD—I think that is right. I think that that is the conclusion I come to. You may say that I am really a copyright-centric person, but I have been through the arguments. We have come through the era with John Perry Barlow saying that copyright will not fit this information age. I have discussed this with very experienced American colleagues. Essentially, although they started off from the perspective of saying 'We could do without copyright', the comments that I have actually had from Lawrence Lessig at the Seoul Ministerial Meeting and from Paul Uhlir at the Brussels Microbial Commons conference two days before are, 'Yes, I think that there are actually advantages.' Paul Uhlir's comment was that there are actually advantages in using copyright and Lawrence Lessig's was that we should not do away with copyright; copyright is workable here.

The CHAIR—I thank you very much. We really do appreciate that, Professor Fitzgerald. Within about a fortnight you will be given copies of the transcript. Typographical errors can be rectified, but the rest of the content cannot. Thank you very much.

Prof. A FITZGERALD—Thank you very much for hearing me.

Witness withdrew.