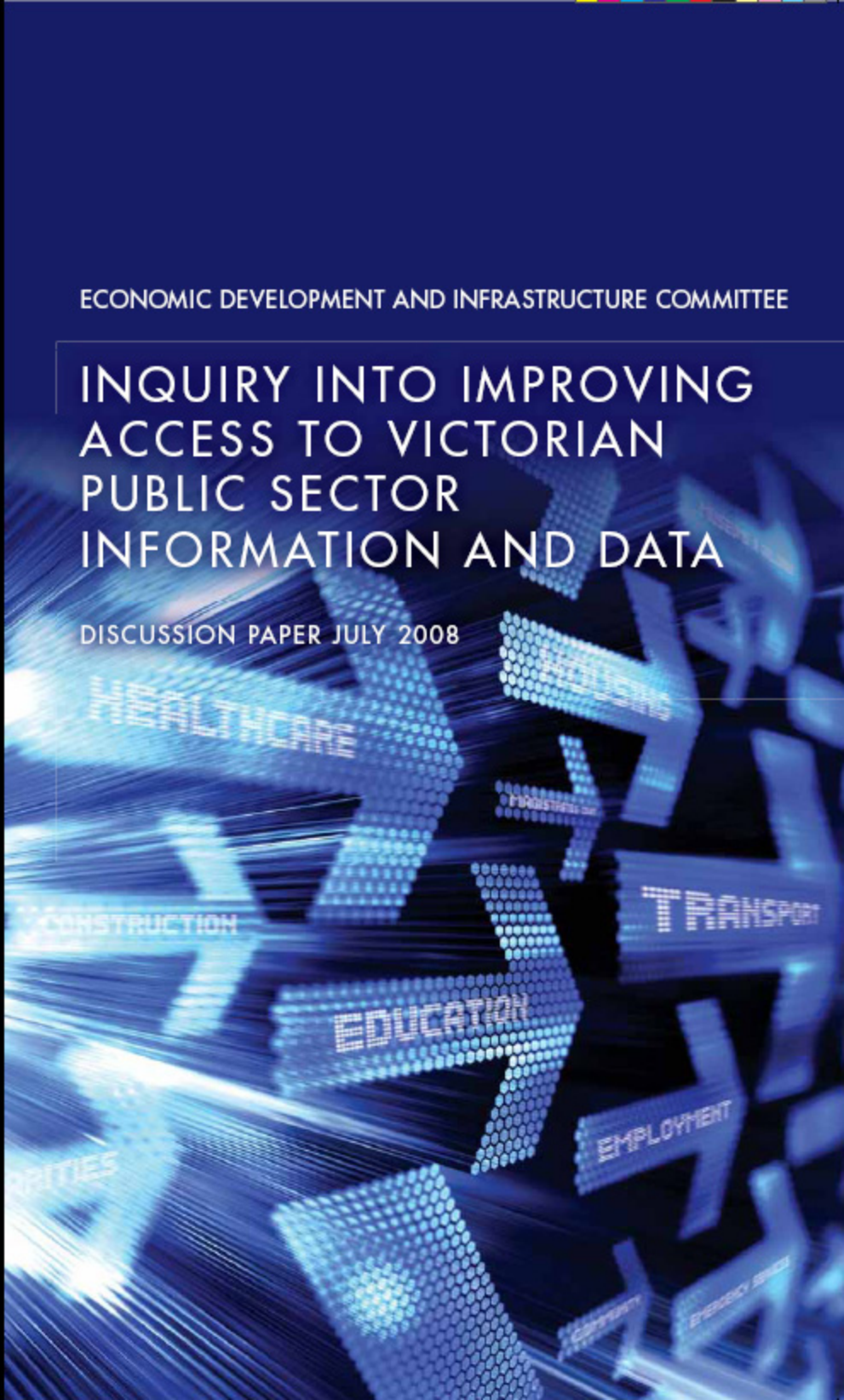
PARLIAMENT OF VICTORIA

ECONOMIC DEVELOPMENT AND INFRASTRUCTURE COMMITTEE

INQUIRY INTO IMPROVING ACCESS TO VICTORIAN PUBLIC SECTOR INFORMATION AND DATA

DISCUSSION PAPER JULY 2008



Economic Development and
Infrastructure Committee

Inquiry into Improving Access to Victorian Public Sector Information and Data

DISCUSSION PAPER

July 2008

Inquiry into Improving Access to Victorian Public Sector Information and Data

Discussion Paper of the Economic Development and Infrastructure Committee on the Inquiry into Improving Access to Victorian Public Sector Information and Data

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Parliament of Victoria
Economic Development and Infrastructure Committee
Inquiry into Improving Access to Victorian Public Sector Information and Data
Discussion Paper

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The Economic Development and Infrastructure Committee

The Victorian Economic Development and Infrastructure Committee is constituted under the *Parliamentary Committees Act 2003,* as amended.

The Committee comprises seven members of Parliament drawn from both houses and across parties.

Its functions under the Act are to inquire into, consider and report to the Parliament on any proposal, matter or thing connected with economic development, industrial affairs or infrastructure, if the Committee is required or permitted to do so by or under the Act.

Committee Members

The members of the Economic Development and Infrastructure Committee are:

Hon. Christine Campbell, MP (Chair)

Mr David Davis, MLC (Deputy Chair)

Mr Bruce Atkinson, MLC

Mr Peter Crisp, MP

Mr Brian Tee, MLC

Mr Evan Thornley, MLC

Hon. Marsha Thomson, MP

Staff

The Committee is supported by a secretariat comprising:

Executive Officer:	Dr Vaughn Koops
Research Officer:	Ms Yuki Simmonds
Administrative Officer:	Ms Shanthi Wickramasurya

Terms of Reference

The Legislative Assembly under section 33 of the *Parliamentary Committees Act 2003* refers Terms of Reference requiring:

That the Economic Development and Infrastructure Committee inquire into, consider and report to Parliament on the potential application of open content[1] and open source licensing to Victorian Government information, and in particular, the Committee is asked to:

a) report on the potential economic benefits and costs to Victoria of maximising access to and use of Government information for commercial and/or non-commercial purposes, including consideration of:

   i. public policy developments elsewhere in Australia and internationally; and

   ii. the types of information that will provide the greatest potential benefit;

b) consider whether the use of open source and open content licensing models, including Creative Commons, would enhance the discovery, access and use of Government information;

c) report on the use of information and communication technology to support discovery, access and use of Government information; and

d) identify likely risks, impediments and restrictions to open content and open source licensing of Government information, including impacts on and implications for any existing cost recovery arrangements.

The Committee is required to report to Parliament by 30 June 2009.

[1] The Terms of Reference received by the Committee from the Legislative Assembly of the Parliament of Victoria referred only to 'open source licensing'. The Committee has determined that the intent of the Reference may be clarified by additional reference to 'open content licensing'. For comparison, the original Terms of Reference, as received from the Legislative Assembly, can be found in Appendix One.

Guide to making a submission

This discussion paper was prepared by the Economic Development and Infrastructure Committee to stimulate discussion and to assist interested individuals and organisations to make written submissions to the Committee's Inquiry on Improved Access to Victorian Public Sector Information and Data. Questions have been posed throughout the discussion paper to assist interested parties in this process.

Making a submission

The Committee invites written submissions from individuals and organisations addressing all or parts of the Terms of Reference.

There is no specific method for organising or presenting a submission. Your contribution can take the form of a letter, a short summary paper or a longer research document that provides information and/or recommendations.

Please sign your submission on behalf of yourself or the organisation you are representing. All submissions are treated as public documents unless confidentiality is requested and granted.

For more information on making a submission, please contact the Committee secretariat on (03) 8682 2832, visit www.parliament.vic.gov.au/edic or email edic@parliament.vic.gov.au.

Sending your submission

Submissions can be submitted by post to:

The Executive Officer

Economic Development and Infrastructure Committee

Parliament of Victoria

Spring Street

EAST MELBOURNE VIC 3002

If possible, please also email an electronic file copy to the Committee secretariat via edic@parliament.vic.gov.au.

The closing date for submissions is Friday 22 August 2008.

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Questions for discussion

Abbreviations

ABS	Australian Bureau of Statistics
AGIMO	Australian Government Information Management Office
BC	British Columbia
BBC	British Broadcasting Company
DEST	Department of Education, Science and Training (Cth)
EDIC	Economic Development and Infrastructure Committee
ERC	European Research Council
EU	European Union
FoI	Freedom of Information
GPL	General Public Licence
ICT	Information and Communication Technology
IPP	Information Privacy Principles
IP	Intellectual Property
OECD	Organisation for Economic Co-operation and Development
OPSI	Office of Public Sector Information
OSI	Open Source Initiative
OSS	Open Source Software
PROV	Public Records Office Victoria
PSI	Public Sector Information
QSIC	Queensland Spatial Information Council
R&D	Research and Development
RSS	Really Simple Syndication
SARC	Scrutiny of Acts and Regulations Committee

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Chapter One:
Access to Public Sector Information

The Economic Development and Infrastructure Committee (EDIC) is a Joint Investigatory Committee of the Parliament of Victoria. The functions of the Committee are to report to the Parliament on any proposal, matter or thing concerned with economic development, industrial affairs or infrastructure.

On 27 February 2008, the EDIC was asked to inquire into, consider and report to Parliament on the potential application of open source licensing to Victorian Government information (the Terms of Reference for the Inquiry are printed on page vii of this paper).

1.1 Structure of this paper

This paper begins with a brief overview of some of the issues that have led to an increased interest in governments providing enhanced access to information and data held by the public sector.

The paper then discusses five key areas of interest arising from the Terms of Reference for the Inquiry. These are:

- the economic and social issues surrounding access to public sector information (PSI), including access by means of open content licensing;
- how the public sector should be defined, and the types of PSI that should be made available;
- issues surrounding pricing for PSI access;
- issues surrounding open content licensing; and
- issues surrounding open source licensing.

1.2 Emerging interest in access to public sector information

Over the past decade, the development of the internet and related technologies has substantially reduced costs associated with the dissemination of most information. As bandwidth has expanded, and with the development of sophisticated internet searching and indexing techniques, it is now possible to place extensive repositories of primary and secondary data and research online, and to have that data identified and accessed by a diverse range of people and organisations.

Along with this development, there has been increasing interest in the potential for information generated by (or obtained in association with) government activities to be made more widely available. Internationally and in Australia a number of studies and commentaries have been initiated within government and academia to examine issues surrounding more open approaches to the provision of government information.[2] A number of commentators now argue that there is significant potential for social and economic benefits to flow from increasing the range of PSI made available to the public at low, or no, cost.[3]

As discussed in Chapter Five, one of the ways to improve access to and re-use of PSI in the public domain is through the application of 'open content' licences to government material. In the literature, the open content licensing model has emerged as a practical alternative to the existing licensing systems adopted by governments as it allows others to obtain access to and re-use copyright material with minimal transactions. This is because the licences are automated and grant permission for others to re-use protected material upon discovery of that material. A number of open content licensing models exist in Australia and internationally, with Creative Commons being the most commonly recognised model.

1.2.1 Potential for economic development

To date, improved access to PSI has most often been considered in the context of opportunities for economic development. This follows observations of the emergence of successful commercial enterprises that create innovative products from repackaged, processed or amalgamated PSI. The basic argument for supporting improved access to PSI on grounds of economic development is that the revenue and economic activity generated through the use of PSI substantially outweighs costs incurred by government in the course of generating and disseminating that information. However, there is still considerable debate about the categories of PSI that are best suited to this purpose, and the circumstances and conditions under which PSI should be released.

1.2.2 Potential for social engagement

While most interest in PSI has surrounded the potential for commercial and/or economic development, a number of commentators have also suggested there is potential for other, less tangible, social benefits to derive from improved access to PSI. For example, improved access to PSI may provide citizens with a heightened sense of social identity and participation.

Some commentators also consider open access to PSI to be an essential prerequisite for functioning modern democracies.[4] One key argument in favour of open access to PSI is that as the information is publicly funded, it is consequently held on behalf of the people, and should also be accessible by them. This idea draws upon an emerging international

[2] Productivity Commission, *Public support for science and innovation*, Commonwealth Government, Canberra, 2007.
[3] Productivity Commission, *Public support for science and innovation*, Commonwealth Government, Canberra, 2007.
[4] Copyright Law Review Committee, *Crown copyright*, Commonwealth of Australia, Canberra, 2005, p. 39.

movement that argues citizens should be given access to data they fund without having to pay for it again.[5]

It has also been suggested that improved access to PSI will provide a broader range of people and organisations with an opportunity to examine data and information about key areas of government responsibility, and potentially develop innovative recommendations and strategies for improvements to government policy. Similarly, improved access to PSI, such as through open content licensing, may also stimulate new commercial and private enterprise. In this way, society may take advantage of its collective intelligence to develop solutions to common issues and problems, and to generate more wealth throughout society.

A related justification for improved access to PSI is that it will provide a mechanism for improving government accountability and transparency. The argument for this approach is that by providing the public with the evidence upon which government decisions are made, improved access to PSI will provide the public with an opportunity to critically assess government policies and decisions.

The Committee notes that in 2005 the Victorian Parliament Scrutiny of Acts and Regulations Committee (SARC) tabled its final report on the *Inquiry into Victorian Electronic Democracy*. This report considered some issues surrounding the use of government information by citizens and businesses, focusing on the use of electronic technologies to improve parliamentary democracy.[6] In part, the current inquiry expands on the work done by SARC by focusing more particularly on costs and benefits associated with different approaches to the provision of PSI.

1.2.3 Recent policy and legislative developments

Internationally, a range of actions have been undertaken to improve access to PSI. On 18 June 2008, for example, the Organisation and Co-operation Economic Development's (OECD) Ministerial Meeting on the future of the internet economy endorsed the *Seoul Declaration for the Future of the Internet Economy*, which included a recommendation for the development of policies that:

> Make public sector information and content, including scientific data, and works of cultural heritage more widely accessible in digital format.[7]

The background document to the declaration pointed to further recommendations for OECD member countries to consider in the context of improved access to PSI, including:

- Maximising the availability of public sector information for use and re-use based upon the presumption of openness as the default rule.

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[5] Dylan Bushell-Embling, 'Private eyes on public data', *Sydney-Morning Herald*, 25 September 2007; Catherine Bond, 'Reconciling Crown copyright and reuse of government information: an analysis of the CLRC Crown copyright review', *Media & Arts Law Review*, vol. 12, no. 3, 2007.

[6] Scrutiny of Acts and Regulations Committee, *Inquiry into electronic democracy*, Parliament of Victoria, Melbourne, 2005.

[7] OECD, 'The Seoul declaration for the future of the internet economy', viewed 25 June 2008, <http://www.oecd.org/dataoecd/49/28/40839436.pdf>.

- Encouraging broad non-discriminatory competitive access and conditions for re-use of public sector information by eliminating exclusive arrangements, and removing unnecessary restrictions on the ways in which it can be accessed, used, re-used, combined or shared.
- Improving access to information and content in electronic form and over the Internet.
- Finding new ways to digitise existing public sector information and content, to develop "born-digital" public sector information products and data, and to implement cultural digitisation projects where market mechanisms do not foster effective digitisation.
- Exercising copyright in ways that facilitate re-use, and where copyright holders are in agreement, developing simple mechanisms to encourage wider access and use, and encouraging institutions and government agencies that fund works from outside sources to find ways to make these works widely accessible to the public. [8]

In the United States, President Bush endorsed a bill in December 2007 that requires all research funded by the National Institutes of Health to be made available to the public.[9] In 2003, the European Commission introduced the European Union (EU) *Directive on the re-use of PSI*, which established a minimum set of rules governing the re-use of PSI held and developed by public sector bodies within EU Member States.[10] All Member States were required to have implemented the Directive by 1 July 2005.

In January 2008, the European Research Council (ERC) also mandated public access to its research projects, requiring that ERC-funded research publications be deposited into a research repository within six months of publication.[11] Australia is taking similar steps through the Commonwealth Government's Accessibility Framework. The overall intent of the Framework is that "outputs of publicly funded research, including research data and research publications, should be managed in ways that maximise public benefit through exposure and use."[12]

1.2.4 What approach should government adopt toward access to and re-use of PSI?

The key consideration with regard to PSI is the extent to which the various ways access can be limited (for example, through price, licensing arrangements, or whether information is available on the internet or not) are justified. While a substantial case can be made that limitations on access to information relevant to the exercise of people's basic human

[8] OECD, 'Shaping policies for the future of the internet economy', viewed 25 June 2008, <http://www.oecd.org/dataoecd/49/28/40839436.pdf>.
[9] Mark Patterson, 'Public access to research funded by National Institutes of Health - now law', viewed 20 March 2008, <http://www.plos.org/cms/node/303>.
[10] European Commission, 'Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information', *Official Journal of the European Union*, 2003.
[11] Mark Patterson, 'Open access mandates from the National Institutes of Health and the European Research Council', viewed 20 March 2008, <http://www.plos.org/cms/node/308>.
[12] Leanne Harvey, 'Open access collections - The future of the accessibility framework and research assessment', viewed 20 March 2008 <http://www.apsr.edu.au/open_access_collections/leanne_harvey.pdf>.

rights should not exist (for example, information about why one's travel visa was declined), the proposition that people have a right to all information – including information that does not pertain to the exercise of basic human rights – is subject to debate.

One way of conceptualising different government approaches to the dissemination of information is by distinguishing between 'pull' and 'push' models. This concept was proposed in the independent review of the Queensland Government's Freedom of Information legislation, which proposed 141 recommendations to achieve a more effective and transparent FoI legislative model.[13]

The pull model most closely resembles current practice, with an emphasis on the dissemination of information in response to individual requests for access – generally through such mechanisms as FoI requests. This model depends, at least in part, on the person requesting the information knowing that it exists in the first place. Information that is proactively released to the public domain by government under this model generally serves a specific policy objective – such as introducing or making a case for a particular program or government action.

The push model, on the other hand, emphasises proactive publication of information by government. Under this model, government identifies and publishes a wide range of data without first waiting for the information to be requested. This approach may mean that the public becomes aware of information because government has made it available. Commentators in favour of this approach suggest that agencies should anticipate information requests, and use the internet to make broad categories of information available online.

Both of these approaches to the dissemination of PSI have advantages and disadvantages, and in practice a mixture of both are generally exercised by government. For example, if a wider range of data were actively published under the push model, more work may be required of the public service to bring relevant data and information up to a publishable standard. In contrast, however, enhancing the level of government information and data that is available in the public domain could reduce the number of FoI requests government has to process. As a consequence, the amount of government resources allocated to responding to such requests could be reduced considerably.

1.3 Purpose of this discussion paper

The purpose of this paper is to identify and discuss issues relevant to the potential application of open content and open source licensing to Victorian Government information. This discussion paper has been prepared to provide information to assist interested people and organisations to make public submissions to the Inquiry. The aim of this paper is to prompt discussion by highlighting key issues and raising questions, rather than by providing answers or solutions. It has also been prepared to encourage a wide range of people to participate in this Inquiry, and for this reason

[13] FOI Independent Review Panel, *The right to information*, The State of Queensland, Brisbane, 2008.

readers' familiarity with issues surrounding access to PSI has not been assumed.

1.4 Questions

Question 1: What are the advantages and disadvantages of government adopting 'push' and 'pull' models toward the publication of public sector information (PSI), respectively?

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Chapter Two:
Economic and social issues surrounding access to public sector information

Governments are major custodians of information and data, which when administered wisely, can generate significant societal and financial gains. Internationally and in Australia, a number of studies have demonstrated returns on investment from releasing PSI into the public domain, as well as the potential for improved access to and re-use of PSI to encourage greater innovation in a global market economy. Of equal importance is the potential for open access to PSI to contribute to an informed citizen base, and to facilitate transparency and accountability within government.

However, there are also potential costs and pitfalls associated with the release of PSI into the public domain. The restricted release of PSI has, and is, used by governments to generate revenue, by licensing selected information to private companies for commercial enterprise. Allowing free access to this data would undermine or remove the capacity of government to obtain revenue from this information. There may also be categories and types of information held by the public sector that should not be released into the public domain – such as personal information, or information pertaining to national security, for example.

The debate about whether or not to open government information and data up to public scrutiny draws upon a long tradition of thought about how the needs of humans as citizens in the political context and social beings in community can best be achieved. While economic arguments for improving access to information can, at least in theory, be supported by observations of commercial activity, benefits to society from improved participation by citizens in governance are very difficult to measure.

2.1 Returns on investment

2.1.1 Improved returns to government from release of PSI

Emerging evidence suggests that in some cases improved access to and re-use of PSI can increase net returns on investment by government, particularly when access to publicly funded research is improved. This is viewed as particularly beneficial to information markets that typically operate on high-fixed costs. A report commissioned by the Commonwealth Department of Education, Science and Training (DEST) *Research communication costs in Australia: emerging opportunities and benefits* suggested that improved access to public sector research data could achieve the following economic benefits:

> With public sector R&D expenditure at AUD 5,912 million and a 25% rate of social return to R&D, a 5% increase in accessibility and efficiency would be worth AUD 150 million a year.[14]

The economic benefits calculated in the report included direct returns on investment in Research & Development (R&D) to funding institutions, and indirect returns obtained from use of the research data in various applications by a broader range of users. In this context, the DEST report identified three sectors that were key beneficiaries of increased access to government-funded research: scholarly and research communities; industry and government; and the wider community.[15] These are outlined in detail below.

2.1.1.1 Research communities

Enhanced access to research may potentially increase the efficiency of R&D investment within scholarly and research communities by reducing duplication of research, and by increasing primary data and information available to researchers. In particular, improved access to R&D research could reduce the number of scientific studies that repeat 'failed' research hypotheses. The DEST report also suggested that wider access to PSI would encourage open scientific inquiry and collective learning; allow closer interrogation of research findings and conclusions; and provide researchers with increased opportunities to identify and explore issues not considered in original research briefs, through a re-examination of primary research data.[16]

2.1.1.2 Industry and government

Another argument for enhanced access to PSI is that it would increase and broaden opportunities for commercial exploitation of research data. Improved access to government research data and information could also potentially benefit the private sector by allowing it to draw on government knowledge and experiences to improve the quality of services, and thereby increase the productivity of the private sector in the economy. Similarly, improved access to PSI by governments in various jurisdictions could increase opportunities for the adoption of 'best practice' in the public sector.[17]

2.1.1.3 Wider community

The general community can potentially benefit through the development of informed citizens and informed consumers, who by having greater access to research publications and government information would better equip

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[14] John Houghton, et al., *Research communication costs in Australia: Emerging opportunities and benefits*, Department of Education, Science and Training, Canberra, 2006, p. 46.
[15] John Houghton, et al., *Research communication costs in Australia: Emerging opportunities and benefits*, Department of Education, Science and Training, Canberra, 2006, p. 32.
[16] John Houghton, et al., *Research communication costs in Australia: Emerging opportunities and benefits*, Department of Education, Science and Training, Canberra, 2006, p. 32.
[17] John Houghton, et al., *Research communication costs in Australia: Emerging opportunities and benefits*, Department of Education, Science and Training, Canberra, 2006, p. 33.

themselves to make efficient use of public and private sector services.[18] An informed community could also, potentially, contribute more actively to the development of effective, efficient, and productive public policy.

2.1.2 Potential costs to government from release of PSI

While there may be benefits to government, or society generally, from open content licensing of PSI, there are also a range of legitimate arguments in support of maintaining restrictions on access to some PSI. These may include restrictions on the release of types and categories of PSI that may provide fiscal or other advantages to a limited pool of organisations or individuals at significant cost (or entailing significant lost revenues) to the public. Possible examples include cases where:

- those who are likely to exploit the information are not operating in a competitive market, increasing the risk that benefits from that information are not passed on to the public at large; and

- there is potential to use the information to realise substantial profits in other jurisdictions, in which case it may be more appropriate for the Government to use the information in a manner that is in the best interests of the Victorian public.

2.1.2.1 Research communities

While there are potential collective advantages to opening up access to publicly funded research, careful consideration must be given to the type of information and data that is made available through open content licensing. For example, the career progression paths of many academics may be determined by success in obtaining research grants and publication in peer-reviewed journals – with a proportion of the latter relying on exclusive access to articles in order to remain commercially viable. If government was to require publicly funded research to be made freely available, opportunities for academics and researchers to publish their works in peer reviewed journals may be reduced, as journals would not have first rights to publish.

2.1.2.2 Industry and government

As noted above, open release of PSI may result in lost opportunities for government to extract additional revenue on behalf of the public. Furthermore, there may be cases in which the only parties that are interested in specific PSI are already paying to obtain it, and that a general policy for open access would merely reduce government revenue without any concomitant increase in public use of that information.

2.1.2.3 Wider community

While improved access to PSI may result in a more informed and engaged community, there is also the potential for the release of specialised information into the public domain to confuse public understanding of complex issues. For example, the release of large datasets for public use may result in incorrect analyses of the significance of data, if the people

[18] John Houghton, et al., *Research communication costs in Australia: Emerging opportunities and benefits*, Department of Education, Science and Training, Canberra, 2006, p. 33.

reusing the information do not fully understand the limitations of the data, and/or lack expertise or familiarity with the conditions under which particular information is collected.

2.2 Innovation and creativity

A key argument in favour of improved access to PSI is that it will greatly enhance the potential for innovation and creativity throughout society, with potentially substantial benefits in both commercial and non-commercial applications. Dr Terry Cutler, who is leading the national *Review of the National Innovation System*, argues that creativity and innovation are "critical to the competitiveness and sustainability of the Australian economy and society."[19] In its report on public support for science and innovation in 2007, the Productivity Commission defines innovation as:

> …deliberative processes by firms, governments and others that add value to the economy or society by generating or recognising potentially beneficial knowledge and using such knowledge to improve products, services, processes or organisational forms.[20]

Access to knowledge is considered a key driver of innovation. However, the type of access that is granted to knowledge is also critical to the expression of innovation and creativity. According to Dr Cutler the ability to adapt knowledge is largely influenced by the terms of access imposed by the original holders.[21] Professor Brian Fitzgerald of Queensland University of Technology asserts that "the pure exchange of ideas is at the very heart of our innovation system."[22] Some commentators suggest access to PSI at no or marginal cost is the most effective means to facilitate experimentation with existing knowledge, and thereby encourage innovation and productivity.[23] In contrast, they argue restricted access to PSI can obstruct innovation and restrain economic growth.

Because the public sector is a major custodian of information, it is important to consider the extent to which releasing PSI into the public domain will create new opportunities for information and knowledge flow. In Australia, government is considered to play a vital role in the national innovation system. This is despite public policy receiving criticism for its failure to effectively manage "the whole domain of innovation and investment in creative capital and intellectual property".[24] Commentators assert that improving access to and re-use of PSI is essential for government to effectively manage its knowledge and data assets and enhance its relationship with the private sector. In turn, the pursuit of

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[19] Terry Cutler, 'Creativity and open access to PSI', Paper presented at the *Australian national summit on open access to public sector information* Brisbane, Queensland 2007.
[20] Productivity Commission, *Public support for science and innovation*, Commonwealth Government, Canberra, 2007, p. 7.
[21] Terry Cutler, 'Innovation and open access to public sector information', Paper presented at the *Australian national summit on open access to public sector information*, Brisbane, 2007, p. 5.
[22] Brian Fizgerald, *Submission*, 30 April 2008, Review of the National Innovation System, Department of Innovation, Industry, Science and Research.
[23] Dylan Bushell-Embling, 'Private eyes on public data', *Sydney-Morning Herald*, 25 September 2007.
[24] Terry Cutler, 'Why governments and public institutions need to understand open content licensing ', Paper presented at the *Open content licensing: cultivating the Creative Commons*, Brisbane, 2006, p. 75.

innovation by the private sector, either alone or in conjunction with government, could have broader implications for the economic and social welfare of the Australian community. [25]

In light of emerging global and national challenges, there is also growing recognition of the need to remove restrictions around data discovery and supply arrangements in order for governments to better respond to uncertainties and risks in an informed manner. In its submission to the *Review of the National Innovation System*, the Federation of Australian Scientific and Technological Societies advocated for the "notion of preparedness to be incorporated into the definitions, understanding and evaluation of innovation".[26] The Federation noted that this idea was adopted by the Productivity Commission who incorporated "preparedness – an enhanced capacity for dealing with future uncertainties"[27] into its approach to define and measure innovation.

A related justification for the adoption of open access to PSI is the potential for government to create its own self-improving innovations to enhance the delivery of public services. A key outcome of this could be the break down of government silos, which are often cited as barriers to the sharing and integration of information across governments and individual departments.[28]

2.3 Social aspects of access to PSI

Most public discussions and commentaries on the social repercussions of improved access to PSI focus on potential benefits to be obtained by citizens and society. However, issues surrounding the availability of PSI are complex, and it is possible that not all of the repercussions – positive and negative – of improved access to PSI have been anticipated in commentary to date. Some of the most commonly discussed 'positives' and 'negatives' associated with the release of PSI are discussed below.

2.3.1 Anticipated social benefits of access to PSI

In a recent speech, the Prime Minister of the United Kingdom, the Rt Hon. Gordon Brown, stated that in the 21st century the "information age has…flattened hierarchies and potentially increased the power of all citizens."[29] In this context, Mr Brown argued that the onset of the information age has considerably improved the manner and extent that governments disseminate information in the public domain, which has been critical to stimulating civil participation and community empowerment.

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[25] Terry Cutler, 'Innovation - what is it and why it matters?' Paper presented at the *Australian Industrial Research Group's annual conference*, Melbourne, 2008.
[26] Federation of Australian Scientific and Technological Societies, *Submission*, Review of the national innovation system, Department of Innovation, Industry, Science and Research, p. 3.
[27] Federation of Australian Scientific and Technological Societies, *Submission*, Review of the national innovation system, Department of Innovation, Industry, Science and Research, p. 3.
[28] Terry Cutler, 'Innovation and open access to public sector information', Paper presented at the *Australian national summit on open access to public sector information*, Brisbane, 2007, p. 9; Brian Fitzgerald, 'Alfred Deakin Innovation Lecture', viewed 19 March 2008, <http://www.abc.net.au/rn/scienceshow/stories/2007/2122486.htm>.
[29] Gordon Brown, 'Speech on liberty', viewed 17 March 2008, <http://www.number10.gov.uk/output/Page13630.asp>.

This point was echoed in the recently released UK report *Democratising engagement*:

> These days there is growing transparency: in many countries, we see the publication of budgets on the internet and in newspapers, the opening of debates within previously closed council and government meetings to the public and other measures aimed at creating more open, accountable government. A wealth of new intermediary institutions have been created in which there is far more direct opportunity than ever before for citizens and their representatives to engage directly with those who set priorities, make plans and commission and deliver services.[30]

The potential to empower individual citizens and communities to meaningfully engage in social and political activities is an important potential benefit of improved access to and re-use of PSI. In this regard, opportunities for citizens to become more responsive in society may occur through the following ways:

- creation of new and extended communities, enterprises and networks through the adaptation of PSI;
- enhanced engagement in democratic society and public policy processes; and
- enhanced opportunities for freedom of expression.

2.3.1.1 The creation of new and extended communities

One of the key benefits that could arise from improved access to and re-use of PSI is the establishment of new enterprises and networks. The report *The power of information* commissioned by the UK Government in June 2007 provided examples of this taking place when individuals had access to PSI at no or marginal cost and the opportunity to re-use and redistribute that information.[31] The report showed how individuals changed their role in society from passive recipients of information to active producers of information as a direct result of open content access to PSI:

> When enough people can collect, re-use and distribute public sector information, people organise around it in new ways, creating new enterprises and new communities. In each case, these are designed to offer new ways of solving old problems. In the past, only large companies, government or universities were able to re-use and recombine information. Now, the ability to mix and 'mash' data is far more widely available…. There are social and economic benefits to new ways of making and sharing information, whether involving government, citizens or both, for example:
>
> - Studies of 'wired' local communities demonstrate that there are more neighbours who know the names of other people on their street;

[30] Andrea Cornwall, *Democratising engagement: What the UK can learn from international experience*, London, 2008, p. 33.
[31] Ed Mayo and Tom Steinberg, 'The power of information', viewed 5 March 2008, <www.cabinetoffice.gov.uk>.

- Sharing restaurants' food safety information in Los Angeles led to a drop in foodborne illness of 13.3% (compared to a 3.2% increase in the wider state in the same time frame). The proportion of restaurants receiving 'good' scores more than doubled, with sales rising by 5.7%;
- By providing clear information when dispensing medication, pharmacists can improve patient adherence/persistence with medication advice by 16–33%.[32]

While not all citizens will be inclined to adopt a leadership role in this regard, these examples reinforce the potential for access to PSI to motivate particular citizens to establish new enterprises using such information that will be of benefit to the broader community.

A related theme is the concept of 'social capital', which is often employed in the analysis of community development and civic engagement. 'Social capital' has been described as "features of social organisation, such as networks, norms and trust, that facilitate coordination and cooperation for mutual benefit." In the form popularised by Robert Putnam in *Bowling Alone: The Collapse and Revival of American Community*, social capital is characterised by the presence (or absence) of social networks between groups of similar people (*bonding social capital*), groups of dissimilar people (*bridging social capital*), and between groups and individuals or institutions that hold power or influence (*linking social capital*).[33] Putnam argued that the participation of people in these social networks – in particular, 'bridging' social capital, where heterogenous groups of people joined together toward common endeavours, and 'linking' social capital – could lead to overall economic, governmental, health and social benefits for society.[34]

The development of the internet, along with the increased potential for people with diverse interests to interact and communicate online, provides new opportunities for the development of social capital, not only within communities, but within regions, states, countries and globally. There is emerging evidence that, by providing citizens with access to PSI, governments can facilitate the development of social capital. This can occur when innovative uses of existing information and technologies can contribute to the development of new interest groups.

2.3.1.2 Engagement in democratic society and public policy processes

"Information is the currency of democracy" – Thomas Jefferson

One argument in favour of increased public access to government information is that it may make democratic governance more effective. Citizens in a democracy vote for candidates and/or parties in order to obtain what they believe will be the best outcome for themselves and/or their state or country. While each citizen makes his or her own decision

[32] Ed Mayo and Tom Steinberg, 'The power of information', viewed 5 March 2008, <www.cabinetoffice.gov.uk>.
[33] Robert Putnam, *Bowling alone: the collapse and revival of American society*, Simon & Schuster, New York, 2000.
[34] Robert Putnam, *Bowling alone: the collapse and revival of American society*, Simon & Schuster, New York, 2000.

about what is important in this regard, there is a strong case to argue that each citizen should be able to draw upon as much information as he or she requires when making that decision. Consequently it can be argued that government has two key responsibilities toward its voting citizenry:

a) to ensure that all citizens possess the necessary skills to obtain information on, and form judgements about, government and government services; and

b) to ensure that all citizens have knowledge of, and access to, information about government and government services.

Professor Fiona Stanley, Director of the Telethon Institute for Child Health Research, argues that access to knowledge is a key driver of social development.[35] In the context of citizen participation, such knowledge can encourage individuals and communities to participate in political activities. Whether it is through the creation of community-based resources or lobbying government for change, the acquisition of information and knowledge can equip citizens with skills to engage in the policy process.[36]

Professor Stanley cites a wide range of benefits to be obtained from increased access to PSI, including:[37]

- building modern democracies and civil societies (which respect human rights);
- empowering citizens by fostering greater accountability of governments;
- improved governance and a culture of accountability; and
- facilitating sustainable development and the identification of inequalities in society.

As noted above, Professor Stanley asserts that access to PSI at no or marginal cost can contribute to a culture of government accountability.[38] Access to PSI, particularly datasets and administrative statistics such as those provided by the ABS, may provide citizens with resources to place pressure on governments to improve decision-making processes. In this way, the development of evidence-based solutions ensures the sequence of data to knowledge and then to government policy is transparent.[39] In contrast, restricting citizens from access to and use of PSI is argued to undermine the transparency of governance.

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[35] Fiona Stanley, 'Open access to PSI - the rationale', Paper presented at the *Australian national summit on open access to public sector information*, Brisbane, 2007.
[36] Fiona Stanley, 'Open access to PSI - the rationale', Paper presented at the *Australian national summit on open access to public sector information*, Brisbane, 2007.
[37] Fiona Stanley, 'Open access to PSI - the rationale', Paper presented at the *Australian national summit on open access to public sector information*, Brisbane, 2007.
[38] Fiona Stanley, 'Open access to PSI - the rationale', Paper presented at the *Australian national summit on open access to public sector information*, Brisbane, 2007.
[39] Fiona Stanley, 'Open access to PSI - the rationale', Paper presented at the *Australian national summit on open access to public sector information*, Brisbane, 2007.

2.3.1.3 Freedom of expression

Another consideration is the extent to which restrictions on access to PSI can be justified with regard to rights for freedom of expression. In Victoria it could be argued that the state has an important role to play in facilitating people's capacity for 'freedom of expression'. By making available to people information over which the state has control, it allows people to form ideas and opinions without constraint. This principal could be currently encapsulated in key Victorian legislation, such as the *Freedom of Information Act 1982 (Vic)* and the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*. Regarding access to information of all kinds, for example, section 15 of the *Charter of Human Rights and Responsibilities Act 2006* states:

> 15 Freedom of expression
>
> (1) Every person has the right to hold an opinion without interference.
>
> (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—
>
> (a) orally; or
>
> (b) in writing; or
>
> (c) in print; or
>
> (d) by way of art; or
>
> (e) in another medium chosen by him or her.
>
> (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
>
> (a) to respect the rights and reputation of other persons; or
>
> (b) for the protection of national security, public order, public health or public morality.[40]

It is notable that the Charter (and indeed, Article 19 of the United Nations *International Covenant on Civil and Political Rights* on which it is based) not only specifies the rights of people to *impart* information of all kinds, but also to *seek* and *receive* information. In this regard, it could be argued that the prerogative of the Victorian Government should be to provide all of its information to the public freely, and withhold or restrict information only in specific cases where it can be demonstrated that the rights and reputations of people, or national security, public order, public health or public morality would be compromised by release of that information.

The free provision of PSI by government, particularly via the internet, has the potential to enhance people's abilities to form ideas and opinions. In a recent commentary on social change in Australia, Mr Hugh MacKay noted that "[t]he Ipsos MacKay Report has been noting a steady decline in respect for TV news and current affairs, as viewers felt increasingly unable to distinguish 'the truth' from the carefully contrived tales of political spin doctors, or the opinions of journalists or commentators."[41] MacKay noted, among other things, that the internet allowed people to access a wider

[40] Charter of the Human Rights and Responsibilities Act 2006 (Vic).
[41] Hugh MacKay, *Advance Australia...Where?*, Hachette Australia, Sydney, 2007, p. 105.

range of views and perspectives on world events, and therefore increase their capacity to form individual views on those events.[42] Increased provision of PSI, particularly online, may enhance freedom of expression by citizens, by providing them with a wider range of resources to critique views and perspectives provided by the media and public institutions.

2.3.2 A need for caution?

The social repercussions of releasing PSI to the public may not be exclusively positive, depending on the range and type of information made available. Some of the most critical considerations surrounding the release of PSI are whether it may: a) impede the right to privacy of individuals or groups; or b) compromise safety or security.

2.3.2.1 Privacy

Existing literature arguing for improved access to PSI acknowledges that there are substantial risks associated with the release of information containing 'identifying information' about individuals, or identifying information about groups of individuals. If this kind of information were released, there is potential that it could be misused and not in the interests of the individuals in question.

Information currently held by the public sector that contains identifying information is subject to the provisions of the *Information Privacy Act 2000 (Vic)*, which provides guidance on how private information should be collected, used and distributed.[43] The objects of the *Information Privacy Act 2000* are to:

1) balance the public interest in the free flow of information with the public interest in respecting privacy and protecting personal information in the public sector; and

2) promote the responsible and transparent handling of personal information in the public sector and promote awareness of these practices.

Core guidance on the treatment of private information is described in the ten Information Privacy Principles (IPPs), as defined in the Act. The Office of the Privacy Commissioner summarises the ten IPPs as follows:

- IPP 1 Collection: Collect only personal information that is necessary for performance of functions. Advise individuals that they can gain access to personal information;

- IPP 2 Use and disclosure: Use and disclose personal information only for the primary purpose for which it was collected or a secondary purpose the person would reasonably expect. Use for secondary purposes should have the consent of the person;

- IPP 3 Data quality: Make sure personal information is accurate, complete and up to date;

[42] Hugh MacKay, *Advance Australia...Where?*, Hachette Australia, Sydney, 2007, p. 105.
[43] Information Privacy Act 2000 (Vic).

- IPP 4 Data security: Take reasonable steps to protect personal information from misuse, loss, unauthorised access, modification or disclosure;

- IPP 5 Openness: Document clearly expressed policies on management of personal information and provide the policies to anyone who asks;

- IPP 6 Access and correction: Individuals have a right to seek access to their personal information and make corrections. Access and correction will be handled mostly under the *Freedom of Information Act 1982 (Vic)*;

- IPP 7 Unique identifiers: A unique identifier is usually a number assigned to an individual in order to identify the person for the purposes of an organisation's operations. Tax File Numbers and Driver's Licence Numbers are examples. Unique identifiers can facilitate data matching. Data matching can diminish privacy. IPP 7 limits the adoption and sharing of unique identifiers;

- IPP 8 Anonymity: Give individuals the option of not identifying themselves when entering transactions with organisations, if that would be lawful and feasible;

- IPP 9 Transborder data flows: Basically, if your personal information travels, your privacy protection should travel with it. Transfer of personal information outside Victoria is restricted. Personal information may be transferred only if the recipient protects privacy under standards similar to Victoria's IPPs; and

- IPP 10 Sensitive information: The law restricts collection of sensitive information like an individual's racial or ethnic origin, political views, religious beliefs, sexual preferences, membership of groups or criminal record.[44]

These principles are exercised in the collection of data for government use in order to protect the privacy rights of citizens, while also seeking to balance the public interest in the free flow of information. Clearly, the responsibilities of government agencies and local councils to protect private information under the Act will have an impact on the type and range of PSI that it will be possible to release under open content licensing. Even if identifying information was removed from the data, the principle that private information should only be used for the primary purpose for which it was collected may restrict release of the information, or substantially increase costs associated with preparing information for release (if, for example, consent has to be obtained from all of the individuals involved).

2.3.2.2 Security and safety

Governments may also hold information that, if used improperly, could compromise the safety and security of citizens, or the state. At its most extreme, this kind of information could include military weapons

[44] Privacy Victoria, 'Information Privacy Principles', viewed 13 June 2008, <http://www.privacy.vic.gov.au>.

technologies, for example – but could also encompass relatively innocuous information, such as government building and infrastructure designs and plans.

In the United States, debates about the release and use of PSI, and the potential for such information to be used to compromise national security, emerged after the terrorist attacks of September 2001 in New York. This issue has continued to be a real concern in the US where the Federal Government supports the open publication of government information including government funded research.

These issues highlight a policy debate between the benefits associated with the open exchange of information and the costs – economic, social and political – that may arise from those ideas being used in a manner that could harm the interests of citizens and/or the state.

2.4 Questions:

Question 2: How can improved access to and re-use of PSI drive economic growth, employment opportunities and new commercial ventures?

Question 3: What can the Victorian Government do to improve access to PSI in a manner that creates new opportunities for information and knowledge flow, and thereby encourage further innovation?

Question 4: If the Victorian public sector is to provide increased access to information, what kind of information would provide the greatest opportunities to improve or develop:

a) investment and business opportunities?
b) social, medical and scientific research?
c) community and civic engagement?

Question 5: How can social engagement, in particular through the development of spontaneous social networks, be enhanced through the provision of enhanced access to PSI?

Question 6: In what circumstances can open access to PSI empower individual citizens and communities to participate in social and political activities?

3

Chapter Three:
Defining the public sector

One of the core tasks for the Committee when considering this Inquiry is to determine the scope of the Terms of Reference. The Committee notes that the Terms of Reference request that the Committee report on the application of open source licensing to 'Victorian Government information'. The Committee is aware, however, that internationally and in Australia, there are various interpretations of what government means in this context. In many jurisdictions discussions surrounding improved access to government information refer to the term 'public sector information' (PSI) rather than government information. While definitions of PSI typically encompass information owned by government, the inclusion of information owned by other public sector agencies tends to vary among the available literature.

The Committee wishes to seek comment on the appropriate definitions of government and PSI for the purposes of this Inquiry. As part of this, various pieces of Commonwealth and Victorian legislation are considered, starting with the *Copyright Act 1968* (Cth). This Act details the Crown copyright provisions, which are relevant to all Australian jurisdictions. The definition of 'public sector body' as detailed in the *Public Administration Act 2004* (Vic) and other relevant references in the *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) are also examined. The Committee also draws upon the experiences of international jurisdictions in their pursuit of improving access to PSI.

3.1 Definitions from Commonwealth and Victorian legislation

3.1.1 Copyright Act 1968 (Cth)

A core objective of this Inquiry is to investigate how to improve access to and re-use of government information. A relevant piece of legislation in this regard is the *Copyright Act 1968*. There are a number of reasons why the Act is important to consider. First, all of the material likely to fall under a definition of PSI will also be subject to copyright. Second, it is likely that a large proportion of PSI (depending on how that is defined) will fall under Crown copyright, as defined in the Act. For this reason, the Act may provide some guidance on the range of institutions and agencies that may be considered in the context of this Inquiry.

Section 176 of the *Copyright Act 1968* grants Commonwealth, State and Territories ownership of copyright in works made by them or under their

direction or control.[45] According to the Australian Copyright Council, the Crown copyright provisions apply to departments of the Commonwealth, State and Territories but agencies and statutory authorities are not covered unless decided upon by individual jurisdictions.[46]

In its report *Managing intellectual property in government agencies*, the Victorian Auditor-General noted that the scope and application of Crown copyright is unclear. The Auditor-General indicated that a case in point was the lack of clarity around the definition of the state:

> …there are different views on what agencies are encompassed by "the state". Whether or not a public body is part of the state will depend on several factors, including the wording of the statute establishing the body, and the degree of autonomy of the agency from state control. This issue becomes heated when public bodies receive funds from government departments. [47]

This is relevant in the case of statutory authorities as there is no overarching policy in Victoria stating whether they are deemed part of the state, or indeed whether materials produced by statutory authorities are protected by Crown copyright. Rather, the status of statutory authorities in this regard is decided on a case-by-case basis by individual departments, involving the legislation that each statutory authority is established under.

There is also no overarching government copyright policy to provide guidance more generally on which agencies are protected by Crown copyright. As noted in the Auditor-General's report, draft guidelines had been developed by the Attorney-General's Office in 2005 but at the time of the report these had not been considered by Cabinet.[48] The Victorian Government indicated that it was awaiting the Commonwealth Government's response to the 2005 Copyright Law Review Committee's Crown Copyright report before finalising its policy. To date, the Commonwealth Government's response has not been publicly released.

Parliament of Victoria

In 2007, the Parliamentary Library of the Victorian Parliament examined what the Crown encompasses as part of its issues brief on *Copyright, Crown Copyright and the Victorian Parliament*.[49] The paper highlighted the ambiguity around whether Crown copyright applies only to the executive branch of government or all three arms of government (i.e. executive branch, legislature and judiciary). The paper referred to the Copyright Law Review Committee's inquiry into Crown copyright for guidance but noted that the Committee did not offer an opinion on the meaning of the Crown. Rather the Committee indicated that the Crown could imply either the broader sense of the term that comprises the entire system of government,

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[45] Copyright Act 1968 (Cth).
[46] Australian Copyright Council, 'Information sheet: Governments (Commonwealth, State and Territory)', viewed 5 May 2008, <www.copyright.org.au>.
[47] Auditor-General, *Managing intellectual property in government agencies*, Auditor General's Office, Victoria, 2005, p. 25.
[48] Auditor-General, *Managing intellectual property in government agencies*, Auditor General's Office, Victoria, 2005, p. 26.
[49] Nathan Bunt, *Copyright, Crown copyright and the Victorian Parliament*, Parliament of Victoria, Melbourne, 2007.

or a narrower interpretation as found in some legislation, where the Crown is typically understood to imply only the executive branch of government.[50]

The Parliamentary Library paper adopted the position that the Crown refers to all three arms of government and concluded that Crown copyright is applicable to the Victorian Parliament, including the work created by its administrative departments.[51] In forming this view, the paper referred to the *Constitution Act 1975* (Vic), which under section 15 refers to the legislative power as part of the State of Victoria.[52]

3.1.2 Public Administration Act 2004 (Vic)

Another piece of legislation that may provide guidance on an appropriate definition for the public sector is the *Public Administration Act 2000.* This Act refers to the concept of a 'public sector body', which it defines as:

a) *a public service body* – government departments, administrative offices, or the State Services Authority;

b) *a public entity* – established by government legislation to undertake a public purpose, including statutory authorities, state-owned corporations, school councils, boards, trusts, and advisory committees; or

c) *a special body* – a department of the Parliament of Victoria, the Electoral Boundaries Commission, the office of the Commissioner for Law Enforcement Data Security, the office of the Health Services Commissioner, the office of the Ombudsman, the office of Police Integrity, the office of the Privacy Commissioner, the State Coroner's Office, Victorian Civil and Administrative Tribunal, the Auditor-General's Office, the Victorian Electoral Commission and Victoria Police.[53]

Some agencies that are exempt from this definition include parliamentary committees, local councils, universities and community health centres.[54]

Despite the above exclusions, the adoption of the term public sector body rather than the Crown or the state could result in the Inquiry covering a broad range of agencies in its investigations. As a consequence, a large body of information could potentially be subject to discussions regarding the benefits of improved accessibility and usability by the public.

3.1.3 Charter of Human Rights and Responsibilities Act 2006 (Vic)

The *Charter of Human Rights and Responsibilities Act 2006* provides further direction on the types of government institutions and agencies that

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[50] Nathan Bunt, *Copyright, Crown copyright and the Victorian Parliament*, Parliament of Victoria, Melbourne, 2007, p. 10.
[51] Note that this paper was prepared by the Research Service for use by Members of the Victorian Parliament. While it is intended that all information provided is accurate, it does not represent professional legal opinion.
[52] Constitution Act 1975 (Vic).
[53] Public Administration Act 2004 (Vic).
[54] Public Administration Act 2004 (Vic).

could potentially be considered 'public sector' for the purposes of this Inquiry. In protecting human rights and responsibilities, the Act imposes an obligation on all public authorities to act in a way that is compatible with human rights. The Act defines a 'public authority' as:

- a public official within the meaning of the *Public Administration Act 2004*; [55]
- an entity established by a statutory provision that has functions of a public nature, and in particular when those functions are exercised on behalf of the Victorian Government or a public authority;
- Victoria Police;
- local council;
- a Minister;
- members of a parliamentary committee when the committee is acting in an administrative capacity; and
- an entity declared by the regulations to be a public authority for the purposes of this Charter.[56]

Under the Charter, a public authority does not include:

- Parliament or a person exercising functions in connection with proceedings in Parliament;
- a court or tribunal except when it is acting in an administrative capacity; or
- an entity declared by the regulations not to be a public authority for the purpose of this Charter.[57]

3.1.4 Freedom of Information Act 1982 (Vic)

The core objective of the *Freedom of Information Act 1982* (FoI Act) is to extend the right of the community to access information owned by the Victorian Government and other bodies constituted under the law of Victoria. Consequently the range of institutions covered by the Act may be relevant to the current Inquiry. In this context, it is important to consider the types of public sector agencies whose information is available for request and exempt for release under this Act.

Information available for request includes that held by:

- ministers;

[55] This includes employees of the public service, including the Head of a government department or an Administration Office and the Chief Executive Officer of the State Services Authority. It also includes the directors and staff of certain public entities, court staff, parliamentary officers and holders of certain statutory or prerogative offices.
[56] Charter of the Human Rights and Responsibilities Act 2006 (Vic).
[57] Charter of the Human Rights and Responsibilities Act 2006 (Vic).

- state government departments;
- local councils;
- most semi-government agencies and statutory authorities;
- public hospitals and community health centres; and
- universities, TAFE colleges and schools.[58]

In drawing upon the *Public Administration Act 2004*, the *Charter of Human Rights and Responsibilities Act 2006* and the *FoI Act 1982* for guidance on an appropriate definition for the public sector, it is important to note that there are discrepancies between the definition of public sector body under the *Public Administration Act 2004*, the definition of public authority under the Human Rights Charter and the information that is available for release under the *FoI Act 1982*. For example, local councils, universities and community health centres are not included in the definition of a public sector body found in the *Public Administration Act 2004*. Information held by these agencies, however, is available for request under the *FoI Act 1982*. Furthermore, while parliamentary committees are not included in the definition of a public sector body under the *Public Administration Act 2004*, members of parliamentary committees are required to adhere to the objectives of the *Charter of Human Rights and Responsibilities Act 2006* while they are acting in an administrative capacity.

3.1.5 Local councils

As noted previously, local councils are not considered part of the Victorian public sector under the *Public Administration Act 2004.* According to the Australian Copyright Council, local councils are also not considered government for Crown copyright purposes.[59] While they are not deemed specifically part of the state, section 74A of the *Constitution Act 1975* (Vic) refers to local governments as a:

> …distinct and essential tier of government consisting of democratically elected Councils having the functions and powers that the Parliament considers are necessary to ensure the peace, order and good government of each municipal district.[60]

Despite these assertions, it could be argued that local councils are part of the public sector in a more general context. They are responsible for the administration of a diverse range of local, state and commonwealth laws and like other levels of government, are accountable to their constituents. Local councils are also custodians of a wide range of information that could be of use to the broader community, and may in fact be of considerable value to entrepreneurs.

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[58] Freedom of Information Act 1982 (Vic).
[59] Australian Copyright Council, 'Information sheet: Governments (Commonwealth, State and Territory)', viewed 5 May 2008, <www.copyright.org.au>.
[60] Constitution Act 1975 (Vic).

3.1.6 International experience

Internationally, there has been extensive work on improving access to and re-use of PSI. Of particular relevance to this Inquiry is the European Commission's *Directive on the re-use of PSI*, which provides another definition for a public sector body. The Directive defines a public sector body as:

> ...the State, regional or local authorities, bodies governed by public law and associations formed by one or several such authorities or one or several such bodies governed by public law.[61]

In implementing the EU Directive, the UK Government adopted the term public sector, which is referred to in the *Re-use of Public Sector Information Regulations 2005* as government departments including government trading funds; devolved institutions including the Scottish Parliament; National Assembly for Wales; the Northern Ireland Assembly; National Health Service bodies; local authorities; and various non-departmental bodies, such as the Environment Agency.[62]

3.2 Documents and information subject to improved PSI access

Another core task of the Committee in the course of this Inquiry is to determine what kinds of information and data should be made available as open content. While this will in large part be determined by the type and range of institutions and agencies regarded as part of the 'public sector' for the purposes of this Inquiry, there are likely to be generic categories of information that should, in principle, be made available – and other categories of information that should not.

In this context, the *FoI Act 1982* and the *Public Records Act 1973 (Vic)* provide two different types of legislative frameworks for citizens to access information in Victoria and consequently provide useful examples of the types of PSI that are available for access, and those that are exempt from public inspection.

While the core objective of these Acts is to provide access to PSI, the Committee wishes to highlight that the Inquiry is concerned with both access to PSI and re-use of PSI. The Committee is also aware that not all PSI that is available in the public domain will require some form of licensing attached to it in order to allow re-use.

3.2.1 Precedents in Victoria

3.2.1.1 Freedom of Information Act 1982

In Victoria, the most relevant precedent for the type of documentation and/or content that may be released can be drawn from the *FoI Act 1982*. In addition to outlining the agencies required to release information upon

[61] European Commission, 'Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information', *Official Journal of the European Union*, 2003, p. 93.
[62] Office of Public Sector Information, *The re-use of public sector information: A guide to the Regulations and best practice*, 2005, p. 9.

request, the Act also describes the types of documents that are available for, or exempt from, release. Overall, the information not available for release includes documents that:

- affect the personal affairs of another person;
- are commercially confidential;
- would undermine law enforcement; or
- contain information supplied in confidence.[63]

Specifically, this includes:

- cabinet documents;
- some internal working documents;
- law enforcement documents;
- documents covered by legal professional privilege, such as legal advice;
- documents containing personal information about other people;
- documents containing information provided to an agency in confidence;
- documents containing information provided to an agency by a business; and
- documents that are covered by other secrecy provisions in other legislation.[64]

'Documentation' as defined in the Act is a broad concept, that may or may not include information in the form of databases or other non-narrative information. In the context of the current Inquiry, the greatest value to be obtained by the public from increased access to PSI may indeed be from databases and statistical information, rather than research reports and images, for example. In this context, the Committee will seek guidance as on any potential issues that may arise from the provision of statistical and primary data to the public, as opposed to (for example) edited reports.

3.2.1.2 Public Records Act 1973

The *Public Records Act 1973* is also relevant to discussions regarding the categories of PSI that should be made for release. The core purpose of the Act is to provide facilities for access to public records by the community and the Victorian Government.[65] The Public Records Office Victoria (PROV), which is responsible for administering the Act, typically promotes

[63] Freedom of Information Online, 'Frequently asked questions', viewed 21 May 2008, <http://www.foi.vic.gov.au/>.
[64] Freedom of Information Act 1982 (Vic).
[65] Public Records Act 1973 (Vic).

the principle of open access and provides access to public records that are more than 25 years old and/or no longer required for administrative purposes. According to the PROV, 80 per cent of records in custody are open for public inspection.[66]

The Act stipulates that all public records transferred to the PROV are immediately available for public access unless the responsible Minister takes action to withhold them. The criteria under which public records are withheld from public inspection are similar to the categories of exemption under the *FoI Act 1982*. For example, under section 9 of the *Public Records Act 1973*, records are deemed to be closed to public access if their release could potentially violate personal privacy. Furthermore, section 10 of the Act allows certain types of records to be closed for up to 30 years from the date of transfer. It does not specify the grounds for such closures, however, categories of exemption under FoI may be used to determine whether records should be closed under section 10 of the *Public Records Act 1973*. On this basis, public records may be withheld if it can be determined that their release may among other things:

- reveal Cabinet submissions or deliberations less than ten years old;
- jeopardise law enforcement investigations;
- release documents protected by legal professional privilege; or
- disclose trade secrets acquired by a commercial entity, the release of which may be disadvantageous to that organisation.[67]

Records can also be withheld from public inspection if their release could damage the security, defence or international relations of the Commonwealth or any State or Territory.

3.2.2 Precedents from the UK

In the UK, the *Re-use of Public Sector Information Regulations 2005 (UK)* also provides guidance on the categories of public sector documents that are potentially available for re-use. 'Document' is defined as it relates to content, which refers to information recorded in any form by defined public sector bodies. Examples include: primary and secondary legislation; departmental circulars; meteorological data produced by the Met Office; consultation and policy documents; statistics produced by the Office for National Statistics; and local planning information.[68]

Documents not covered under the UK Regulations include those held by educational and research institutions, cultural establishments (i.e. museums, libraries, archives and performing arts), and any documents exempt for release under FoI legislation.[69]

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[66] Public Record Office Victoria, 'Access to public records', viewed 13 June 2008, <http://www.prov.vic.gov.au/records/downloads/9704s4-May2008revision.pdf>.
[67] Public Record Office Victoria, 'Access to public records', viewed 13 June 2008, <http://www.prov.vic.gov.au/records/downloads/9704s4-May2008revision.pdf>.
[68] Office of Public Sector Information, *The re-use of public sector information: A guide to the Regulations and best practice*, 2005, p. 9.
[69] Office of Public Sector Information, *The re-use of public sector information: A guide to the Regulations and best practice*, 2005, p. 11.

3.2.3 OECD definition of applicable documents

As noted in 1.2.3, OECD Member countries met in Korea on 18 June 2008 and endorsed the Ministerial *Seoul Declaration for the Future of the Internet Economy*. One of the key recommendations from the Declaration called for enhanced access and more effective use of PSI. For the purposes of the Declaration, the OECD defined 'public sector information' as:

> …information, including information products and services, generated, created, collected, processed, preserved, maintained, disseminated , or funded by or for the Government or public institution. This includes use by the original public sector generator or holder or other public sector bodies and further re-use by business or individuals for commercial or non-commercial purposes. In general, the term "use" implies this broad spectrum of use and re-use. [70]

In previous discussions regarding PSI and digital broadband content, the OECD adopted a different emphasis for categorising appropriate data for release. In this context, the OECD differentiated between 'public sector information' and 'public sector content'. Public sector information was defined as information continually and directly generated by the public sector, for the purposes of aiding public sector operations, and readily useable in commercial applications.[71] Public sector content, on the other hand, referred to static information that is held by the public sector rather than being directly generated by it (i.e. cultural archives, artistic works) and is not directly associated with government operations. While public sector content is not necessarily associated with commercial use, it may serve other public purposes.[72]

3.3 Questions:

Question 7: What institutions and agencies should be considered part of the public sector for the purposes of this Inquiry? What advantages will be obtained by encompassing some or all of the following agencies and institutions under this definition:

a) executive government: principally government departments, but also incorporating statutory authorities?
b) the legislature: including parliament?
c) the judiciary?
d) local councils?
e) other public institutions, such as universities, TAFEs, public hospitals, etc?

[70] OECD, 'OECD recommendation of the Council for enhanced access and more effective use of public sector information', viewed 25 June 2008, <http://www.oecd.org/dataoecd/1/28/40821729.pdf>.
[71] Graham Vickery and Sacha Wunsch-Vincent, *Digital broadband content: public sector information and content*, Organisation for Economic Co-operation and Development, 2006, p. 8.
[72] Graham Vickery and Sacha Wunsch-Vincent, *Digital broadband content: public sector information and content*, Organisation for Economic Co-operation and Development, 2006, p. 8.

Question 8: What kinds of documents, data and/or other materials should be considered for public access? What criteria should be applied when judging whether specific documents, data and materials should be made available to the public?

4

Chapter Four:
Issues surrounding pricing for PSI access

With the growing recognition of the commercial value of PSI, there is ongoing debate about whether open access to PSI should also be access at no cost. This issue raises a number of questions about the manner in which such information should be made publicly available, including whether it is appropriate for government to use PSI as an income generating source, and most importantly, what access model and re-use arrangements will facilitate the greatest re-use of PSI. Examination of this issue also requires consideration of which model will maximise the economic and social benefits of PSI.

The literature regarding access to PSI typically makes reference to two broad access models. The first is commercialisation, which comprises either cost-recovery strategies that aim to recoup some or all of the costs of data production or profit maximising strategies where prices are set above the costs of data production.[73] The second model is open access where PSI is priced at either no or marginal costs, with the latter applying principally when data is not disseminated electronically.[74]

These two models represent divergent philosophical rationales that place different emphases on the balance between the rights of citizens to access PSI and the economic return to government that can be achieved through the commercialisation of PSI.[75] At a practical level, it can also lead to differences in the role that government has in enhancing the value of PSI. In this context, access to information at no or marginal costs is said to allow commercial re-users to add value to PSI rather than government.[76] Commercialisation, on the other hand, encourages government to hold

[73] Mark Burdon, 'Re-using public sector information (PSI) for profit: who's data is it anyway?' Paper presented at the *Second workshop on the social implications of national security*, Canberra, 2007, p. 131; David Newbery, et al., *Models of public sector information provision via trading funds*, Department for Business , Enterprise and Regulatory Reform and HM Treasury, London, 2008, p. 11; Graham Vickery and Sacha Wunsch-Vincent, *Digital broadband content: public sector information and content*, Organisation for Economic Co-operation and Development, 2006, p. 6.

[74] Mark Burdon, 'Re-using public sector information (PSI) for profit: who's data is it anyway?' Paper presented at the *Second workshop on the social implications of national security*, Canberra, 2007, p. 132; David Newbery, et al., *Models of public sector information provision via trading funds*, Department for Business , Enterprise and Regulatory Reform and HM Treasury, London, 2008, p. 12.

[75] Mark Burdon, 'Re-using public sector information (PSI) for profit: who's data is it anyway?' Paper presented at the *Second workshop on the social implications of national security*, Canberra, 2007, p. 130.

[76] Graham Vickery and Sacha Wunsch-Vincent, *Digital broadband content: public sector information and content*, Organisation for Economic Co-operation and Development, 2006, p. 5.

onto PSI for its own use or adopt cost-recovery strategies that provide limited and potentially expensive access to external users.[77] Under this model, government is more involved in producing value-added services.

4.1 International experience

Examples of these two access approaches are found in the US and the EU.[78] At a federal level, the US is characterised as having a "strong freedom of information law"[79] whereas a number of states within the EU view PSI as an asset to be exploited by government.

In the US, rule 34 of the *Copyright Act 1976* prohibits copyright protection for any work created by the Federal Government.[80] The Federal Government policy *Management of Federal Information Resources* states:

> Because the public disclosure of government information is essential to the operation of a democracy, the management of Federal information resources should protect the public's right of access to government information.[81]

The US access model aims to minimise government control and maximise public access to PSI. By disseminating PSI as widely as possible, the private sector adopts a greater role in enhancing the value of PSI by establishing services out of raw public data and then re-selling it in the public domain. While the actual contribution of PSI to the US economy is difficult to quantify, it is believed to be considerable in terms of the creation of additional employment opportunities and tax revenue.[82]

In contrast to the US, the EU is characterised as having a lack of clear policies regarding access to PSI. The introduction of the *EU Directive on the re-use of PSI* in 2003, however, intended to change this by encouraging harmonisation across the EU Member States. Member States were required to bring their laws into conformity with the Directive on 1 July 2005. Its application is scheduled for review in July 2008.[83]

In regard to the pricing of PSI, article six of the Directive states:

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[77] Graham Vickery and Sacha Wunsch-Vincent, *Digital broadband content: public sector information and content*, Organisation for Economic Co-operation and Development, 2006, p. 6.

[78] Mark Burdon, 'Re-using public sector information (PSI) for profit: who's data is it anyway?' Paper presented at the *Second workshop on the social implications of national security*, Canberra, 2007; Peter Weiss, *Borders in Cyberspace: Conflicting public sector information policies and their economic impacts*, U.S. Department of Commerce, 2002.

[79] Pira International Ltd, *Commercial exploitation of Europe's public sector information - Executive Summary*, European Commission Directorate-General for the Information Society, Luxembourg, 2000, p. 5.

[80] Mark Burdon, 'Re-using public sector information (PSI) for profit: who's data is it anyway?' Paper presented at the *Second workshop on the social implications of national security*, Canberra, 2007, p. 133.

[81] U.S. Federal Government, 'Circular A-130 Management of federal information resources', viewed 4 April 2008, <http://www.whitehouse.gov/omb/circulars/a130/a130trans4.html>.

[82] Pira International Ltd, *Commercial exploitation of Europe's public sector information - Executive Summary*, European Commission Directorate-General for the Information Society, Luxembourg, 2000, p. 6.

[83] European Commission, 'Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information', *Official Journal of the European Union*, 2003, p. 95.

> Where charges are made, the total income from supplying and allowing re-use of documents shall not exceed the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment. Charges should be cost-oriented over the appropriate accounting period and calculated in line with the accounting principles applicable to the public sector bodies involved.[84]

The Directive also states:

> ...Member States should encourage public sector bodies to make documents available at charges that do not exceed the marginal costs for reproducing and disseminating the documents.[85]

This later assertion has some commentators speculating that the European Commission has moved away from encouraging high licence fees for the re-use of PSI.[86] Other commentators still allege, however, that the Directive creates income opportunities for Member States by providing them with the discretion to profit from the re-sale of PSI.[87] The European Commission, in stating that the Directive is a "form of market legislation, not freedom of information legislation" [88] could be said to confirm this view.

Despite the establishment of the EU Directive, a lack of harmonisation still exists across the Member States on this issue. Hungry has adopted an open access policy that supports the notion of citizens having access to information of public interest. While protecting personal information, the *Electronic Freedom of Information Act 2005* regards information handled by public agencies as accessible to anyone by default.[89] Norway also endorses open access to PSI, with the *Freedom of Information Act 1970* promoting transparency, price-limits, access and non-exclusivity.[90]

The UK is one Member State that is said to have translated the commercial purposes of the EU Directive into its PSI policy. Under the *Trading Funds Act 1973,* certain government departments and executive agencies are

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[84] European Commission, 'Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information', *Official Journal of the European Union*, 2003, p. 94.
[85] European Commission, 'Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information', *Official Journal of the European Union*, 2003, p. 91.
[86] Makx Dekkers, et al., *Final report of study on exploitation of public sector information - benchmarking of EU framework conditions*, Measuring European Public Sector Information Resources, 2006, p. 3; Graham Vickery and Sacha Wunsch-Vincent, *Digital broadband content: public sector information and content*, Organisation for Economic Co-operation and Development, 2006, p. 45; Graham Vickery and Sacha Wunsch-Vincent, *OECD Workshop on public sector information: summary*, Organisation for Economic Co-operation and Development, 2006, p. 10.
[87] Mark Burdon, 'Re-using public sector information (PSI) for profit: who's data is it anyway?' Paper presented at the *Second workshop on the social implications of national security*, Canberra, 2007, p. 132.
[88] Graham Vickery and Sacha Wunsch-Vincent, *OECD Workshop on public sector information: summary*, Organisation for Economic Co-operation and Development, 2006, p. 21.
[89] Graham Vickery and Sacha Wunsch-Vincent, *Digital broadband content: public sector information and content*, Organisation for Economic Co-operation and Development, 2006, p. 21.
[90] Graham Vickery and Sacha Wunsch-Vincent, *Digital broadband content: public sector information and content*, Organisation for Economic Co-operation and Development, 2006, p. 24.

established as Trading Funds by a Trading Fund Order, which requires them to be self-sufficient by selling their data and services and provide a return to the UK Treasury. [91] One example is the Ordnance Survey, which is Britain's national mapping agency. The Wider Markets Initiative also requires departments to earn an income from selling or licensing PSI.[92]

More recently, the UK Government has enacted various initiatives to improve access to PSI, which has created uncertainty in the public domain about its overall pricing policy. In recognition of this issue, Carol Tullo, Director of the Office of Public Sector Information indicated:

> The central task is to strike the right balance between making information available at a cost, which will not act as a barrier to re-use, yet at the same time ensuring that products and services created within the public sector, often at a considerable expense, provide a financial return for the taxpayer. That balance defines the UK debate.[93]

4.2 PSI access in Australia

In Australia, the policy regarding access to PSI is varied. This is apparent in the *Intellectual Property Principles for Australian Government agencies*, which indicates that the business practices of Australian Government agencies differ. Some agencies do not seek to control the extent to which their resources are used in the community whereas others maintain a strong commercial focus. Rather than outline a clear policy framework, the document advises:

> Agencies are encouraged to develop individual IP management frameworks that reflect their own needs and objectives, consistent with other relevant Australian Government policies and requirements.[94]

In 2001, the Commonwealth Government released its Spatial Data Access and Pricing Policy, which asserts that spatial data is provided:

- free of charge over the Internet;
- at no more than the marginal cost of transfer for packaged products; or
- at the full cost of transfer for customised services.[95]

This policy was implemented for the purposes of maximising the social and economic benefits arising from the use of spatial data.[96] The

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[91] Charles Athur, 'What has happened to the trading funds report?' *The Guardian*, 28 February 2008.
[92] Office of Fair Trading, *The commercial use of public information*, UK Government, London, 2006, p. 14.
[93] Chris Corbin, *PSI pricing 2: impact analysis in the context of the PSI Directive*, ePSIplus Thematic Network, 2007, p. 7.
[94] Attorney-General's Department, 'Intellectual property principles for Australian Government agencies', viewed 30 April 2008, <http://www.ag.gov.au>.
[95] Office of Spatial Data Management, 'Australian Government policy on spatial data access and pricing', viewed 6 May 2008, <http://www-ext.osdm.gov.au/osdm/policy/accessPricing.html>.

Commonwealth Government's Office of Spatial Data Management is responsible for administering this policy.

Another example of a government agency that currently provides access to information at no or marginal cost is the Australian Bureau of Statistics (ABS). In 2005, the former Treasurer of the Commonwealth Government, the Honourable Peter Costello, announced that a majority of ABS statistical information would be available on the ABS website free of charge.[97]

4.3 Access at no or marginal cost versus commercialisation

The emerging consensus regarding access to PSI is that access at no or marginal cost is the best approach to ensure the greatest re-use of PSI within the public domain.[98] Opponents to this model, however, question the sustainability of government providing PSI at no or marginal prices when the cost of creating the information can be substantial for governments. This argument is at the core of the commercialisation model and provides a rationale as to why governments might choose to recover some or all of the costs associated with developing government information or activities.

A related justification for the commercialisation model raises the question of whether it is fair for commercial re-users to profit from the re-sale of PSI after having obtained the data from government at no or marginal costs. In the US, where information created by the Federal Government is made as freely and widely available as possible, it is not uncommon for government documents to be reprinted in any form and at any price.[99] Obtaining information this way may be more costly to taxpayers rather than obtaining it directly from government. There is also the chance that taxpayers may end up paying twice for the information – once when it is first created by government with public funds and twice when it is purchased from the commercial re-user.

While the commercialisation model presents obvious solutions for government to minimise the costs of data production, a number of studies have found that it is not the most viable option in order to maximise the economic value of PSI.[100] Inappropriate cost-recovery strategies are argued to significantly restrict access to PSI within the broader community,

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[96] Office of Spatial Data Management, 'Australian Government policy on spatial data access and pricing', viewed 6 May 2008, <http://www-ext.osdm.gov.au/osdm/policy/accessPricing.html>.

[97] Brian Fitzgerald, 'Alfred Deakin Innovation Lecture', viewed 19 March 2008, <http://www.abc.net.au/rn/scienceshow/stories/2007/2122486.htm>.

[98] Pira International Ltd, *Commercial exploitation of Europe's public sector information - Executive Summary*, European Commission Directorate-General for the Information Society, Luxembourg, 2000; Peter Weiss, *Borders in Cyberspace: Conflicting public sector information policies and their economic impacts*, U.S. Department of Commerce, 2002, p. 17.

[99] Mark Burdon, 'Re-using public sector information (PSI) for profit: who's data is it anyway?' Paper presented at the *Second workshop on the social implications of national security*, Canberra, 2007, p. 133.

[100] Mark Burdon, 'Re-using public sector information (PSI) for profit: who's data is it anyway?' Paper presented at the *Second workshop on the social implications of national security*, Canberra, 2007; Pira International Ltd, *Commercial exploitation of Europe's public sector information - Executive Summary*, European Commission Directorate-General for the Information Society, Luxembourg, 2000.

and lead to the emergence of data monopolies. This has been a criticism of the EU model where it is often government that behaves in a commercial manner and as a consequence squeezes out private competitors, some of whom might be highly innovative.[101]

Unlike the commercialisation model, access to PSI at no or marginal cost is said to improve the competitive market conditions for PSI re-use by opening up access to all to do with as they wish. The basic argument behind this model is that charging no or marginal costs for PSI will result in social and economic benefits that far outweigh the immediate financial benefits attained by cost-recovery strategies. The potential for economic growth can be achieved through providing businesses with incentives to invest in new information and services, and thereby encourage higher commercial use of PSI. According to research conducted by the UK Office of Fair Trading into *The commercial use of public information,* increased competition in PSI could benefit the UK economy by around £1 billion a year.[102] Another study conducted for the European Commission projected that the abolition of government licence fees would result in a doubling of the market size and produce additional tax revenues that would more than offset the lost income from charging for PSI.[103]

4.4 Questions:

Question 9: What types of access and pricing policies have been adopted by Victorian Government agencies for the provision of PSI? Is there consistency across individual departments? What have been the costs and benefits associated with these pricing policies in terms of:

a) investment and business opportunities?
b) social, medical and scientific research?
c) community and civic engagement?

Question 10: How should governments ensure transparency and fairness in their pricing policies?

Question 11: What criteria should government apply when determining whether to provide access to PSI? Under what circumstances would the following pricing options be appropriate:

a) no cost?
b) marginal cost or cash recovery?
c) commercial profit and return?

[101] Graham Vickery and Sacha Wunsch-Vincent, *OECD Workshop on public sector information: summary*, Organisation for Economic Co-operation and Development, 2006, p. 7.
[102] Office of Fair Trading, *The commercial use of public information*, UK Government, London, 2006, p. 4.
[103] Pira International Ltd, *Commercial exploitation of Europe's public sector information - Executive Summary*, European Commission Directorate-General for the Information Society, Luxembourg, 2000.

5

Chapter Five:
Open content licensing

There is a growing consensus among those who support open access to PSI that existing licensing systems used by government require remodelling to improve accessibility.[104] The 2005 review of Crown copyright determined the need to promote the widest possible access to government-owned materials and recommended the abolition of the Crown copyright provisions.[105]

The onset of the digital age, which has improved the manner in which information is disseminated, has lead to the development of new licence models that allow others to obtain access to and re-use protected material with minimal transactions.[106] These licences, referred to as 'open content' licences, are automated and do not require negotiation between copyright owners and potential licensees. Open content licences are considered a viable alternative to the existing licensing systems adopted by governments.

Open content licences are said to improve the public availability of copyright material by granting permission for re-use in advance and minimising formal processes required to permit re-use. In this context, open content licences do not attempt to remove copyright but rather use copyright as the legal means to promote open access and grant broad rights of re-use. As a consequence, these licences significantly increase opportunities for re-use of PSI in the public domain, without requiring governments to relinquish their intellectual property (IP).[107]

Internationally and in Australia, a number of open content licensing models have been developed in recent years. These include:

- AEShareNet Limited – an Australian model established by the Australian vocational and training sector that promotes open

[104] Dylan Bushell-Embling, 'Private eyes on public data', *Sydney-Morning Herald*, 25 September 2007; Brian Fitzgerald, 'Alfred Deakin Innovation Lecture', viewed 19 March 2008, <http://www.abc.net.au/rn/scienceshow/stories/2007/2122486.htm>; Neale Hooper, 'Why governments and public institutions need to understand open content licensing', Paper presented at the *Open content licensing: cultivating the Creative Commons*, Brisbane, 2005.
[105] Copyright Law Review Committee, *Crown copyright*, Commonwealth of Australia, Canberra, 2005.
[106] Brian Fitzgerald, et al., *Creating a legal framework for copyright management of open access within the Australian academic and research sector*, Oak Law Project, Brisbane, 2006, p. 10.
[107] Neale Hooper, 'Why governments and public institutions need to understand open content licensing', Paper presented at the *Open content licensing: cultivating the Creative Commons*, Brisbane, 2005.

access to and re-use of educational data and resources, including some owned by government. This model offers 'instant' licences that require no transaction, or 'mediated' licences, which are negotiated and may involve fees;[108]

- Click-Use Licences – is an online licensing system developed by the UK Office of Public Sector Information (OPSI), which allows potential users to submit online requests for re-use of Crown copyright material. There are two key Click-Use Licences – one that covers information central to government operations and attracts no charge, and another that covers value-added material produced by government and allows flexibility to charge;[109]

- Creative Archive – established by the BBC (British Broadcasting Company), Channel 4, The Open University and the British Film Institute to make available programs for re-use from their archives. This licence only allows re-use in the UK and it comprises a 'no endorsement or derogatory use' condition, which does not permit licensed material to be used for promoting political, charitable or other campaigning purposes;[110] and

- BC Commons – the British Columbia (BC) Campus organisation in Canada offers two licensing options for BC public, post-secondary institutions that develop online content. Developers can choose between either a Creative Commons licence or a BC Commons licence that restricts the sharing of information to within the BC, post-secondary system.[111]

Further to these examples, the most commonly recognised open licensing model is Creative Commons. This is described in the following section.

5.1 Creative Commons

The Creative Commons licensing system was developed by Professor Lawrence Lessig of Stanford University in 2001.[112] It comprises a predetermined set of licensing terms and conditions that allow copyright owners to grant some or all of their rights to the public while retaining other rights through a number of pre-determined conditions. Creative Commons was premised on the basis of creating a forum where IP would facilitate free culture.[113]

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[108] Ed Barker, et al., *The Common Information Environment and Creative Commons*, Common Information Environment, United Kingdom, 2005, p. 16.
[109] Ed Barker, et al., *The Common Information Environment and Creative Commons*, Common Information Environment, United Kingdom, 2005, p. 11.
[110] Ed Barker, et al., *The Common Information Environment and Creative Commons*, Common Information Environment, United Kingdom, 2005, p. 17.
[111] Ed Barker, et al., *The Common Information Environment and Creative Commons*, Common Information Environment, United Kingdom, 2005, p. 17.
[112] Brian Fitzgerald, et al., *Creating a legal framework for copyright management of open access within the Australian academic and research sector*, Oak Law Project, Brisbane, 2006, p. 10.
[113] Lawrence Lessig, 'The vision for the Creative Commons : what are we and where are we headed? Free culture', Paper presented at the *Open content licensing: cultivating the Creative Commons*, Brisbane, 2005.

While originating in the US, the Creative Commons system has expanded to become an international product and is now offered in over 60 countries. In Australia, the localised project is iCommons and is hosted by the Queensland University of Technology. In Australia, there are six Creative Common licences, which are formed from one or more of the following conditions:

- Attribution – applicable to every Creative Commons work and requires that whenever a work is copied or redistributed, credit must always be given to the creator;

- Non-Commercial – allows others to copy, distribute, display and perform the work, including derivative works based upon it but only for non-commercial purposes;

- No derivative works – allows others to copy, distribute, display and perform only verbatim copies of the work, not derivative works based upon it; and

- Share Alike – allows others to distribute derivative works only under a licence that comprises the same licence conditions that govern the original work. This licence term does not apply to the no derivative works option.[114]

The six Creative Commons licensing options offered in Australia are:

1. Attribution (as explained above);

2. Attribution-ShareAlike – allows others to use Creative Commons work and make derivative works, provided it is licensed on the same conditions as the original work;

3. Attribution-NonCommercial – allows others to use Creative Commons work and make derivative works but only for non-commercial purposes;

4. Attribution-NonCommercial-ShareAlike – combines the above three options;

5. Attribution-NoDerivs – allows others to copy, distribute and transmit the Creative Commons work only, provided that credit is given to the creator; and

6. Attribution-NonCommercial-NoDerivs - allows others to copy, distribute and transmit the Creative Commons work only, provided that it is for non-commercial purposes and credit is given to the creator.[115]

Each Creative Commons licence is available in three formats:

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[114] Creative Commons Australia, 'Creative Commons licences', viewed 9 May 2008, <http://www.creativecommons.org.au/licences>.
[115] Australian Copyright Council, 'Creative Commons Licences', viewed 10 May 2008, <www.copyright.org.au>.

1. Human-readable deed – described as the 'common deed' and is the user-friendly version that provides users with clear instructions of what type of use is allowed for each Creative Commons work;

2. Lawyer-readable – is the full legal licence and it is always linked to the common deed; and

3. Machine-readable – a small section of code that is made available to cut and paste into web pages. When placed in a web page, it displays the Creative Commons logo and also includes the Resource Description Framework code, which allows it to be discovered by search engines.[116]

5.1.1 The application of Creative Commons to PSI

While the original target user group of Creative Commons was producers of creative copyright material, there has been growing interest in its application to government-owned material. Creative Commons is considered only suitable for PSI when access is the key principle and it is provided through open access rather than via cost-recovery strategies.[117] Both of these prerequisites are core to the Creative Commons licensing system as it is premised on non-discriminatory access that does not allow royalties to be charged.[118]

The Queensland Spatial Information Council (QSIC) at Queensland Treasury commissioned the *Government Information Licensing Framework Project* to review best practice and international trends in the transaction of PSI. Following an examination of the access and licensing practices of Queensland Government agencies in Stage 1 of the project, it was concluded that open content licensing, and in particular the Creative Commons model, could be used to meet approximately 85 per cent of Queensland Government's licensing arrangements.[119] As part of Stage 2 of the project, the QSIC endorsed the recommendation that:

> …state government agencies move to an information licensing framework based on Creative Commons for qualifying information where no issues of privacy, confidentiality or other legal or policy constraints apply.[120]

The Queensland Government is currently considering the business case for the broad implementation of the *Government Information Licensing Framework*, which was developed as part of the project.

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[116] Ed Barker, et al., *The Common Information Environment and Creative Commons*, Common Information Environment, United Kingdom, 2005, p. 14.
[117] Mierille van Eechoud and Brenda van der Wal, 'Creative Commons licensing for public sector information: Opportunities and pitfalls', viewed 22 May 2008, <http://learn.creativecommons.org>.
[118] Mierille van Eechoud and Brenda van der Wal, 'Creative Commons licensing for public sector information: Opportunities and pitfalls', viewed 22 May 2008, <http://learn.creativecommons.org>.
[119] Neale Hooper, 'Government Information Licensing Framework', Paper presented at the *Australian national summit on open access to public sector information*, Brisbane, 2007.
[120] Queensland Spatial Information Council, 'Stage 2 - A government information open access and use strategy', viewed 28 March 2008, <www.qsic.qld.gov.au>.

5.1.2 Opportunities for the application of Creative Commons to PSI

The growing interest in Creative Commons among public institutions has lead to a greater understanding of the key benefits and issues associated with its application to PSI. Advocates of Creative Commons argue that one of the main advantages for government is that the system is ready to use[121] and is compatible with the Australian *Copyright Act 1968*. As a consequence, government can save time and money by not needing to draft its own licensing system. Following the implementation of Creative Commons, government may also reduce the legal input normally required to draft licences for individual requests.[122]

A related justification, particularly relevant to the Victorian Government, is the potential for the adoption of the Creative Commons licensing system to lead to the establishment of a consistent, whole-of-government copyright policy. This is currently non-existent in Victoria. As noted in the Auditor-General's report *Managing intellectual property in government agencies*, a lack of clear IP policies can contribute to inefficiencies across government:

> The lack of documented decision-making criteria has an impact on the transparency and defensibility of decisions. Decisions on allocation of IP rights can have significant economic consequences, and the current lack of a clear framework exposes staff to risks that their decisions are not seen as fair and impartial.[123]

Another key advantage of Creative Commons is the accompanying technical infrastructure that ensures re-usable works are easily discoverable. Material licensed under Creative Commons is published online and is always re-usable at the point of discovery. This is the result of the material in question displaying the Creative Commons logo (linked to the associated code), which creates an automatic link to the Creative Commons website where the licence conditions are detailed. Government websites, on the other hand, do not always display consistent or comprehensive copyright notices, with some websites not displaying a copyright notice at all.

To assist in the discovery process, Google and Yahoo now comprise filters that allow users to specifically search for content licensed under Creative Commons. The implementation of this initiative by such mainstream internet search engines highlights the level of infrastructure and technical support surrounding its application and also signifies the legitimisation of the Creative Commons licensing system on a global scale.[124]

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[121] Mierille van Eechoud and Brenda van der Wal, 'Creative Commons licensing for public sector information: Opportunities and pitfalls', viewed 22 May 2008, <http://learn.creativecommons.org>.
[122] Queensland Spatial Information Council, *Government information and open content licensing: An access and use strategy*, Queensland Treasury, Brisbane, 2006, p. 20; Ed Barker, et al., *The Common Information Environment and Creative Commons*, Common Information Environment, United Kingdom, 2005, p. 32.
[123] Auditor-General, *Managing intellectual property in government agencies*, Auditor General's Office, Victoria, 2005, p. 35.
[124] Nick Sweeney, 'An outline of the project known as Creative Commons, iCommons or Copyleft', viewed 1 May 2008, <www.artslaw.com.au>.

Those in support of Creative Commons also draw attention to the simplistic nature of the licensing system, which allows users to easily interpret the icons and human-readable code. The common deed provides users with a clearer understanding of their rights regarding the re-use of material, particularly around which rights are reserved and to what extent.[125]

5.1.3 Concerns about the application of Creative Commons to PSI

There is speculation that the simplistic nature of Creative Commons may be problematic for government. Because the number of Creative Common licences must be kept to a minimum and must not steer too far from the core licence, there is little opportunity to draft additional licence conditions that are specifically relevant to government.[126]

The wording of the Creative Commons licences has also received criticism for being misleading, particularly the lawyer-readable format. According to the Australian Copyright Council, the 'No-Derivs' licence does not necessarily prohibit others from re-using the original works in the ways listed under this licensing condition:

> Unless it's technically an "adaptation" (a narrowly defined type of use, such as arrangement of a piece of music, or a translation) people can generally use your material in "derivative works".[127]

This is also the case with the 'Non-Commercial' licence, as while original works cannot be used in ways that are primarily intended for commercial purposes, it does allow use in other circumstances that are clearly commercial, such as reproduction in calendars, publications and websites.[128]

Other open content licensing models have been established as a consequence of Creative Commons not accommodating certain licence conditions. One example is the Creative Archive licence. A key rationale for its establishment related to the lack of geographical restrictions in all of the Creative Commons licences.[129] While this is considered a benefit by some commentators, others raise the question of whether it is appropriate for resources that are created using public funds from one jurisdiction to be

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[125] Ed Barker, et al., *The Common Information Environment and Creative Commons*, Common Information Environment, United Kingdom, 2005, p. 33; Mierille van Eechoud and Brenda van der Wal, 'Creative Commons licensing for public sector information: Opportunities and pitfalls', viewed 22 May 2008, <http://learn.creativecommons.org>.
[126] Mierille van Eechoud and Brenda van der Wal, 'Creative Commons licensing for public sector information: Opportunities and pitfalls', viewed 22 May 2008, <http://learn.creativecommons.org>.
[127] Australian Copyright Council, 'Creative Commons Licences', viewed 10 May 2008, <www.copyright.org.au>.
[128] Australian Copyright Council, 'Creative Commons Licences', viewed 10 May 2008, <www.copyright.org.au>; Kimberlee Weatherhall, 'Would you ever recommend a Creative Commons license?' viewed 4 April 2008, <http://www.austlii.edu.au/au/other/AIPLRes/2006/4.html>.
[129] Ed Barker, et al., *The Common Information Environment and Creative Commons*, Common Information Environment, United Kingdom, 2005, p. 17.

made available for world-wide use. To address this issue, the Creative Archive licence only allows the re-use of its material in the UK.[130]

The Creative Archive licence also comprises a 'no endorsement or derogatory use condition', which does not permit licensed material to be used for promoting political, charitable or other campaigning purposes.[131] This condition does not exist in the standard Creative Common licences and it cannot be incorporated on a per licence basis as there is no opportunity for negotiation between copyright owners and potential licensees. In this context, the Creative Commons licensing system is often criticised because it makes it difficult to monitor moral right issues.[132]

There are other circumstances, particularly in the government context, when the use of the Creative Commons may not be appropriate. Stage 2 of the QSIC project noted that while a majority of Queensland Government databases could be made available under Creative Commons, some data and information would not qualify. An example provided was high value commercial transactions, which are considered "outside the scope of the Creative Commons philosophy and licence structure."[133] Private and confidential information are also not compatible with the Creative Commons licences.

In circumstances when information does not qualify for licensing under Creative Commons, government may be required to create other licensing templates.[134] Consequently, this could lead to a suite of inconsistent licences, which would contradict one of the key justifications for the adoption of the Creative Commons licensing system in the first place. To address this issue and as an alternative to Creative Commons, government could choose to develop its own suite of licences to be adopted as an overarching policy. These licences could draw on the principles of open access but also include licence conditions not found in Creative Commons and be tailored to the specific purposes of government. While this would be a timely and costly process, it could result in the adoption of a consistent, whole-of-government copyright framework.

5.1.4 Implementation of open content licensing models

Because the use of open content licences by government is a recent phenomenon, there is limited experience that can be drawn upon to guide the implementation of this licensing model in government contexts. As a starting point, however, there is an emerging consensus that emphasises the need for government to develop a clear policy framework and guiding principles to assist the implementation process.[135] While this would be

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[130] Ed Barker, et al., *The Common Information Environment and Creative Commons*, Common Information Environment, United Kingdom, 2005, p. 17.
[131] Ed Barker, et al., *The Common Information Environment and Creative Commons*, Common Information Environment, United Kingdom, 2005, p. 17.
[132] Kimberlee Weatherhall, 'Would you ever recommend a Creative Commons license?' viewed 4 April 2008, <http://www.austlii.edu.au/au/other/AIPLRes/2006/4.html>.
[133] Queensland Spatial Information Council, *Government information and open content licensing: An access and use strategy*, Queensland Treasury, Brisbane, 2006, p. 19.
[134] Queensland Spatial Information Council, *Government information and open content licensing: An access and use strategy*, Queensland Treasury, Brisbane, 2006, p. 20.
[135] Ed Barker, et al., *The Common Information Environment and Creative Commons*, Common Information Environment, United Kingdom, 2005, p. 27; Queensland Spatial Information Council, *Government information and open content licensing: An access and*

considered standard practice, it is particularly important when implementing an open content licensing system so there is clarity about the type of information that will be made available, how it will be made available, if it is appropriate for licensing and on what terms. The UK's Common Information Environment report *Common Information Environment and Creative Commons* highlighted the importance of government developing a licensing policy:

> The motivation for public sector organisations to make resources available for reuse is enormous and driven by legislative, cultural and economic forces. Difficult decisions will be required when considering specific licensing conditions so it is advisable to be able to base such decisions on a sound and principled basis.[136]

It is during this policy development process that government should decide whether to create a new and tailored licensing system or adopt an existing model, such as Creative Commons. This decision will then determine the management system required to administer the licensing model.

The following list outlines the various matters identified in the literature as requiring attention when implementing an open content licensing model:

- identifying material for open access;
- identifying and managing third party IP;
- systematic digitisation of analogue materials;
- development of electronic catalogues and open access repositories of digital content;
- ensuring or encouraging inclusion of material in open access repositories; and
- creating systems for prospective users to identify the available material.[137]

The technical infrastructure required to support the search function is considered critical to achieving the aims of any open access initiative. Commentators argue that there is limited value in providing access to information if it difficult for users to locate.[138] As noted earlier, Creative Commons through its metadata allows search engines to specifically

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use strategy, Queensland Treasury, Brisbane, 2006, p. 22; Kimberlee Weatherhall, 'Would you ever recommend a Creative Commons license?' viewed 4 April 2008, <http://www.austlii.edu.au/au/other/AIPLRes/2006/4.html>.

[136] Ed Barker, et al., *The Common Information Environment and Creative Commons*, Common Information Environment, United Kingdom, 2005, p. 27.

[137] Kimberlee Weatherhall, 'Would you ever recommend a Creative Commons license?' viewed 4 April 2008, <http://www.austlii.edu.au/au/other/AIPLRes/2006/4.html>.

[138] Mierille van Eechoud and Brenda van der Wal, 'Creative Commons licensing for public sector information: Opportunities and pitfalls', viewed 22 May 2008, <http://learn.creativecommons.org>; Queensland Spatial Information Council, *Government information and open content licensing: An access and use strategy*, Queensland Treasury, Brisbane, 2006.

search for material licensed under particular conditions.[139] Another example is the *Information Asset Register,* which is administered by the UK's OPSI and lists resources held by the UK Government and allows users to identify, from one single source, the information held across the UK Government.[140]

Another matter to consider during the implementation process is deciding which government department or agency will be responsible for administering the licensing model, or whether it is necessary to create a central body, as done in the UK. In the UK the purpose of OPSI is to lead and transform information management and advise on and regulate the operation of the re-use of PSI.[141] It provides a wide range of services to government and the broader community regarding the finding, using, sharing and trading of information.

5.2 The alternative to licensing PSI

As noted earlier, the Copyright Law Review Committee recommended as part of its review of Crown copyright that it be repealed. This was based on the notion that government should not have a privileged position compared to other copyright holders. While the removal of Crown copyright would still allow government to claim copyright ownership under the general provisions of the *Copyright Act 1968*, this recommendation draws attention to a related question about whether government should retain copyright ownership at all.

In a review of criticisms targeting Creative Commons, Kimberlee Weatherhall questioned the feasibility of maintaining licences to manage the use of information:

> …it seems to me, a licence does nothing that removal or restriction of copyright could not do, and in fact adds costs and uncertainty: because it can be revoked, because terms can be added, because different terms might be applied by different governments.[142]

Similarly, Dr Terry Cutler asserts that removing Crown copyright and putting government information back in the public domain will make a significant difference to improving access to PSI, as well as industry development. In the context of the Queensland Government, Dr Cutler indicated it should adopt Creative Commons as its Crown IP.[143] Other commentators stipulate, however, that the debate should not be characterised by the rhetoric of 'all or nothing' or 'copyright versus public domain' but rather it should be about finding a balance between the two.[144]

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[139] Nick Sweeney, 'An outline of the project known as Creative Commons, iCommons or Copyleft', viewed 1 May 2008, <www.artslaw.com.au>.
[140] Office of Public Sector Information, 'Information Asset Register', viewed 28 March 2008, <http://www.opsi.gov.uk/iar/index.htm>.
[141] Office of Fair Trading, *The commercial use of public information*, UK Government, London, 2006, p. 34.
[142] Kimberlee Weatherhall, 'Would you ever recommend a Creative Commons license?' viewed 4 April 2008, <http://www.austlii.edu.au/au/other/AIPLRes/2006/4.html>.
[143] Terry Cutler, 'Why governments and public institutions need to understand open content licensing ', Paper presented at the *Open content licensing: cultivating the Creative Commons*, Brisbane, 2006, p. 80.
[144] Anne Fitzgerald, 'Why governments and public institutions need to understand open content licensing', Paper presented at the *Open content licensing: cultivating the Creative*

Open content licences are considered one way to do this as they allow government to increase the accessibility and usability of its IP, while at the same time not relinquishing its IP rights.

5.3 Questions:

Question 12: What other open content licensing models may be of interest to the Committee?

Question 13: Is the absence of conditions regarding geographical restrictions or no endorsement in Creative Commons likely to be an issue for Victorian PSI?

Question 14: What are the merits of the Victorian Government developing its own whole-of-government licensing framework as an alternative to adopting the Creative Commons licensing system?

Question 15: Is it appropriate for the Victorian Government's licensing framework to comprise both the Creative Commons licences and other more tailored licences?

Question 16: What are the benefits of establishing a central agency whose core responsibility would be managing the Victorian Government's licensing model?

Question 17: What are the range of licence conditions that the Victorian Government is likely to require when issuing open content licenses?

Commons, Brisbane, 2005, p. 84; Neale Hooper, 'Why governments and public institutions need to understand open content licensing', Paper presented at the *Open content licensing: cultivating the Creative Commons*, Brisbane, 2005, p. 85.

6

Chapter Six:
Open source licensing

The Terms of Reference for the current Inquiry refer to 'open source licensing' as the potential means to enhance the discovery, access and use of government information. However, in the discussions above and in the literature, this is referred to as 'open content' licensing. Open source, on the other hand, is relevant to the development of software. Open source software (OSS) is defined as:

> …any program or application that is freely distributed, non-platform specific – and in which the programming code is open and visible.[145]

The origin of OSS was in the free software movement, which was founded by Mr Richard Stallman in the 1980s with the key objective to distribute free software and to have the source code disclosed at the point of distribution.[146] To ensure protection of the software, Mr Stallman established the General Public Licence (GPL), which requires anyone who modifies the source code to disclose their modifications to any further recipients of the software.[147] As a result, all improvements are shared among the broader community.

Concerns regarding the potential lack of commercial interest in free software lead to the establishment of the Open Source Initiative (OSI). The OSI is a non-profit organisation that conceptualised OSS and the business models that allow the commercial uptake of such software.[148] The Initiative outlines the basic licence conditions that developers, distributors and users of OSS must release software under for it to be considered open source. Basic licence conditions allow users to (among other things):

- use the software for any purpose;
- make copies of the software for any purpose;
- access or modify the source code of the software for any purpose; and

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[145] Natalie Whitlock, 'The security implications of open source software', viewed 16 May 2008, <http://www.ibm.com/developerworks/linux/library/l-oss.html>.
[146] Brian Fitzgerald and Nic Suzor, 'Legal issues for the use of free and open source software in government', viewed 28 February 2008, <http://www.austlii.edu.au/au/journals/MULR/2005/13.html>.
[147] Brian Fitzgerald and Nic Suzor, 'Legal issues for the use of free and open source software in government', viewed 28 February 2008, <http://www.austlii.edu.au/au/journals/MULR/2005/13.html>.
[148] Brian Fitzgerald and Nic Suzor, 'Legal issues for the use of free and open source software in government', viewed 28 February 2008, <http://www.austlii.edu.au/au/journals/MULR/2005/13.html>.

- without payment of a royalty or other fee, distribute copies of:
    - the software (including distributing the software as part of an aggregate distribution containing software from several different sources); or
    - a derived or modified form of the software (either in complied form or as source code), under the same terms as the licence applying to the software. [149]

The most common use of OSS in information and communication technology (ICT) projects is in the areas of network infrastructure, security, internet and intranet applications, and network communications.[150]

6.1 Government use of OSS

In recognition of the growing interest in OSS by government, the Australian Government Information Management Office (AGIMO) released *A guide to ICT sourcing* in 2004, followed by the complementary document *A guide to open source software for Australian Government agencies* in 2005.

The AGIMO's guide to OSS outlines the following four key methods of how government can introduce OSS into its ICT business solutions:

- in-house sourcing: direct procurement of OSS;
- external sourcing: using external solution providers to deliver and organise OSS solutions;
- incidental sourcing: OSS is not the primary focus but rather is one component of a larger sourcing solution; and
- custom software development: OSS is developed or modified by government.[151]

In circumstances when government commissions external sourcing, there is no payment for the software licences but rather payment is made to commercial vendors to administer the software and provide support services. This is how OSS vendors generate revenue.[152]

In November 2007, the Commonwealth Government's Department of Finance and Deregulation released the findings of its *Free and Open Source Software survey of Australian Government agencies.* Some of the key messages were:

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[149] Australian Government Information Management Office, *A guide to open source software for Australian Government agencies*, Australian Government Department of Finance and Administration, Canberra, 2005, p. 9.
[150] Brian Fitzgerald and Nic Suzor, 'Legal issues for the use of free and open source software in government', viewed 28 February 2008, <http://www.austlii.edu.au/au/journals/MULR/2005/13.html>.
[151] Australian Government Information Management Office, *A guide to open source software for Australian Government agencies*, Australian Government Department of Finance and Administration, Canberra, 2005, p. 18.
[152] Australian Government Information Management Office, *A guide to open source software for Australian Government agencies*, Australian Government Department of Finance and Administration, Canberra, 2005, p. 9.

- 86 per cent of agencies felt positively towards OSS;
- over 90 per cent of agencies believe that OSS and proprietary software can coexist; and
- the three areas of most potential for OSS are Really Simple Syndication (RSS), which is the subscription formats for blogs, news and updates and pod casting, inter/intranet content management systems and agency-specific business applications.[153]

Key concerns reported by agencies were:

- lack of perceived vendor support for OSS;
- difficulties obtaining relevant information on the use of OSS in government contexts, resulting in limited knowledge of OSS and the emerging technologies; and
- difficulties evaluating OSS because of the perceived inability to trial the software.[154]

The ABS is one government agency that has explored the opportunities around OSS over the years and has been satisfied with the outcomes. As indicated below, its involvement with OSS is extensive:

> The movement towards collaborative activities in developing and sharing ICT capabilities have been a major driver for us…We have built an Open Source development stack called JABS for use by developers. We have been using Open Source products like the statistical system R. We have collaborated on projects like Data Ferret. We have collaborated with Open Source Federated Single Sign On and Attribute Exchange Frameworks like Shibelert.[155]

6.2 Open source software versus proprietary software

The adoption of proprietary software solutions for ICT projects is typically core practice for government. While there are few similarities between proprietary software and OSS, they do comprise similar copyright ownership provisions. Under both software models, copyright is owned by developers of the source code although with OSS, there may be various contributors to the software development and as a consequence various copyright owners. To simplify the ownership, some OSS projects require all of the contributors to appoint their copyright to a central entity, which then acts as the guardian of the software.[156]

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[153] Department of Finance and Deregulation, 'Open source software overview November 2007', viewed April 2008, <www.agimo.gov.au>.
[154] Department of Finance and Deregulation, 'Open source software overview November 2007', viewed April 2008, <www.agimo.gov.au>.
[155] Don Bartley, Paper presented at the *Open source software in government: innovation and shared experience*, Canberra, 2007.
[156] Australian Government Information Management Office, *A guide to open source software for Australian Government agencies*, Australian Government Department of Finance and Administration, Canberra, 2005, p. 46.

The general understanding of 'proprietary' in regard to software is that it has one owner who has control over what users do with that software. This is a key difference between proprietary software and OSS. Open source licences are not concerned with how users use the software but rather they focus on the redistribution and continued access of the source code to anyone who wishes to use it.[157] With proprietary software, the source code is not made available to users.

One of the key rationales for government choosing proprietary software over OSS is the perceived risk mitigation.[158] Choosing a well-established software product that is owned by a large and experienced company is perceived to comprise fewer risks than an OSS product, in particular those OSS products that are in the initial stages of development. The AGIMO's guide to OSS advises that it is difficult to make broad statements about the robustness of such software products as there have been few studies that have reviewed their reliability. It is typically understood, however, that as the use of OSS products increases, their reliability and robustness improve.[159]

The use of proprietary software can be costly for government in circumstances when software owners obtain a monopoly on the product in question.[160] This is unlike OSS where having the source code available to all can lead to various vendors offering competing products based on the same technology.[161] This reduces the likelihood of lock-ins and the potential for sole vendors to increase their product prices and cost of support services.[162] The freedom to choose from a number of OSS vendors provides government with the opportunity to negotiate and ensure it receives value for money.

The issue of security is also a point of continued debate around the two software models. The perceived security risk with OSS stems from the widespread availability of the source code and the potential for developers' contributions to lead to deficiencies in the software or for it to be intentionally interfered with. In response, those in support of OSS argue that the closure of the source code with proprietary software offers no advantage when dissemblers can re-create it.[163]

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[157] Australian Government Information Management Office, *A guide to open source software for Australian Government agencies*, Australian Government Department of Finance and Administration, Canberra, 2005, p. 9.
[158] Jeff Waugh, Paper presented at the *Open source software in government: innovation and shared experience*, Canberra, 2007.
[159] Australian Government Information Management Office, *A guide to open source software for Australian Government agencies*, Australian Government Department of Finance and Administration, Canberra, 2005, p. 16.
[160] Australian Government Information Management Office, *A guide to open source software for Australian Government agencies*, Australian Government Department of Finance and Administration, Canberra, 2005, p. 29.
[161] Australian Government Information Management Office, *A guide to open source software for Australian Government agencies*, Australian Government Department of Finance and Administration, Canberra, 2005, p. 30.
[162] Australian Government Information Management Office, *A guide to open source software for Australian Government agencies*, Australian Government Department of Finance and Administration, Canberra, 2005, p. 29.
[163] David Wheeler, 'Is open source good for security', viewed 16 May 2008, <www.dwheeler.com>.

Advocates of OSS assert that the security arrangements of OSS are characterised by the notion of 'peer review'.[164] This implies that because the source code is available to all, various programmers on a global scale have the opportunity to examine it for security vulnerabilities. This concept, however, is believed by other commentators to be highly overrated as it assumes that users are motivated to discover and address problems, or that users have the expertise to know what to look for.[165] Some commentators state that the notion of peer review has the potential to lull users into a false sense of security.[166] Because the widespread use of OSS is still in the early stages, it has been suggested that potential remains for software security to be considerably enhanced.[167]

6.3 Questions:

Question 18: To what extent have other Australian governments adopted the use of OSS in their ICT business solutions?

Question 19: What risks and benefits do OSS products offer over proprietary software for use in government operations? Are there opportunities for broader adoption of OSS by the Victorian Government?

Question 20: What is the capacity for both software models to coexist in the same organisation?

Question 21: What is the role of the Victorian government in procuring and distributing OSS in ICT business solutions?

[164] Natalie Whitlock, 'The security implications of open source software', viewed 16 May 2008, <http://www.ibm.com/developerworks/linux/library/l-oss.html>.
[165] Natalie Whitlock, 'The security implications of open source software', viewed 16 May 2008, <http://www.ibm.com/developerworks/linux/library/l-oss.html>.
[166] David Wheeler, 'Is open source good for security', viewed 16 May 2008, <www.dwheeler.com>; Natalie Whitlock, 'The security implications of open source software', viewed 16 May 2008, <http://www.ibm.com/developerworks/linux/library/l-oss.html>.
[167] David Wheeler, 'Is open source good for security', viewed 16 May 2008, <www.dwheeler.com>.

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Appendix One:
Extract from LA Votes and Proceedings.

No 58, Wednesday 27 February 2008, pages 282-283.

PARLIAMENTARY COMMITTEE REFERENCES — Motion made and question proposed — That under s 33 of the *Parliamentary Committees Act 2003* the following matters be referred to the joint investigatory committees specified:

(1) To the **Economic Development and Infrastructure Committee** — for inquiry, consideration and report no later than 30 June 2009 on the potential application of open source licensing to Victorian Government information and, in particular, the Committee is asked to:

(a) report on the potential economic benefits and costs to Victoria of maximising access to and use of Government information for commercial and/or non-commercial purposes, including consideration of:

(i) public policy developments elsewhere in Australia and internationally; and

(ii) the types of information that will provide the greatest potential benefit;

(b) consider whether use of open source licensing models, including Creative Commons, would enhance the discovery, access and use of Government information;

(c) report on the use of information and communication technology to support discovery, access and use of Government information; and

(d) identify likely risks, impediments and restrictions to open source licensing of Government information, including impacts on and implications for any existing cost recovery arrangements.