Creative Commons and Government Guide

Using Creative Commons 3.0 Australia Licences on Government Copyright Materials

Professor Anne Fitzgerald, Neale Hooper and Cheryl Foong
IMPORTANT NOTE:
This Guide deals with copyright law and the Creative Commons 3.0 Australia licences only

This Guide deals with the licensing of government copyright materials for distribution and reuse under Creative Commons (CC) 3.0 Australia licences. It is important for government agencies to note that government copyright materials may be subject to restrictions on access and/or reuse, for a range of reasons, such as to:

- protect personal information, as required by privacy laws;
- maintain confidentiality;
- comply with obligations imposed by contract or legislation;
- protect public security; or
- meet administrative requirements.

This Guide is not an exhaustive resource, and is not a substitute for obtaining your own legal advice.

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4 Note that the CC & Government Guide for version 2.5 of the Australian CC licences is available at http://eprints.qut.edu.au/32519/.

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1 Who should read this?

This Guide has been developed for government departments and agencies\(^5\) that make their copyright materials available for access, use and reuse. It provides practical step-by-step guidance for agencies and their officers on licensing and use of government copyright materials under Creative Commons 3.0 Australia (CC) licences.\(^6\)

In Australia, as in other countries worldwide, there is a growing awareness at the government level of the advantages of using open content licences when distributing or providing access to their copyright materials, to give effect to their policies on open access and reuse of public sector materials.\(^7\) CC licences are an internationally recognized suite of open content licences which can be used by governments as a simple and effective mechanism to support the distribution and reuse of their copyright materials, particularly where it is released in digital form online or on DVD or CD.

This Guide covers:

- copyright law basics and how copyright applies to government materials;
- the importance of whole of government Intellectual Property (IP) standards and policies;
- open access practices and the benefits of open access practices when adopted by governments; and
- how CC licences can be used by agencies to achieve open access to government material.

This is a step-by-step Guide. When proceeding through this Guide at each step, consider what is a suitable licence for the material that your agency is considering for licensing. The relevant whole of government IP policies and standards, and your agency’s legislation, IP policies and guidelines, will indicate the issues you need to consider in deciding which of the six Creative Commons (CC) licences is to be selected and applied (see Part 3 “Intellectual Property Policies and Standards” for more details).

\(^5\) For the purposes of this Guide:
- the terms “government” or “governments” include state, territory and federal governments, government departments, and public authorities and agencies.
- the term “agency” is used to cover both a government department and a government agency.

\(^6\) It is also intended to be useful to the Australian public more generally, and anyone dealing with government about PSI (including researchers).

2 Government Material / Public Sector Information

In Australia, governments generate and collect a vast amount of material and information – much of which is protected by copyright. Government copyright materials may be produced by their employees and contractors, as well as other entities that are commissioned or directed by government to produce materials for an agency.

The terms ‘government material’ and ‘public sector information (PSI)’ are used here in a broad sense to include material that is:

- created within government by government employees;
- commissioned by government from non-government parties (usually under a contractual arrangement); or
- prepared by non-government parties and lodged with government under a statutory obligation or regulatory direction.

PSI covers a vast range and amount of material including policy documents and reports of government agencies, public registers, legislation and regulations, meteorological information, scientific research databases, statistical compilations and datasets, maps and geospatial information and numerous other data and products produced by government for public purposes.  

The management of these informational works is one of the most significant issues for government in the current era. During the last decade much attention has focused on policies and practices to enable PSI to be more readily accessed and used, as governments have come to appreciate that significant social, cultural and economic benefits stand to be gained from doing so. As Senator Kate Lundy observed at the 2009 Free and Open Source

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8 Ibid, p 1.  
Software for Geospatial Conference, “open access to government data can dramatically increase the value created from the data both socially and economically [and] the society as a whole benefits from access to the data.”

3  Intellectual Property Policies and Standards

Any distribution of government copyright materials must be informed by and comply with relevant laws, policies, standards and other requirements which govern access to and reuse of PSI. Your agency needs to be aware of and comply with, all applicable requirements, some of which will have general or whole of government application whilst others may apply only to your agency.

Below are examples of IP policies and standards which should be considered by agencies (which are considered in more detail in Appendix I of this Guide).

- Federal government agencies:
  - Guidelines on Licensing Public Sector Information for Australian Government Agencies (Draft, 1 February 2011)
- Queensland government agencies:
  - Queensland Government Enterprise Architecture framework 2.0 (QGEA 2.0)
  - Queensland Government Information Licensing Framework (GILF) Policy

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13 Australian Government Attorney-General’s Department, Statement of IP Principles for Australian Government Agencies, available at http://www.ag.gov.au/www/agt/agt.nsf/Page/Copyright_CopyrightCommonwealthCopyrightAdministration_StatementofIPPoliciesforAustralianGovernmentAgencies. The statement was updated on 1 October 2010 to formally endorse the Government 2.0 Taskforce recommendation that agencies should license their PSI under Creative Commons Attribution (BY) licence as the default license type and only adopt more restrictive licenses after a process of ‘due diligence and on a case-by-case basis’ (see Principle 11(b)).


Appendix I of this Guide also contains select excerpts of these policies and standards, and a list of State and Territory policies, standards and reports. This list is not intended to be definitive and there may also be other laws, policies and principles applicable to your agency’s material, including some specifically applicable to your agency only, and which are not considered in this Guide. It is important to identify all laws, policies and standards that apply to you and your agency and act in compliance with them in licensing your agency’s copyright materials.

4 Open Access

There is a growing trend in Australia and overseas for governments to provide greater access and grant more generous reuse rights to PSI. It is through the greater levels of reuse of PSI that its potential may come to be realised.

What is Open Access?

The advent of the internet and digital technologies has enabled information to be accessed and disseminated far more easily than ever before. For the public sector, the new technologies have brought about changes not only in the volume and kind of information that is generated and how it is produced, but also in how – and by whom – it is used.

In this context, the term open access encompasses two aspects:

- the dissemination of PSI broadly and freely across the internet in a timely fashion; and
- access to PSI on terms and in formats that clearly permit and enable use and reuse by any member of the public.


Why Open Access?

Governments generate a vast and important flow of PSI. The value of PSI increases when restrictions on access and reuse are removed and it is made available in common digital formats downloadable from internet websites.  

As well as contributing to social and economic development, advancing education, research and innovation, PSI use and reuse enhances public health and safety, creates opportunities for engagement between government and citizens, fosters transparency of governance and promotes democratic ideals. It is an essential foundation of an informed, participatory society and provides a foundation for evidence-based policy and decision-making, for example, in the planning and delivery of health and social welfare programs.

Worldwide developments in Open Access practices

International: The OECD PSI Recommendation

On 30 April 2008, the Organisation for Economic Cooperation and Development (OECD) Council adopted the Recommendation for the Enhanced Access and More Effective Use of Public Sector Information, which included these two principles:

**Openness.** Maximising the availability of public sector information for use and re-use based upon presumption of openness as the default rule to facilitate access and re-use. Developing a regime of access principles or assuming openness in public sector information as a default rule wherever possible that the model of funding is for the development and maintenance of the information. Defining grounds of refusal or limitations, such as for protection of national security interests, personal privacy, preservation of private interests for example where protected by copyright, or the application of national access legislation and rules.

**Access and transparent conditions for re-use.** Encouraging broad non-discriminatory competitive access and conditions for re-use of public sector information, eliminating exclusive arrangements, and removing unnecessary restrictions on the ways in which it can be accessed, used, re-used, combined or shared, so that in principle all accessible information would be open to re-use by all. Improving access to information over the Internet and in electronic form. Making available and developing automated on-line licensing systems covering re-use in those cases where licensing is applied, taking into account the copyright principle below.

Developments in Open Access to PSI

During the last few years, international and government bodies around the world have recognised the benefits of open access to PSI and have promoted more openness around

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government information. In 2008, the OECD released a global statement recommending improved access to PSI. The US and UK governments have developed data portals to provide open access to their government data.\footnote{See \url{http://www.data.gov} and \url{http://www.data.gov.uk}.} In Australia, various government bodies including the Australian Bureau of Statistics, Geoscience Australia and the Bureau of Meteorology have released data under CC licences.\footnote{For examples in Open Access see Professor Anne Fitzgerald, \textit{Open Access Policies, Practices and Licensing: A Review of the Literature in Australia and Selected Jurisdictions}, QUT (July 2009), available at \url{http://eprints.qut.edu.au/28026/} accessed on 17 March 2010.} These are but a few examples. Further examples of government use of Creative Commons are available at:

- Creative Commons Case Study wiki at \url{http://wiki.creativecommons.org/Government_use_of_Creative_Commons#Australia};
- CC Australia, Rachel Cobcroft (ed), \textit{Building an Australian Commons: Creative Commons Case Studies Volume I} (Creative Commons, Cultural & Government Institutions chapter), available at \url{http://creativecommons.org.au/learn-more/publications/casestudiesvol1}.

### Worldwide developments in Open Access practices

#### United States: data.gov

In May 2009, the Data.gov portal was launched as part of the Obama administration’s Open Government Initiative.\footnote{See \url{http://www.data.gov}. The portal was developed by the Federal CIO Council as an interagency Federal initiative. For more details see \url{http://www.data.gov/faq}.} The portal provides access to datasets generated and held by the US federal government.\footnote{See \url{http://www.data.gov/about}.} Data.gov enables US federal government datasets to be accessed from the “raw” data catalogue and mined using tools to which links are provided from the website.

The purpose of the website is to:

- increase public access to high value, machine readable datasets generated by the Executive Branch of the Federal Government.\footnote{Ibid.}

A clear goal of the initiative is to promote participatory democracy through greater engagement between government and its citizens. As the website states:

\textit{[p]ublic participation and collaboration will be one of the keys to the success of Data.gov. Data.gov enables the public to participate in government by providing downloadable Federal datasets to build applications, conduct analyses, and perform research.}\footnote{Ibid. In January 2010, the UK Government launched a somewhat parallel open access initiative of its PSI portal data.gov.uk (see later discussion at p 31 of this Guide, \textit{United Kingdom: data.gov.uk}).}
5 Copyright

What is copyright?

Copyright is a set (or “bundle”) of legal rights that attach to an original work when it is created. These rights permit the owner of copyright to control the doing of certain acts in relation to their material (such as making copies of it) and to prevent others from using the material without their permission. The rights of a copyright owner are referred to as “exclusive rights” because they enable the copyright owner to exclude others from engaging in the same acts in relation to the copyright material.

Copyright is a property right that can be owned by individuals, organisations and governments. It can be sold or licensed in the same way that other forms of property can be.

As a general rule, copyright lasts for the duration of the life of the person who has created the material, plus a further 70 years. However, where copyright is owned by government, government (“Crown”) copyright generally applies for 50 years from the year the work was first published.

What does copyright protect?

Copyright only protects original works, that is, works which:

- have not been copied from an earlier work; and
- possess the requisite level of originality under law.

A work will meet the originality threshold if it has been produced through the exercise of independent intellectual effort.

In general, copyright may protect a very wide range of original works in different formats, including:

- tables;
- compilations of data (such as datasets and databases);
- written materials (“literary works”) such as reports, accounts, documented observations etc;
- photographs and other pictures (“artistic works”);
- sound recordings; and
- video and multimedia works.

29 Copyright comes into existence automatically when an original work is created. There is no need to register copyright or comply with any formalities.

30 This duration applies to published literary, dramatic, artistic (apart from photographs) and musical works where the author is living and identified. Anonymous works or works published after the death of the author (except for computer programs) have a copyright term of 70 years from publication. See Copyright Act 1968 (Cth), s 33.

31 See Factsheet 1, question 3 below in this Guide. See generally Copyright Act 1968 (Cth), Part VII.

32 Copyright in original literary, dramatic, musical and artistic works is protected under Part III of the Copyright Act 1968 (Cth). Copyright in subject-matter other than works, i.e. sound recordings, cinematograph films, television broadcasts and sound broadcasts, and published editions of works is protected under Part IV.
Some complexities may arise in assessing whether a data compilation is sufficiently original to attract copyright protection under law. Data compilations are considered more fully below.

**Important note: Copyright protects expressions, not facts or ideas**

A general principle of copyright law is that copyright protects the *material form* in which ideas, information or facts are expressed and not the ideas, information or facts themselves.

### 5.1 Data compilations and datasets

In Australia, copyright may protect compilations of data, such as datasets or databases, provided that the compilation meets the originality threshold required by law. A compilation is protected as a literary work. The protection extends only to the material form in which the data is presented in the compilation. Copyright does not apply to the data itself.

Compiled data is not always simply raw data or information – a compilation may also include written materials, reports, diagrams, tables and graphs. These items may be protected by copyright as independent works (for example, a written report will be protected in its own right as a literary work).

An important distinction lies between copyright in discrete data items and copyright in a database as a whole. In the latter, copyright serves to protect the arrangement of the collected components. Copyright interests may co-exist independently in components contained within the database and in the database itself, and may be owned by different parties. Article 5 - Compilations of Data (Databases) of the World Intellectual Property Organization (WIPO) Copyright Treaty states that:

> Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

The law surrounding the protection of data compilations is still developing in Australia. The originality test was once considered to be satisfied if substantial labour or expense had been invested in collecting the materials included in the compilation (the so-called “sweat of the brow” approach). However, subsequent case law has cast doubt on this position, indicating that substantial labour or expense alone will not be enough without also “independent intellectual effort”.

Further, the Full Federal Court in *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149 held that where the expression of a work is essentially computer-generated with minimal authorial input, it will not be protected by copyright. The applicant is seeking special leave to appeal to the High Court, therefore the law in this respect could change.

The law as it stands does not draw a clear line between copyright protected and non-copyright protected data compilations. Owners/creators of data compilations should carefully consider the principles which have emerged from these cases. A data compilation is likely to be protected by copyright where it can be shown that:

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33 See *Acohs Pty Ltd v Ucorp Pty Ltd* [2010] FCA 577, [81]. The mere tagging of elements in a database does not create a separate/new work protected by copyright. A body of data is not considered a copyright work unless and until it has taken a material form.

34 *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112.

35 *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14; *Telstra Corp Ltd v Phone Directories Company Pty Ltd* [2010] FCA 44, affirmed on appeal to the Full Federal Court in *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149.

36 *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149. See also *Acohs Pty Ltd v Ucorp Pty Ltd* [2010] FCA 577.
• an author or authors of a compilation exist; and
• the compilation is original in the sense that it is the product of
  o some “independent intellectual effort”;
  o the exercise of “sufficient effort of a literary nature”;
  o involves a “creative spark”; or
  o the exercise of “skill and judgment”.  

If it is important for a data compilation to be protected by copyright, the owner/creator should approach the development of the compilation in a way which meets the above criteria.

The use of computer software is not fatal to a claim of copyright in a compilation. However, there must be sufficient authorial input in the creation of the expression of the work in which copyright is claimed.

### Subsistence of copyright in data compilations: case summaries

**Desktop Marketing v Telstra (2002) Federal Court decision**

Telstra claimed that it held copyright in their White Pages Directory (WPDs), Yellow Pages Directory (YPDs) and Heading Books. The WPDs and YPDs were listings of names and businesses in alphabetical order, and with businesses grouped under appropriate headings from the Heading Book. Names and contact information were collected by Telstra’s employees and entered into a computer program, developed to collect information of customers at considerable cost to Telstra. This info was then transferred into a graphics compilation and typesetting system where the printing process begins. Editors then proofread every line of the proof pages created by the system to detect errors in formatting and layout and also to check for silent numbers.

Lindgren J (Black CJ and Sackville J concurring) considered a range of Australian and overseas cases in support of the “sweat of the brow” approach. His honour held that there was no principle that labour and expense in collecting, verifying, recording and assembling data to be compiled are irrelevant to establishing originality. This was despite the fact that the compilation was a “whole of universe” compilation (“universe” being all residential and business telephone subscribers) which could logically only be arranged in alphabetical order.

**IceTV v Nine Network (2009) High Court decision**

Nine Network published a Weekly Schedule of television programs to be broadcast each week. They claimed copyright in the Weekly Schedule as a compilation, and that IceTV had infringed their copyright by taking part of the time and title information and including it in their own guide, the “IceGuide”. The case was appealed from the Federal Court to the High Court.

Although subsistence of copyright was not disputed by IceTV (and was therefore not an issue), the question of originality arose in determining whether what IceTV had taken was a substantial part of the Weekly Schedule.

Chief Justice French and Justices Crennan and Kiefel gave a joint judgment, finding that the expression of time and title information was essentially dictated by the nature of the information, and therefore lacked the requisite originality to constitute a substantial part. Similarly Justices Gummow, Hayne and Heydon in their honours’ joint judgment held that the originality of the Weekly Schedule “lay not in the provision of time and title information, but in the selection and presentation of that information together with additional programme information and synopses to produce a composite whole.” Gummow, Hayne and Heydon JJ commented that the reasoning in Desktop Marketing with respect to compilations and its emphasis on “labour and expense” may be “out of line with the understanding of copyright law over many years” and should be treated with caution.

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37 Telstra Corporation Ltd v Phone Directories Company Pty Ltd [2010] FCA 44 at [344] per Gordon J.
38 Telstra Corporation Limited v Phone Directories Company Pty Ltd [2010] FCAFC 149; Acohs Pty Ltd v Ucorp Pty Ltd [2010] FCA 577.
Under occupational health and safety regulations, Material Safety Data Sheets ("MSDSs") have to be made available to anyone supplied with certain hazardous substances. Acohs was in the business of providing these MSDSs to manufacturers, importers or suppliers ("MISs") of these substances. It maintained a Central Database ("CDB") of information necessary to create MSDSs, and used a data system called the "Infosafe System" to generate these MSDSs. Upon a customer request for a particular MSDS, the Infosafe System would call up data and other elements from the CDB, compile the relevant HTML source code and send the code to the customer's computer. The source code contained all the content, tags and instructions necessary to give a particular layout to an MSDS.

Data entered into the CDB were sourced from employees (either entering the discrete data or transcribing from existing MSDSs) and customers who had editorial access to the CDB. A data entrant to the CDB would enter information under discrete headings/subheadings; at no stage would the person see a partially-completed MSDS. Acohs claimed copyright in the source codes and layout of MSDSs as generated by the Infosafe System, and in "a compilation of data which generated and rendered the MSDS as required" by a particular client, Blackwoods (termed the "Blackwoods Compilation").

Jessup J at [50] considered that: "the question is whether the complete source code as a work is original, not whether some parts of it are. It may be accepted that, had the source code been written as such by an Acohs author, its originality would not necessarily be compromised by the existence of much material drawn from other places – even from material stored in databases. The problem is more that the source code as a work – ie as a complete entity – was not written by any single human author. It was generated by a computer program." Jessup J rejected the argument that the contributions from programmers, authors/transcribers to the source code for MSDSs were works of joint authorship, because the contributions were separate from each other in terms of communication, time, expertise and content. "Only by a very artificial straining of the language to meet the needs of Acohs in the present litigation might those contributions be regarded as a matter of collaboration in the statutory sense." (at [59])

In terms of the so-called "Blackwoods Compilation", Jessup J concluded that it was not protected as an original "literary work" under the Copyright Act 1968 (Cth). Firstly, the "Blackwoods Compilation" did not have a discrete existence from the Acohs database; it had never taken a material form. His Honour expressed difficulty in accepting the concept that "merely by residing in a database from which elements might be, but have not yet been called up, pieces of data should be regarded as amounting to a work in the copyright sense." (at [81]) Secondly, the lack of evidence that Acohs' staff had identified, collected and organized the data required to generate the Blackwoods MSDSs led Jessup J to find that the authorship and originality requirements were not satisfied.

Telstra v Phone Directories (2010) Federal Court decision

Eight years after the Desktop case, Telstra again claimed copyright infringement in its WPDs and YPDs. The typesetting and formatting (i.e. expression) of the WPDs and YPDs were highly automated, with minimal human contribution except to correct errors which were automatically detected. No claim was made for copyright in the database or software used in creating the WPDs and YPD.

At first instance, Gordon J placed emphasis on the need to identify the author/authors of the work (which Telstra had failed to do). Even if the authors could be identified, Gordon J held that the author must exercise independent intellectual effort in creating the material expression of the work. This was absent here, as mechanical human effort was directed to antecedent efforts of collecting and verifying the information and ensuring the automated system was doing its job. This may be contrasted with the weight given to antecedent efforts in Desktop Marketing. Although the High Court’s decision in IceTV v Nine Networks on originality related to the issue of infringement, not subsistence of copyright, Gordon J considered it as binding authority on the proper interpretation of the Copyright Act 1968 (Cth) beyond infringement.

On appeal, the Full Federal Court generally agreed with Gordon J's decision, and that authorship was central to originality. However, Keane CJ and Perram J clarified that Identification by name of each
and every author was not necessary; it was only necessary to show that the work in question originated from an individual author or authors; i.e. that the authors existed.

In this instance, copyright did not protect the WPDs and YPDs because the process of expressing the information into publishable form was largely automated. Perram J contrasted this to a situation where the person controlling the computer program is directing or fashioning the material form of the work, and may therefore be seen as the work’s author.

5.2 Government (“Crown”) copyright

Ownership of copyright by government is dealt with in Part VII of the Copyright Act 1968 (Cth). The Copyright Act provides that the government owns copyright in literary, dramatic, musical and artistic works, sound recordings and films that is made or first published in Australia “by, or under the direction or control of the Commonwealth or a State”.39

“by, or under the direction or control of”

The meaning of the phrase “by, or under the direction or control of, [the Crown]” was considered by the Full Federal Court in Copyright Agency Limited v State of New South Wales [2007] FCAFC 80, which made it clear that governments will own copyright not only in works produced by their employees but in works produced by a more extensive (but not clearly defined) group. Emmett J (with whom Lindgren and Finkelstein JJ agreed) considered that:

“By” is concerned with those circumstances where a servant or agent of the Crown brings the work into existence for and on behalf of the Crown. “Direction” and “control” are not concerned with the situation where the work is made by the Crown but with situations where the person making the work is subject to either the direction or control of the Crown as to how the work is to be made. In the copyright context, that may mean how the work is to be expressed in a material form.

Direction might mean order or command, or management or control (Macquarie Dictionary Online). Direction might also mean instructing how to proceed or act, authoritative guidance or instruction, or keeping in right order management or administration (Oxford English Dictionary Online).

Control might mean the act or power of controlling, regulation, domination or command (Macquarie Dictionary Online). Control might also mean the fact of controlling or of checking and directing action, the function or power of directing and regulating, domination, command, sway: Shorter Oxford English Dictionary (5th ed, Oxford University 2002).

Thus, when the provisions refer to a work being made under the direction or control of the Crown, in contrast to being made by the Crown, the provisions must involve the concept of the Crown bringing about the making of the work. It does not extend to the Crown laying down how a work is to be made, if a citizen chooses to make a work, without having any obligation to do so.

The question is whether the Crown is in a position to determine whether or not a work will be made, rather than simply determining that, if it is to be made at all, it will be made in a particular way or in accordance with particular specifications. The phrase “under the direction or control” does not include a factual situation where the Crown is able, de facto, to exercise direction or control because an approval or licence that is sought would not be forthcoming unless the Crown’s requirements for such approval or licence are satisfied. The phrase may not extend much, if at all, beyond commission, employment and analogous situations. It may

39 Copyright Act 1968 (Cth), ss 176-178.
merely concentrate ownership in the Crown to avoid the need to identify particular authors, employees or contracting parties.  

Finkelstein J also addressed the question of what works can be considered to be made under the direction or control of the Crown, stating:

There is probably a degree of overlap in the case of works made ‘under the direction of’ or ‘under the control of’ the Crown. Broadly speaking, however, where the Crown has power to require a work to come into existence, the work is made under the "direction” of the Crown. If the Crown has dominion over the execution of the work then it is made under its "control". The assumption that underlies each concept (direction and control) is the existence of a relationship between the Crown and the author that authorises the Crown to give the direction or exercise the control as the case may be. That authority may be found in statute, including regulations made under a statute, contract or elsewhere. But, whatever its source may be, the authority must exist.

The operation of these provisions can be displaced by a written agreement between the government and the person who created the copyright material which states that copyright is to belong to that person or some other party specified in the agreement (not the ‘Crown’).

Governments own copyright in a vast range of written and other materials.

Crown copyright lasts for 50 years from the end of the calendar year in which the copyright item is first published or is made.

As the Copyright Act does not generally differentiate between the rights of government as copyright owner and the rights of private parties who own copyright, government can exercise the same range of rights in their copyright materials as non-government entities.

41 Copyright Agency Limited v State of New South Wales [2007] FCAFC 80, [186].
42 Copyright Act 1968 (Cth), s 179. For further discussion, see Part 5.3 “Copyright ownership” below.
44 Copyright Act 1968 (Cth), ss 180, 181.
45 Section 182 specifically states that, apart from the provisions in Part VII of the Copyright Act 1968 (Cth) (in ss 176-181) relating to the subsistence, duration and ownership of copyright, the provisions of Part III and Part IV of the Act apply.
Important note: Copyright should not be used for ulterior purposes

It seems to be widely acknowledged that at least part of the original rationale for government copyright ownership was to promote the accuracy and integrity of official government publications.46

While government, as copyright owner, enjoys the same exclusive economics rights as other copyright owners, the nature and purpose of government copyright means that these rights should not be exercised in a way that restricts the flow of PSI.47

Copyright should not, as a general practice, be relied upon by governments for secondary purposes not directly related to the exercise of Crown copyright (such as to restrict access to government documents containing confidential or otherwise sensitive information).48

Crown Copyright should not be used to restrict access and control use in light of FOI

In Commonwealth v Fairfax (1980) 147 CLR 39, Mason J of the High Court of Australia granted an interim injunction to restrain the publication of certain documents produced by the Department of Defence and the Department of Foreign Affairs on the basis that publication would infringe copyright. However, the case has been criticised as a “poor exercise of government copyright because it was essentially used for an ulterior purpose, that of preserving the confidentiality of documents.”49

The Copyright Law Review Committee (CLRC), in its Issues Paper on Crown Copyright,50 sought submissions on whether Crown copyright should be used as a means of restricting access and controlling use in light of privacy laws and Freedom of Information (FOI) legislation.

The Australasian Legal Information Institute (AustLII) in its submission stated that:

There are other public interests that governments, Courts and Tribunals may need to protect, particularly in relation to judgments, including privacy, commercial confidences and national security. Copyright is simply an inappropriate instrument to protect these interests, even if it has been so used in the past. They should be protected by specific actions or legislation which include appropriate defences, not by copyright. In particular, where Courts and Tribunals do not consider that certain judgments should be published at all, or only published in any anonymised form, because of privacy considerations, privacy laws should provide this protection.51 [emphasis added]

Factsheet 1 on the following 4 pages can help you to determine whether copyright subsists in an item of PSI which you are assessing for open access by applying a CC licence.

46 See above note 43, CLRC, Crown Copyright (2005) at p xxiv.
47 Above note 7, Anne Fitzgerald et al, Enabling Open Access to PSI with CC (2010), p 11-12.
Fact Sheet 1  Is this material protected by copyright?

This factsheet can help you to determine whether copyright subsists in public sector material which your agency is assessing for applying a Creative Commons (CC) licence.

This factsheet should be used in conjunction with our guide: Fitzgerald, Anne M. and Hooper, Neale and Foong, Cheryl (2010) Using Creative Commons 3.0 Australia licences on Government Copyright Materials http://eprints.qut.edu.au/38364/ (see in particular, the ‘Checklist for applying a Creative Commons licence to government material’).

1. Identify the material (metadata record)

<table>
<thead>
<tr>
<th>Type of material (e.g. text, image):</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Title of material:</td>
<td></td>
</tr>
<tr>
<td>Format (e.g. PDF):</td>
<td></td>
</tr>
<tr>
<td>Where is the material located?</td>
<td></td>
</tr>
<tr>
<td>From which government agency did the material originate?</td>
<td></td>
</tr>
<tr>
<td>For enquiries regarding the material, contact:</td>
<td></td>
</tr>
<tr>
<td>Date created:</td>
<td></td>
</tr>
<tr>
<td>Other relevant information:</td>
<td></td>
</tr>
</tbody>
</table>
Fact Sheet 1

Is this material protected by copyright?

2. Is the material in one of the categories to which copyright can apply?

Is it:

- [ ] a written/text document (e.g. report)?
- [ ] a table?
- [ ] a map?
- [ ] a photograph?
- [ ] a visual image?
- [ ] a sound file?
- [ ] a film or video?
- [ ] a multimedia work?
- [ ] data compilation, dataset or database?¹

If YES to any of the boxes above, the material is in a category to which copyright applies.

Go to Question 3.

---

¹ Copyright protection applies to a data compilation, dataset or database provided it meets the originality threshold required by law.
Fact Sheet 1

Is this material protected by copyright?

3. When was the material created/compiled?

☐ Less than 50 years ago

For government material, if YES - Crown copyright is likely to apply (Go to Question 4).

For non-government material, if YES - copyright is likely to apply (Go to Question 4).

☐ More than 50 years but less than 70 years ago

For government material, if YES — Crown copyright will have elapsed and the work is in the public domain (copyright no longer applies).

Where the material is in the public domain, you may apply a Creative Commons Public Domain Mark http://creativecommons.org/choose/mark to certify that the material is already in the public domain.

Check the date the work was made or first published. Crown copyright expires 50 years after the work is made or first published. BUT if the work has not yet been published, copyright continues and the copyright term begins to run from the time the work is published.

For non-government material, if YES — copyright is likely to apply. (Go to Question 4)

☐ More than 70 years ago

For government material, if YES — Crown copyright does not apply, as the copyright term has elapsed. BUT if the work has not yet been published, copyright continues and the copyright term begins to run from the time the work is published.

For non-government material, if you answered YES — copyright may apply, or the copyright term may have elapsed. You need to discover when exactly the material was created.

Where the material is in the public domain, you may apply a Creative Commons Public Domain Mark http://creativecommons.org/choose/mark to certify that the material is already in the public domain.
5.3 Is this material protected by copyright?

4. Was it created/compiled in Australia?

☐ Yes — copyright protection under Australian law is likely to apply.

☐ No — if the work was created in a country that is a member of the Berne Convention¹ or the World Trade Organization,² copyright will usually be protected under Australian law.

For more information about the CC licences, see http://creativecommons.org.au/licences.
For more information about Creative Commons and Government in Australia, see http://creativecommons.org.au/sectors/government.

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² See http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm
Copyright ownership

Important note: Check if there is an existing agreement

The basic ownership rules that follow apply unless there is an agreement (contract) to the contrary between the employer and employee, the commissioner and the independent contractor, or the author and another interested party.

The basic principle of copyright ownership is that the author or creator of the copyright material is the first owner of copyright.

Ownership of databases

In the case of databases and datasets, the author will usually be the person(s) who has compiled the information. However, the situation may be different where data is compiled for a government agency by its employees (as opposed to independent contractors).

Ownership of material created by employees

Generally an employer owns copyright in materials that are created or compiled by their employee in the ordinary course of the employee’s duties and in pursuance of the terms of employment. Factors that may be relevant to whether materials are created or compiled “in pursuance of the terms of employment” are:

- whether the employee was engaged to perform the task that results in the materials being created;
- whether the employee creates the materials with the understanding and intention that the employer will own copyright; and
- whether the materials were created or compiled during the employee’s usual work hours (or by contrast, in the employee’s own time).

If the employing institution is a government agency, the government (which may be the Commonwealth, a State or a Territory) will own copyright.

Ownership of material created by an independent contractor

Copyright in materials created or compiled by an independent contractor under a contract for services is owned by the independent contractor, unless there is a written agreement to the contrary between the party who has commissioned the material to be produced and the independent contractor.

Note also government (“Crown”) copyright material, i.e. literary, dramatic, musical and artistic works, sound recordings and films made or first published in Australia by, or under the direction or control of the Commonwealth or a State. See Part 5.2 “Government (“Crown”) copyright” above.
Such a contract may provide that:

- any copyright material created or compiled by the independent contractor will be owned by the party who has commissioned the material; or
- copyright is assigned to the party who has commissioned the material.

However, even where copyright in the material produced under the contract belongs to the independent contractor, it will often be possible to imply a licence so that the party who has commissioned the material will be able to use it for the purpose for which it was commissioned.

**How can you tell whether someone is an employee or an independent contractor?**

Generally, an employee is someone who is working under a *contract of service* for an employer. An independent contractor is someone who is engaged under a *contract for services* and is in business on their own account.

When ascertaining whether a person is an employee or independent contractor, it is important to consider the totality of the relationship between that person and the person or institution that is employing or contracting them. One relevant factor is whether or not there is a right of control by the employer over the employee’s manner of doing the work.

Other factors that may indicate the existence of a contract of service for an employee are:

- a regular salary;
- holiday leave;
- PAYE tax deductions;
- the provision of equipment and resources; and
- the provision of an office space.

Factors that may indicate a contract for services for an independent contractor are:

- the person is engaged to carry out a specific task;
- the person is paid a lump sum;
- the person is not required to give their services exclusively; and
- the person has autonomy as to how and when the work is performed.

**Important note: Apply a CC licence only if your agency has authority**

Your agency should enter into appropriate arrangements for copyright ownership with any person or organization that provides material to it. Before applying, on behalf of your agency, a Creative Commons licence to the material, you must make sure that you have the necessary authority from your agency to do so (i.e. government (the Crown) is the copyright owner or government has permission from the copyright owner to apply the CC licence), and also you as an officer have authority to apply the licence.

See further Part 6.6 “Legal application: How to use Creative Commons?” for other restrictions on applying CC.
Copyright Assignment

Even though the creator of a work owns copyright in that work at first instance, they may transfer copyright ownership to another person through an assignment.

Usually, a person will assign copyright in return for something else, such as payment or the provision of a service.

An assignment must:

- be in writing; and
- be signed by the person who is transferring the copyright (the “assignor”).
Who owns copyright?

Instructions

This factsheet can help you to determine who owns copyright in the material you are assessing for applying a Creative Commons (CC) licence.

Start here! Does this person who created the material work in or with your agency?

Yes: Is the person your agency's employee or an independent contractor?

No: The person is a third party

Independent contractor

Was the material created in the course of employment?

Yes: Your agency owns copyright (subject to a written contract to the contrary)

No: The third party or independent contractor owns copyright

Is there a written contract?

Yes: The employee owns copyright

No: The third party or independent contractor owns copyright

Is there a written contract?

Yes: Check the contract terms. The contract may specify who owns copyright.

No: Your agency owns copyright

† Note: Your agency holds copyright or behalf of the legal owner, the Crown (ie government)

For more information about the CC licences, see http://creativecommons.org/licenses. For more information about Creative Commons and Government in Australia, see http://creativecommons.org.au/sec/or/government.
5.4 The rights of copyright owners

Copyright confers on the copyright owner the exclusive proprietary right to do a range of acts in relation to the copyrighted work. The copyright owner also has the exclusive right to authorise the doing of any of those acts by someone else, whether by sale (assignment) or by licence.\(^53\)

The economic rights of a copyright owner of a literary, dramatic or musical work are the rights to:

- reproduce the work in a material form;
- publish the work;
- perform the work;
- communicate the work to the public;
- make an adaptation of the work (for example, a translation); and
- control rental of the work, where the work is a computer program or is reproduced in a sound recording.\(^54\)

For artistic works, the exclusive rights are the rights to:

- reproduce the work in a material form;
- publish the work; and
- communicate the work to the public.\(^55\)

The right to communicate to the public is an important right in the online environment. “Communicate” is defined to mean:

Make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject matter.\(^56\)

Making a copyright work available online or through a computer network will be an exercise of the copyright owner’s right to communicate the work to the public.\(^57\)


\(^{54}\) Copyright Act 1968 (Cth) s 31(1).

\(^{55}\) Copyright Act 1968 (Cth) s 31(1).

\(^{56}\) Copyright Act 1968 (Cth) s 10(1).

5.5 Copyright licensing

A copyright licence is a permission from the copyright owner that allows someone to exercise one or more of the exclusive rights of the copyright owner in relation to the copyright material.\textsuperscript{58} A licence does not assign (transfer) ownership of copyright to another person – it simply grants permission to exercise certain rights.

A licence can be exclusive or non-exclusive. Under an exclusive licence, the licensee (i.e. the recipient of the licence) is the only person who can use the material in the way or ways covered by the licence (even to the exclusion of the copyright owner).\textsuperscript{59} A non-exclusive licence merely provides the right to exercise one or more of the copyright owner’s rights in the work but not to the exclusion of the copyright owner or other licensees.\textsuperscript{60}

A licence can be limited in terms of:

- the length of operation (for example, the licence may grant permission for a one-time use only or it may grant permission to use the material for a period of say six months);
- the rights granted (for example, the licence may grant permission to exercise the right of reproduction only or it may grant permission to exercise multiple rights);
- the geographical region in which the rights may be exercised (for example, the licence may operate worldwide or only within Australia); or
- the purposes for which the rights may be exercise (for example, the licence may provide that it allows non-commercial use only).

A licence can be contractual or non-contractual. A contractual licence operates like a standard contract – in exchange for permission to exercise the relevant rights, the licensee agrees to do or give something in return (at law this is called “consideration”). A non-contractual licence is essentially a bare permission to exercise the rights granted (a “bare licence”). A copyright owner can still place restrictions on a bare licence, but the licensee is not contracting to fulfill any additional obligations.\textsuperscript{61} There are also standard-form open content licences that can be adopted by organisations or individuals, the most common of these being Creative Commons licences.

\textsuperscript{58} For more on the exclusive rights of the copyright owner, see Part 5.4 “The rights of copyright owners” above.
\textsuperscript{60} Ibid.
Worldwide developments in Open Access practices

Australia: Government Information Licensing Framework (GILF)

One of the most influential projects in Australia in recent years has been the Queensland Government Information Licensing Framework Project (GILF Project). It grew out of a project commissioned by the Queensland Spatial Information Council (QSIC) in 2006 to develop a legal framework to support the sharing and reuse of spatial and other information within and across the various levels of government and between government and the private sector.

The focus of the GILF project was the development of a licensing model to be applied to PSI, the objective being new standardised information licensing arrangements which could be recommended for use with all kinds of Queensland government information to enable enhanced, on-demand access to PSI. The licences used under GILF consist of the six Creative Commons licences, and Restrictive Licences developed by applying the model clauses and schedules in the Restrictive Licence template used for PSI which is subject to restrictions such as privacy, confidentiality or statutory constraints.

5.6 Why a copyright-based licensing approach?

Adoption of a copyright-based, licensing approach for PSI (as opposed to a no-copyright dedication to the public domain) has some distinct advantages that are not readily achievable otherwise.

What is the “public domain”?

From a copyright law perspective, the concept of “public domain” traditionally connoted materials that were not subject to copyright protection, whether because copyright had expired or because the materials did not qualify for copyright in the first place.

During the last decade however, the concept of public domain has been recast more broadly to mean “open” knowledge and content – that is materials that can be accessed, reused and redistributed openly by users, including materials protected by copyright that are made available for access and reuse under open content licences such as Creative Commons licences.

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63 Queensland Government, Queensland Spatial Information Council, Government Information and Open Content Licensing: An access and use strategy (Government Information Licensing Framework Project Stage 2 Report) (October 2006).
64 See the GILF website at [http://www.gilf.gov.au](http://www.gilf.gov.au) for further details, including access to an online interactive licensing tool designed to enable licences to be selected from the GILF standard suite of licences.
65 For example, the Creative Commons Zero (CC0) Protocol. See [http://creativecommons.org/choose/zero](http://creativecommons.org/choose/zero). For an outline of the various cogent reasons why the use of CC0 is not supported see Part 5.7.1 “Creative Commons Zero (CC0)” at below.
The most readily identified benefits of this copyright-based licensing approach are that it:

1. enables governments to achieve their open access (OA) policy objectives;
2. ensures that information about the provenance of PSI is distributed along with the PSI; and
3. avoids government and citizens being locked out (through pricing or technical barriers) from accessing and using materials produced with public funding.

Each of these points is explained further below.

Point 1: Supports government’s open access policy objectives

It is increasingly apparent that restrictions on access to and reuse of PSI are due less to the subsistence and ownership of copyright in government materials than to the failure to adopt a clear policy position on access and reuse. A related problem is the lack of established practices, such as proper licensing and use of interoperable file formats, supporting open access and reuse.

A broader and more robust information commons

Submissions to the Copyright Law Review Committee’s Crown Copyright review made the point that the management of copyright to enable dissemination and reuse of PSI should not simply revolve around considerations about the subsistence of copyright. Professor Brian Fitzgerald’s submission stated:

Ten years ago the question would simply have been whether the Crown should or should not have copyright. Many advocating for no copyright would have been seeking open access to information. However, today we know more about the intricacies of open content licensing. It is arguable that a broader and more robust information commons can be developed by leveraging off copyright rather than merely “giving away” material.67 [emphasis added]

Government policy may support unrestricted access to PSI and encourage users to copy and widely distribute these materials, provided that the copies circulated are accurate, or, if altered, are not misrepresented as being the original versions released by government. For such materials, the continued recognition of copyright is regarded as central to ensuring the integrity and authenticity of PSI, so that the public can be aware of the status of each publication.68

Distribution of PSI under copyright licensing conditions provides governments with a means of ensuring the integrity and authenticity of their materials, whether by terminating the licence or bringing an action for copyright infringement if materials are misused or

misrepresented.\textsuperscript{69}

\begin{center}
\textbf{New South Wales government’s so-called “copyright waivers”}
\end{center}

Fully a decade before the implementation of CC licences in Australia, the advantages of a copyright-based licensing approach were recognised by Australian governments\textsuperscript{66} which issued general copyright licences to promote the widespread accessibility of judicial and legislative materials.\textsuperscript{71} Under what are (somewhat misleadingly)\textsuperscript{72} referred to as “copyright waivers”, the New South Wales government granted general licences, initially just for legislation (1993)\textsuperscript{73} but later extended to judgments (1995),\textsuperscript{74} authorising any publisher to “publish and otherwise deal with” these materials, subject to compliance with specified conditions.

Importantly, the New South Wales government did not relinquish or abandon its copyright interests in the licensed materials. Rather, the notices published in the Government Gazette make it clear that copyright continues to reside with the New South Wales government but that it will not be enforced if the material is published or otherwise dealt with in accordance with the authorisation. In publishing the materials, publishers are prohibited from indicating (directly or indirectly) that their publication is an official version of the material and must ensure that it is “accurately reproduced in proper context and [is] of an appropriate standard”.\textsuperscript{75}

While publishers are granted extensive rights to publish legal materials, the government retains rights which can be exercised to ensure the accuracy and integrity of the published versions of its material, through the express reservation of the right to revoke, vary or withdraw its permission if the conditions of the grant are breached.

\begin{center}
\textbf{Point 2: Provenance and attribution}
\end{center}

For much PSI, it is important that information about its origin, quality, currency and significance continues to be displayed on or in association with it, for example, by means of a metadata description accompanying the document or accessible via hyperlink. The credibility a user gives to information (whether generated by the public sector or otherwise) relates directly to who has created it and how, and what the information represents.

Ensuring that the provenance of PSI is properly documented is even more important for


\textsuperscript{70} New South Wales and the Northern Territory.


\textsuperscript{72} These “waivers” did not, in reality, waive copyright, but rather provided broad permissions (licences) under the copyright system.


\textsuperscript{74} The Hon John Hannaford MLC, Attorney General, \textit{Notice: Copyright in judicial decisions}, NSW Government Gazette No.23 (3 March 1995) p. 1087.

authoritative or official materials and in circumstances where correct attribution of ideas and information is a prerequisite to its public release, such as with scientific research results. Using copyright-based licence conditions to ensure that provenance and attribution information is retained with PSI not only enhances its reliability but also significantly improves its discoverability by search engines.

**Point 3: Avoids financial and technical lock-up of taxpayer-funded materials**

PSI is produced at taxpayers’ expense. Yet if PSI is distributed without any copyright-based controls as to its reuse, a recipient is free to incorporate the PSI into a new work and then prevent others (via legal and technological controls) from accessing that new work and, consequently, the PSI. The creator of the new work will own copyright in that work and may assert their rights against all other parties, including the government, notwithstanding that the work has been produced by drawing on, and incorporates, PSI.

It is desirable to avoid creating a situation where government and taxpayers are precluded from accessing and using PSI that has been produced at public expense and released without any legal or technical encumbrance. Retaining copyright in PSI and distributing it under open content licences such as Creative Commons ensures that PSI released by government continues to be freely available for access and reuse, even where it has been included in a value added commercial product or locked up behind technological measures.

Importantly, copyright preserves the openness of PSI and avoids the situation which would see governments and citizens alike having to obtain permission and pay for the pleasure of using their publicly funded democratic and cultural heritage.

**5.7 Creative Commons Public Domain Tools**

There are two Creative Commons ‘Public Domain Tools’, namely:

- the Creative Commons Zero (CC0) tool for authors and copyright owners who wish to dedicate their works to the worldwide public domain; and
- the Public Domain Mark (PDM) to facilitate the labeling and discovery of works in which there is no copyright.

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77 Alternatively, restrictions could apply under a contract between the government and a particular recipient or could apply generally under legislative provisions. However, contractual controls are much more onerous to apply, because they must be applied anew with each new user of the PSI to ensure privity of contract.

78 The newly created independent work may consist primarily of PSI which has been value added, for example, through features which better organise the base material and make it more easily searchable, or may consist largely of new materials produced by third parties.

79 David Bollier explains: “[A]s Anne Fitzgerald, Brian Fitzgerald, and Jessica Coates of Australia have pointed out, “putting all such material into the public domain runs the risk that material which is essentially a public and national asset will be appropriated by the private sector, without any benefit to either the government or the taxpayers.” For example, the private sector may incorporate the public-domain material into a value-added proprietary model and find other means to make the information private. … Open-content licenses offer a solution by ensuring that taxpayer financed works will be available to and benefit the general public”: David Bollier, *Viral Spiral: How the Commoners Built a Digital Republic of Their Own*, The New Press, New York, 2008, pp 192-193, available at [http://www.viralspiral.cc/download-book](http://www.viralspiral.cc/download-book) accessed on 5 March 2010.

80 See [http://creativecommons.org/publicdomain/](http://creativecommons.org/publicdomain/). A work may have no copyright interests, for example, where copyright existed but has since expired, or where the work was never protected by copyright.
5.7.1 Creative Commons Zero (CC0)

Creative Commons Zero (CC0) is intended to allow copyright owners to waive copyright interests in their works and place their works “as completely as possible” in the public domain.\(^81\) It is described as a “no rights reserved” option.

This is a preview of how the waiver would appear on a website:

![Public Domain Mark](http://creativecommons.org/about/cc0)

Having identified in Part 5.6 above the advantages for government of adopting a copyright-based licensing approach for PSI, it is apparent there are limitations in adopting the opposite approach of a ‘no-copyright’ dedication of PSI to the public domain that is represented by Creative Commons Zero (CC0).\(^82\) None of the identified advantages of a copyright-based licensing approach for government are secured or delivered by use of CC0.

Government agencies should exercise caution in using CC0 because it is:

- not part of the suite of Australian CC licences;
- inconsistent with Australian law on moral rights – under Australian copyright law, CC0 defaults to a licence with the same effect as CC-BY, and so it is far less confusing simply to use CC-BY;
- contrary to the Australian governments’ Intellectual Property (IP) policies (at federal and state levels);\(^83\)
- inconsistent with the research Code of Conduct which is mandatory for (Australian) National Health and Medical Research Council (NHMRC) funded research; and
- inconsistent with well-established science norms, particularly with respect to correct attribution, no false attribution, and the integrity of research results.

5.7.2 Public Domain Mark (PDM)

The Public Domain Mark (PDM), released by Creative Commons in October 2010, is intended to be a label (or tag) to identify works that are free of known copyright around the

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\(^81\) See [http://creativecommons.org/about/cc0](http://creativecommons.org/about/cc0).

\(^82\) See [http://creativecommons.org/choose/zero](http://creativecommons.org/choose/zero).

\(^83\) See Appendix I: Intellectual Property Policies and Standards of this Guide for a list of select policies, standards and reports relevant to the management of government intellectual property in different Australian jurisdictions.
world. The PDM enables these works to be labeled in a way that makes their no-copyright status explicit to the public, and allows the works to be easily discoverable over the internet.\(^{84}\)

This is how the PDM would appear on a website:

Unlike the CC licences and CC0, the PDM is not a legal instrument; there is no accompanying legal code or agreement. It is merely a label, and should not be used to attempt to change a work’s status under copyright law, or affect any person’s right in the work.\(^{85}\)

5.7.3 CC0 and PDM

CC0 and PDM each have distinct purposes. CC0 is intended for use by copyright owners to waive copyright in works that are still subject to copyright. PDM, however, is only a label for works that are no longer subject to copyright throughout the world. The PDM does not, and is not intended to, have any legal effect.\(^{86}\)

5.8 Current licensing practices

Currently, the prevailing practice is for short copyright notices to be displayed – if at all – on government websites.\(^{87}\) Government bodies sometimes endorse these short statements as being succinct and easy for users to read. In reality, however, these statements often lack sufficient detail or clarity for users to understand what they are permitted to do with the material.

A survey of 130 New South Wales government websites conducted in mid-2006 found there to be a diversity of licensing approaches and no uniform whole-of-government policy on copyright notices.\(^{88}\) Eleven per cent of websites had no copyright notice at all, 8% had a basic

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\(^{85}\) See Creative Commons PDM FAQ, at [http://wiki.creativecommons.org/PDM_FAQ](http://wiki.creativecommons.org/PDM_FAQ).

\(^{86}\) I[bid.](http://wiki.creativecommons.org/PDM_FAQ#What_is_the_difference_between_the_PDM_and_CC0.3F)

\(^{87}\) See for example, the Australian Government Attorney General’s Department website “Copyright” page at [http://www.ag.gov.au/www/agd/agd.nsf/Page/About_the_DepartmentCopyright](http://www.ag.gov.au/www/agd/agd.nsf/Page/About_the_DepartmentCopyright) accessed on 1 June 2010.

\(^{88}\) In 2005, the NSW Premier’s Department published *Intellectual Property Management Framework for the NSW Public Sector*, which recommends that copyright notices “should also make clear any automatic copyright
one and a further 8% displayed “All rights reserved” statements or stated that there was to be “no reproduction without express permission”, requiring users to obtain written permission to reproduce the content on the website for any purpose.\textsuperscript{89} A total of 52% of websites conveyed “either no or few explicit permissions” other than those provided for in the Copyright Act.\textsuperscript{90}

These disparate and unclear practices do not properly facilitate Open Access to PSI.

**Telling users what they cannot do restricts the flow of PSI**

Where a copyright notice is displayed on government websites and other materials, the statement typically addresses what the user cannot do and requires them to seek express permission (sometimes in writing) to do anything beyond the very circumscribed range of permitted activities.

A very real advantage of using open content licences drafted along the model found in the CC licence suite is that they expressly tell users what they can do with the licensed material.

This advantage of using open content licensing has been noted by the Australian Bureau of Statistics (ABS):

An open licensing framework clarifies the responsibilities and obligations of ABS users in using, sharing and reusing ABS data. This will in turn create an environment which will optimise the flow of ideas and information of social and economic benefit.\textsuperscript{91}

**Important note: Display a clear copyright licensing statement**

Any government agency that intends to provide open access to PSI should display a copyright licensing statement on its website or database and should attach a copyright licensing statement to its datasets.

The statement should assert copyright and name the copyright owner. Then, licensing terms granting access and reuse rights to the work can be included with the statement, in such a way that they can be understood by all recipients of the work. Copyright licensing statements are explained below under Part 6.6 “Legal Application: How to use Creative Commons?”.

Creative Commons licences, with their standard set of icons that are easily recognisable worldwide, provide an excellent licensing framework for data sharing. Creative Commons licences are considered more fully below.
6 Enabling Open Access: Creative Commons

6.1 Open (content) licensing

Open licences provide a broad permission to the public to reuse the materials (or PSI) that are subject to the licence. However, they also allow the copyright owner to retain some control over how the materials may be reused. For example, if a copyright owner chooses to license their material under a Creative Commons Attribution Non-Commercial licence, users may only reuse the licensed material for any purpose that is not commercial. They must seek further permission from the copyright owner to use the material for a commercial purpose.

The emergence of open content licensing models has made it much simpler for copyright owners to license their material to a wide range of people, especially where it is distributed over the internet. The last few years have seen an increasing appreciation of open content licences to grant access to copyright-protected PSI.

The benefits of open licensing include:

- allowing others to circulate the licensed work freely and widely;
- not forcing others to seek permission every time they wish to use or circulate a copy of the licensed material, which can be time consuming;
- encouraging others to continuously add value to the work; and
- encouraging others to create new works based on or derived from the original work.

Open content licences can be seen as both the legal expression of a policy supporting access and reuse and the means of implementing the policy.

There are a number of standard-form open licences in use, the most common being the suite of Creative Commons licences. Most open licences can be accessed online and can be easily attached to copyright material.

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95 Above note 7, Anne Fitzgerald et al, Enabling Open Access to PSI with CC (2010), p 12.
96 For a more complete list and more information on open licences, see http://www.opendefinition.org/licenses?head=4712a6a96f10cc9d008b83d615f0f01c5d75a2e at 5 September 2007.
Creative Commons licences can be applied to most copyright materials (excluding computer software). The licences consist of:

- a legal code;
- a short “human readable” summary of the legal code;
- a digital code that can be understood by computers; and
- a set of icons that can be recognised internationally independent of language.

**Important note: Do not use CC to license software**

Creative Commons licences should not be used for software, as they do not mention source or object codes. You should consider using existing licences which are designed specifically for use with software, for example the GNU General Public License (GPL).  

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**Worldwide developments in Open Access practices**

**United Kingdom: data.gov.uk**

On 21 January 2010, the UK Government achieved its commitment to open up government information by launching the data.gov.uk beta website. The site provides a single access point to over 2,500 central government datasets that have been made available for free re-use.

Data available through data.gov.uk will be re-usable both commercially and non-commercially, on terms and conditions aligned with and interoperable with any Creative Commons Attribution 3.0 Licence. These terms and conditions are also machine-readable.

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### 6.2 Creative Commons licences

Creative Commons (CC) licences provide a way to give permission in advance to the world at large to use material protected by copyright. The licence attaches to the material so that it moves with the material. A copyright owner only needs to give permission once, rather than having to respond to numerous separate requests from those seeking permission to use the material.

A CC licence gives users rights in relation to material protected by copyright, subject to certain conditions as selected by the licensor. The baseline rights granted are the rights to copy, distribute, display and perform the copyright work.

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97 See further [http://www.gnu.org/licenses/gpl-howto.html](http://www.gnu.org/licenses/gpl-howto.html).
100 See for example Clause 3A *Grant of Rights*, Creative Commons Legal Code, Attribution 3.0 Australia licence, available at [http://creativecommons.org/licenses/by/3.0/au/legalcode](http://creativecommons.org/licenses/by/3.0/au/legalcode) (reproduced in *Appendix III*).
Where one or more elements of a database or a compilation attract copyright, a CC licence can be used to license that copyright to users. For example, if your agency wishes to license photos contained in an article but not the text, you may do so by specifying that the CC licence is to apply to the photos only.

The conditions that may be imposed in a Creative Commons licence are:

- **Attribution** (BY) – this applies to every Creative Commons licensed work and means that whenever the work is copied or redistributed the author/creator must be reasonably credited;

- **Non-Commercial** (NC) – the work can be used for non-commercial purposes only;

- **No Derivatives** (ND) – only exact copies of the work (not derivative works based on the original work) can be made, displayed, distributed and performed; and

- **Share-Alike** (SA) – users may distribute derivative works, but only under a licence identical to the one that governs the original work.

These four sets of conditions, together with the baseline permissions, can be combined to create six licences:

- Attribution 3.0 (BY)  
  <http://creativecommons.org/licenses/by/3.0/au/>

- Attribution No Derivatives 3.0 (BY-ND)  
  <http://creativecommons.org/licenses/by-nd/3.0/au/>

- Attribution Non-Commercial 3.0 (BY-NC)  
  <http://creativecommons.org/licenses/by-nc/3.0/au/>

- Attribution Non-Commercial No Derivatives 3.0 (BY-NC-ND)  
  <http://creativecommons.org/licenses/by-nc-nd/3.0/au/>

- Attribution Non-Commercial Share Alike 3.0 (BY-NC-SA)  
  <http://creativecommons.org/licenses/by-nc-sa/3.0/au/>

- Attribution Share Alike 3.0 (BY-SA)  
  <http://creativecommons.org/licenses/by-sa/3.0/au/>

For example, an Attribution-Share-Alike (BY-SA) licence allows others to use the licensed material as long as they credit the creator of the material and they license any derivative material that they create under the same type of licence. The only conditions that are incompatible and may not feature in the same licence are the No Derivatives and Share-Alike conditions.
terms (because the Share Alike term applies to derivative works).\textsuperscript{101} Some care needs to be exercised in an agency selecting a CC licence with a Share-Alike term as it may lead to an unintended limiting or restricting effect which may reduce the scope for innovation.

See the compatibility charts\textsuperscript{102} on page 51 of this Guide, which summarise how a derivative work (derived from material licensed under one of the different CC licences) or a collective work may subsequently be licensed.

**Important note: CC BY as a default licence for PSI**

The Creative Commons 3.0 Attribution licence is the most practical of the Creative Commons licences for PSI as it is generally considered the most "open" of all the Creative Commons licences.

Where a user wishes to combine different CC licensed works to form a new work (a "derivative work") or a "mash up",\textsuperscript{103} only CC-BY licensed material is compatible with all the other CC licences.\textsuperscript{104}

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**Engage: Getting on with Government 2.0**

In the Government 2.0 Taskforce’s final report, *Engage: Getting on with Government 2.0*, the Taskforce made several recommendations, including that PSI should be “licensed to permit free reuse and transformation by others”, using machine readable licences that “conform to some international standard such as Creative Commons”.\textsuperscript{105}

The Taskforce proposed that CC BY should be the default licence applied when distributing PSI in which the government owns copyright, as well as PSI containing third party material, subject to negotiation with the copyright owners.\textsuperscript{106} Further, it recommended that Crown copyright works should be automatically licensed under a CC BY licence at the time when government records become available for public access under the *Archives Act 1983* (Cth).\textsuperscript{107}

The Federal Government's response to the Government 2.0 Taskforce final report supports the use of CC BY as the default licence for PSI.\textsuperscript{108} This approach was formally endorsed by the Federal

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\textsuperscript{101} For more information about Creative Commons licences, see <http://www.creativecommons.org.au> and <http://www.creativecommons.org>.

\textsuperscript{102} Available at Creative Commons Frequently Asked Question [http://wiki.creativecommons.org/Frequently_Asked_Questions](http://wiki.creativecommons.org/Frequently_Asked_Questions).

\textsuperscript{103} The term “mash up” is primarily used to describe a remix of digital data: see Mashup on Wikipedia at [http://en.wikipedia.org/wiki/Mashup_%28web_application_hybrid%29](http://en.wikipedia.org/wiki/Mashup_%28web_application_hybrid%29) accessed on 11 March 2010. In the context of government data, see Mashup Australia’s About page at [http://mashupaustralia.org/about/#mashup](http://mashupaustralia.org/about/#mashup) accessed on 11 March 2010.

\textsuperscript{104} See Part 6.4 “Advantages of Creative Commons licensing – Enable legal remixing of copyright materials” below.


\textsuperscript{106} Ibid, p xv and 58.

\textsuperscript{107} Ibid, p 59.

The flowchart in Appendix II provides an overview on how to choose which CC licence to apply for your agency’s purposes.

6.3 How Creative Commons licences operate

In the context of licensing PSI, there are three important aspects of Creative Commons licences to bear in mind. These are that the licences:

1. terminate automatically upon breach of any licence term;
2. do not provide for termination at the licensor’s convenience; and
3. do not preclude the imposition of fees and charges for the licensed PSI.

**Point 1: Termination on breach**

If a user of material licensed under a CC licence breaches the terms of the licence, the licence and the rights granted under it terminate automatically. Therefore, in the absence of an ongoing licence to use the copyright material, the ordinary principles of copyright law come into operation.

This means that, following termination for breach, any unauthorised use of the copyright material by the licensee may be an infringement of copyright that is subject to civil and criminal penalties.

**Point 2: Do not provide for termination for convenience**

The grant of rights under a CC licence is perpetual, lasting for the full duration of copyright. CC licences do not contain an express provision which entitles the licensor to terminate the licence solely for the licensor’s convenience, although the licensor reserves the right to release the work under a different licence or to stop distributing it at any time.

Some commentators have contended that the absence of a right to terminate for convenience means that CC licences are irrevocable. For most practical purposes, the issue of termination for convenience is unlikely to arise where government has distributed PSI under a CC licence.
to give effect to a policy position supporting open access to government materials. The question of revocation of CC licences will usually only arise in the event that government changes its policy, either generally or in relation to a specific copyright work or category of materials, or if the distribution of the PSI in question is found to be illegal or to raise national security concerns. An operational response to a shift in policy of this kind would be for the government agency to cease distributing the material or to continue making it available under altered licence conditions, although any material that has already been distributed under the original licence would continue to be so.  

A bare (non-contractual) licence can be revoked at any time, provided that adequate notice of revocation is given to any licensee. Accordingly, where a CC licence takes effect as a bare licence, it may be revoked at any time by the government agency (the licensor) that has applied the licence to its material, upon giving reasonable notice to the licensee. What period of notice will be “reasonable” will depend upon the circumstances in each case but might range from a period of some weeks to several months or more.

**Trumpet Software v Ozemail: A bare licence can be revoked**

In *Trumpet Software v Ozemail* [1996] FCA 560, the plaintiff had distributed its internet connection Trumpet Winsock computer program as shareware available for free download from FTP (file transfer protocol) sites, under a bare licence which permitted those who obtained a copy to use it for a specified period for assessment and to pass on the entire program (including the same terms of use) to other users. As is the case with CC licences, the licence granted to users of Trumpet Winsock operated directly from the plaintiff to each user.

Heerey J rejected the defendant’s assertion that the method of distribution of Trumpet Winsock as shareware gave rise to a licence which could not be revoked, even if reasonable notice of termination was given. While Heerey J countenanced that it may be the case “that a bare licence not supported by consideration can still only be revoked on giving the licensee reasonable notice”, he said it would be without foundation to hold that such a licence could not be revoked at all.

The basis for the contention that CC and other open source/content licences are irrevocable seems to owe more to the practical difficulties of recalling works that have been widely distributed to users other than those who are the immediate recipients of the work from the licensor, than to the lack of legal grounds for revocation. Notwithstanding the earlier

116 Both of these options are provided for in Clause 8, Legal Code, Creative Commons Attribution 3.0 Australia licence.
117 *Trumpet Software v Ozemail* [1996] FCA 560. A licence is a bare licence (or a non-contractual licence) where no consideration is given in exchange for the provision of the licence.
118 In this respect, CC licences operate in a similar fashion to the general “waivers” of copyright in judgments and legislative material issued by the New South Wales government: Notice: Copyright in judicial decisions, NSW Government Gazette No.23 (3 March 1995) p. 1087; and Notice: Copyright in legislation and other material, NSW Government Gazette No. 110 (27 September 1996) p. 6611.
119 See P Johnson, “Dedicating” Copyright to the Public Domain, (2008) 71(4) Modern Law Review 587 at pp 605-606. Johnson (at p 606) comments that six months’ notice was considered reasonable where the licensee had spent substantial sums in reliance upon the licence (*Dorling v Honnor Marine* [1963] RPC 205), but a reasonable notice period might be considerably less where the licensee had expended less.
120 His Honour cited *Computermate Products (Aust) Pty Ltd v Ozi-Soft Pty Ltd* (1988) 20 FCR 46 at 49.
121 *Trumpet Software Pty Ltd v OzEmail Pty Ltd* [1996] FCA 560.
122 Note that this reasoning is implicit in the argument put forward by the defendants in *Trumpet Software Pty Ltd v OzEmail Pty Ltd* [1996] FCA 560 that the shareware licence granted by the plaintiff to users of its Trumpet Winsock software was irrevocable.
impracticalities of seeking to give notice of revocation to all the distributed recipients of a copyright work, in the internet era the core features of CC licences assist in locating copies of licensed works and notifying users of changed conditions of use. All CC licences include provision for the identification of the licensor and Digital Code, which enable the web location of licensed works to be discovered by search engines such as Google and Yahoo. Consequently, it is not difficult to locate copies of CC-licensed works on the web and to notify the administrators of websites where they are displayed that the licence has been or will be terminated.

While the issue of revocability of CC licences may be a theoretical rather than a practical concern, if a licence granted by a government over PSI were to be revoked, the licensee may still be entitled – under the estoppel doctrine – to continue using the material. To successfully raise estoppel, the licensee would need to show that they had, in reliance on the CC licence, altered their position such that it would now be unreasonable (unconscionable) for the government agency/licensor to withdraw permission to use the licensed material. Where the licensee has relied on the terms of the CC licence to their detriment, the doctrine of estoppel would prevent the licensor from resiling from the representations made in the licence about how it will exercise its rights as copyright owner.

The Commonwealth v Verwayen: Estoppel can be raised against a government

It is established in Australian law that estoppel can be raised against a government. In the leading case, The Commonwealth v Verwayen [1990] HCA 39, (1990) 170 CLR 394, members of the High Court of Australia applied the doctrine of estoppel, holding that the Commonwealth could not avail itself of a defence that a tort action was statute barred when it had earlier made representations to the plaintiff that it would not rely on that defence.

Point 3: Fees and charges – upfront payment for licensed material

A government agency may wish to impose a statutory charge or fee for the provision of CC licensed PSI for cost recovery purposes. Licensing PSI under a CC licence does not

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124 The term “waivers” of copyright in legislation and judgments that “[t]he State will not enforce copyright in any judicial decision [or legislative material] to the extent that it is published or otherwise dealt with in accordance with this authorisation”: Clause 3, Notice: Copyright in judicial decisions, NSW Government Gazette No.23 (3 March 1995) p. 1087; and Clause 3, Notice: Copyright in legislation and other material, NSW Government Gazette No. 110 (27 September 1996) p. 6611.

125 Mason CJ at p 413, Deane J at pp 446-51; Dawson J at pp 455-63.


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preclude the government from charging a fee at the time that the PSI is made available to the user. However, the government information provider will not be able to prevent the licensee from sharing the CC licensed work with others for free. Therefore cost recovery will only occur at that point of access, but not from other downstream recipients.

For example, the government agency could make a digital file available for access on a website where it can be viewed but not copied by a user; however, if the user wants to proceed to download a licensed copy of the file for use and reuse, they may be required to pay a charge or fee. Here, the downloaded digital material can be licensed by the government to the user under a CC licence – including a CC BY-NC licence – notwithstanding that the government obtains payment from the licensee. The licensee may then share that material with others under the terms of that CC licence.

Note, however, that charging for PSI is not in line with the federal Attorney-General’s Statement of IP Principles for Australian Government Agencies, which provides that permission for public use and re-use of PSI should be given royalty free.128

A CC licence applies to the licensee, not the licensor
The terms of the CC licence describe the scope of the permission granted to the licensee, not the licensor’s rights in relation to the copyright material. There is no restriction on the licensor making the material available to the licensee under a CC BY-NC licence and requiring payment before providing the material even though the licensee is prohibited from using the licensed material for commercial purposes.

6.4 Advantages of Creative Commons licensing

CC licences have several advantages for governments that are managing their copyright to give effect to open access policy objectives. These advantages can be attributed to the following qualities of CC licences (and are discussed in detail below):

- the enforceability of the licences;
- that the licences contain an explicit statement of reuse rights;
- that the licences can include a clear statement that information is sourced from government;
- the universal recognition of the CC symbols;
- the discoverability of digital objects;
- that the licences enable legal remixing of copyright materials; and
- that the licences enable the monitoring of usage levels.

127 The ability to share the licensed material is a baseline right in all the CC licences. See for example, Clause 3A Grant of Rights, Creative Commons Legal Code, Attribution 3.0 Australia licence.

Enforceability

In Australia, it was established in the case of Trumpet Software v OzEmail [1996] FCA 560 that non-contractual (bare) licences were enforceable (see above at p 35). Notwithstanding (or perhaps because of) the widespread use of CC and other open content and open source licences, there have been relatively few cases in which their validity and enforceability have been tested in court.

The most authoritative consideration to date of the effectiveness of open licences is the decision of the United States Court of Appeals for the Federal Circuit in Jacobsen v Katzer in August 2008.129 In this case, it was held that the defendant had gone beyond the scope of the open licence and thereby infringed copyright. From this decision, it is clear that open licences such as CC licences will be upheld by the courts, even though they are applied to copyright materials distributed for no financial reward, and that failure to comply with the licence conditions may be an infringement of copyright, for which the usual remedies will apply. CC licences have also been enforced in the Netherlands, Bulgaria130 and Norway,131 and treated as valid in court cases in Spain.132

Explicit statement of reuse rights

Government agencies can use CC licences to clearly communicate to users what they are permitted to do with the licensed PSI without having to seek individual permissions or to engage in time-consuming negotiation of licensing conditions. Unlike the static websites of the web 1.0 era, CC licences can be included not only on each of the individual pages of a website but also on every digital object or file downloaded from the site.

Case Study: Australian Bureau of Statistics

On 18 December 2008, the Australian Bureau of Statistics (ABS) implemented CC licensing on its website and began making an extensive range of its statistical information products available online under a Creative Commons Attribution 2.5 Australia licence. Implementation involved adding to the footer on every page of the ABS website an updated Copyright Statement, Disclaimer notice, CC symbols, information on how to attribute material sourced from the ABS website and a hyperlink to the CC licence. In effect, ABS makes its website material openly available, on the condition that users acknowledge ABS as the source of the data.

In explaining the reason behind the adoption of CC licences, Siu-Ming Tam, senior executive officer of the ABS, emphasised the importance of a simple, easily understood licensing model to facilitate

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129 Jacobsen v. Katzer, 535 F.3d 1373 (Fed.Cir. Aug 13, 2008), on remand, Jacobsen v. Katzer, 609 F.Supp.2d 925 (N.D.Cal. Jan 5, 2009), available at http://www.cafc.uscourts.gov/opinions/08-1001.pdf. Although the licence at issue was an open source licence of computer programming code, the decision is of direct relevance to CC licences as Creative Commons intervened in the appeal as amici curiae. For more on open source licences see http://www.opensource.org/docs/osd.


enhanced and innovative reuse such as through mash-ups in which different layers of information are combined:

33. The recent advent of Web 2.0 technologies increases the potential to use, share and 'mix and match' ABS data sets to add value to ABS information. 'Mash ups' are an excellent example of how the value of a product may be significantly enhanced by including different layers of information with statistical information. To facilitate this, and other innovative uses of ABS data, the ABS needs to have an internationally recognised licensing framework for accessing, using and reusing its statistical information.  

49. One of the hallmarks of a democracy is freedom to choose one's own affairs. Choice requires decisions and in turn good decision making requires information. Therefore, open access to statistical information is fundamental to a democracy.  

52. Most recently, the introduction of Creative Commons licences, an internationally recognised licensing framework, onto the ABS website provides clarity on responsibilities and obligations on users of ABS statistics when using, sharing and reusing ABS information. It is our belief that this initiative will facilitate an environment for creativity, innovation, and the development of value added products, all of which will lead Australia to be a better place for its citizens.  

Clear statement that information is sourced from government – increased user confidence

The amount of information accessible online is increasing exponentially, and is of variable quality and reliability. A clear advantage for government in applying CC licences to PSI is that the source or provenance of the material is made clearly apparent to users. This is an important and practical factor for users online when trying to assess the character of information and determine the confidence they can have in the information’s quality and accuracy.

Conversely, if the provenance of information is not stated in clear and transparent terms, the degree of confidence a user may have in it will diminish, reducing the likelihood that - and the extent to which - the information will be used or relied upon.

Another advantage of adopting a standard practice of applying CC licences to copyright material is that it prospectively avoids the problem of so-called “orphan” copyright works, for which it is not possible to identify or locate the copyright owner in order to obtain permission to use the material. With respect to PSI, the problems currently encountered with orphan works could be virtually eliminated in the future if metadata - including the name of the creator/s of the work and the copyright owner/s, and licensing permissions - were to be

134 All CC licences require that attribution be given to the author, or other party designated for the purposes of attribution.
135 The crucial role played by clearly stating the source or provenance of licensed information in facilitating the flows and reuse of the information is strongly affirmed in the report, by Dr Prodromos Tsiavos, Case Studies Mapping the Flows of Content, Value and Rights across the Public Sector, March 2009 (available at http://www.jisc.ac.uk/publications/programmerelated/2009/scaiprcasestudies.aspx) which contains an analysis of seven UK case studies of publicly funded e-content initiatives.
attached to or embedded in copyright works at the time they are created and before distribution.

The symbols used to indicate the terms of CC licences have the advantage of being widely recognised and understood, irrespective of the language in which the Licence Deed or Legal Code is written, or the location of the licensor. This is a particularly important advantage for works distributed online in digital form. When a government agency applies a CC licence and related symbols to a public sector work, the terms on which the work can be used are readily apparent to users, independently of their jurisdiction or language.

Discoverability of digital objects

CC licences are designed for the web 2.0 environment. Each of the CC licences is expressed in machine readable Digital Code (or Licence Metadata) which is used to “tag” the digital object (or file), as well as the web page that links to it. Unlike the static copyright notices typically found on government websites, the Digital Code of CC licences is included in the digital object and travels with it, facilitating the distribution and discoverability of CC licensed works. As observed in the New Zealand Government Open Access and Licensing Framework (NZGOAL):

> Distribution and discoverability is increasingly significant in the digital age as it facilitates, among other things, machine-based indexing and searching of CC-licensed works by reference to the Digital Code’s metadata.136

The machine-readable Digital Code enables CC-licensed materials to be indexed and retrieved by search engines such as Google, along with the licensing information. The inclusion of an express statement of user permissions with the digital file – both in the form of the human-readable Licence Deed and the machine-readable Digital Code – means that a user is immediately provided with information about what they can and cannot do with the material, which can be verified by checking with the licensor.

Enable legal remixing of copyright materials

A significant impediment to the efficient sharing and reuse of PSI is the diversity of licensing practices and the lack of consistency or compatibility of the rights granted to users. Incompatibility of licence terms creates a legal logjam and presents a major obstacle to the ready flow of PSI. Although it may be possible, technologically, to obtain access to, and to mix and match (mash up or remix) various information inputs or products, this does not mean that such remixing or reuse of the information inputs or products is lawful.137

Where there are different reuse rights attaching to the various components of a remixed or mashed work, the lowest common denominator principle applies: the most restrictive reuse

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137 On the importance of being able to remix from among a wide range of existing materials, see Dr T Culter, The Role of Cultural Collections in Australia’s Innovation System, keynote address presented at the State Library of Victoria, 23 October 2009, pp 3-4. Dr Cutler introduces the term “combinatorial innovation” to refer to remix.
rights applying to any one of the inputs will govern what can be done with the whole of the remixed or mashed work, irrespective of whether it is intended to be used only by the person who has produced it or licensed to other parties for downstream use. When licensing the remixed work, the person who has created it would only be able lawfully to license or grant the lowest common denominator rights of reuse. This can have a severely limiting effect on the scope of the reuse of remixed information products, representing a significant impediment to reuse of PSI.

The use of numerous different licences, often with inconsistent or incompatible terms, has been identified in numerous reviews as an impediment to effective flows of PSI. Open content licences such as Creative Commons are a legally effective and efficient way in which to promote globally compatible reuse rights for copyright material, including PSI.

**Inconsistent licensing practices impede the flow of PSI**

**GILF:** The Government Information Licensing Framework (GILF) project was instigated by QSIC specifically to address the recurring problems in accessing and sharing spatial information among government agencies and utility service providers during and after natural disasters due to the fragmented, inefficient and confusing arrangements for information access and reuse.

**NGISS:** The National Government Information Sharing Strategy (NGISS) identified several existing barriers to information sharing, including "information management practices that restrict sharing capability" and recommended the development of "appropriate governance arrangements for information sharing [which are] clearly defined and applied consistently across government." In particular, NGISS recommended that the governance documentation should include "instructions regarding information conditions of use e.g. copyright, licensing etc" and referred to the GILF as one of the tools to be used in establishing clear governance arrangements for shared information.

**NZGOAL:** The draft New Zealand Open Access and Licensing Framework (NZGOAL) observed that there are at least three broad categories of licensing in place across New Zealand government departments and that these "various and inconsistent licensing practices" were a cause of "confusion, uncertainty and criticism" by members of the public.

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138 In Queensland, the problems of accessing and sharing spatial information were highlighted by Cyclone Larry which devastated large areas of northern Queensland in 2005; in Victoria, the 2009 bushfires poignantly demonstrated the criticality of real time, spatially-related information to enable effective emergency response management.


141 Ibid, pp 6 and 19.

142 Ibid.


144 Ibid, p 7. NZGOAL was approved by Cabinet on 5 July 2010 and its release announced by the Minister of State Services on 6 August 2010. See http://www.e.govt.nz/policy/nzgoal.
Monitoring levels of usage

With the increasing sophistication of online search capabilities it is now practicable for licensors to monitor the level of usage of their material licensed in the online world. This ability largely removes the need for licensors to continue to seek to impose a reporting obligation on a licensee to record and report back on the number of licences granted over a specified period. In practice, the accuracy of any usage or customer details reports was largely dependent upon the licensee’s diligence and record keeping ability.

Now, the licensor can simply do an internet search for the licensed material, largely eliminating the need for detailed reporting conditions.

6.5 Changes introduced by version 3.0 of the CC licences

Every few years, Creative Commons updates its core licences to ensure they keep up with copyright law and open access developments (e.g. legal decisions, new technologies or changes in community norms or expectations). Once released, the new versions become the new default standard. The older versions remain accessible on the Creative Commons website145 but are no longer available through the Creative Commons licence chooser.146 Works already licensed remain under their original licence, unless the creator chooses to license them under the new version.

Version 3.0 of the Creative Commons Australia licences was released in June 2010. It is a refinement of version 2.5. The look and feel of the licences has changed, increasing the readability of the legal codes. Besides changes in appearance, changes introduced by version 3.0 include:

1. Addition of ‘no endorsement’ language;
2. Addition of language providing the option of licensing CC BY-SA derivatives under a CC compatible licence;
3. Different language with regard to how moral rights are dealt with under CC licences;
4. Different language which explains that no sub-licensing of the work is allowed; and
5. Addition of language to ensure that the licences comply with the requirements of Australian consumer protection law.

These changes are explained below.

Point 1: ‘No endorsement’ language

The ‘no endorsement’ language which was added into version 3.0 of the licences states that a person should not use CC licensed material to improperly assert or imply an association or relationship with the licensor or author. Although this may have been implicit in the earlier versions of the CC licences, it has been made explicit in version 3.0:

4B. (f) For the avoidance of doubt, You may only use the credit required by this clause 4B for the purpose of attribution in the manner set out above. By exercising Your rights under this Licence, You must not assert or imply:

145 http://creativecommons.org/.
146 http://creativecommons.org/choose/.

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i. any connection between the Original Author, Licensor or any other Attribution Party and You or Your use of the Work; or

ii. sponsorship or endorsement by the Original Author, Licensor or any other Attribution Party of You or Your use of the Work, without their separate, express prior written permission. 147

**Point 2: CC Compatible Licence**

The inclusion of a clause in the BY-SA licence makes it possible for derivatives to be licensed under a Creative Commons Compatible Licence:

4B.(a) You may only Distribute or publicly perform a Derivative Work if You apply one of the following licences to it:

i. this Licence;

ii. a later version of this Licence with the same Licence Elements (such as Attribution-ShareAlike 4.0 Australia); or

iii. a Creative Commons Unported licence or a licence from another jurisdiction (either this or a later version) that has the same Licence Elements (such as Attribution-ShareAlike 3.0 Netherlands); or

iv. a Creative Commons Compatible Licence. 148

This change is in line with CC’s objective of increasing interoperability between CC licences and non-CC content copyright licences. Flexible content copyright licences approved by Creative Commons as guaranteeing the same freedoms as the CC BY-SA licence will be listed on the CC website at [http://creativecommons.org/compatiblelicenses](http://creativecommons.org/compatiblelicenses). However, to date, CC has not approved any licences for compatibility.

**Point 3: Moral Rights**

Version 3.0 adopts language used in the unported version 3.0 licences to explain how moral rights are unaffected by the CC licences. The wording is different to version 2.5 but it is not intended to change the legal effect. The relevant version 3.0 clause is reproduced below:

4C. Moral rights remain unaffected to the extent they are recognised and nonwaivable at law. In this clause 4C, "moral rights" means the personal rights granted by law to the Original Author of a copyright work. For example, Part IX of the Copyright Act 1968 (Cth) grants authors the right of integrity of authorship, the right of attribution of authorship, and the right not to have authorship falsely attributed. 150

**Point 4: No Sublicensing**

Language changes have been made to further clarify two clauses, which provide that no sublicensing of the work is allowed, and that all downstream licensees (i.e. recipients of the work under the licence) are granted a direct licence from the original licensor:

4A. (d) You are not granted the right to sublicense the Work. The rights of recipients of the Work from You are governed by clause 9.

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147 Creative Commons Legal Code, Attribution 3.0 Australia licence, clause 4B(f).

148 Creative Commons Legal Code, Attribution-ShareAlike 3.0 Australia licence, clause 4B(a), available at [http://creativecommons.org/licenses/by-sa/3.0/au/legalcode](http://creativecommons.org/licenses/by-sa/3.0/au/legalcode).

149 See [http://creativecommons.org/compatiblelicenses](http://creativecommons.org/compatiblelicenses).

150 Creative Commons Legal Code, Attribution 3.0 Australia licence, clause 4C. Compare Creative Commons Legal Code, Attribution 2.5 Australia licence, clause 2, available at [http://creativecommons.org/licenses/by/2.5/au/legalcode](http://creativecommons.org/licenses/by/2.5/au/legalcode).
9. Each time You Distribute or publicly perform the Work, a Derivative Work or a Collection the Licensor offers the recipient a licence to the Work on the same terms as are granted to You under this Licence.\(^\text{151}\)

**Point 5: Compliance with Australian consumer protection law**

Where Australian consumer protection law applies, false and misleading representations about the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy is prohibited.\(^\text{152}\) Clarification that the disclaimer and limit of liability clauses in the licences cannot, and are not intended to exclude, restrict or modify the warranties implied by law has been added. The new paragraphs are underlined below:

5. Representations, Warranties and Disclaimer

   a. Except as expressly stated in this Licence or otherwise agreed to by the parties in writing, and to the full extent permitted by applicable law, the Licensor offers the Work "as-is" and makes no representations, warranties or conditions of any kind concerning the Work, express, implied, statutory or otherwise. This includes, without limitation, any representations, warranties or conditions regarding:
      
      i. the contents or accuracy of the Work;
      
      ii. title, merchantability, or fitness for a particular purpose;
      
      iii. non-infringement;
      
      iv. the absence of latent or other defects; or
      
      v. the presence or absence of errors, whether or not discoverable.

   b. The Trade Practices Act 1974 (Cth), and the corresponding State and Territory fair trading legislation, imply certain warranties and conditions in certain circumstances, such as the right to supply or fitness for purpose of goods or services supplied to a consumer. Clause 5(a) cannot and is not intended to exclude, restrict or modify these warranties.

6. Limit of Liability

   a. To the full extent permitted by applicable law, and except for any liability arising from contrary agreement, in no event will the Licensor be liable to You on any legal basis (including without limitation, negligence) for any loss or damage whatsoever, including (without limitation):
      
      i. loss of production or operation time, loss, damage or corruption of data or records; or
      
      ii. loss of anticipated savings, opportunity, revenue, profit or goodwill, or other economic loss; or
      
      iii. any special, incidental, consequential, punitive or exemplary damages arising out of or in connection with this Licence or the use of the Work, even if the Licensor has been advised of the possibility of such damages.

   c. The Trade Practices Act 1974 (Cth), and the corresponding State and Territory fair trading legislation, restrict the limitation of liability in certain circumstances, such as a contract for the supply of goods or services of a kind ordinarily acquired for personal, domestic, or household use. Clauses 6(a) and 6(b) cannot and are not intended to apply in circumstances where it is prohibited by law.\(^\text{153}\)

For more information on these version 3.0 updates, please see [http://creativecommons.org.au/learn-more/licences/version3](http://creativecommons.org.au/learn-more/licences/version3) and [http://wiki.creativecommons.org/Version_3#Creative_Commons_Version_3.0_Licenses](http://wiki.creativecommons.org/Version_3#Creative_Commons_Version_3.0_Licenses).

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\(^{151}\) Creative Commons Legal Code, Attribution 3.0 Australia licence, clauses 4A(d) and 9. Compare Creative Commons Legal Code, Attribution 2.5 Australia licence, clauses 4(a) and 8(b), available at [http://creativecommons.org/licenses/by/2.5/au/legalcode](http://creativecommons.org/licenses/by/2.5/au/legalcode).

\(^{152}\) See for example, Trade Practices Act 1974 (Cth) s 53(g).

\(^{153}\) Creative Commons Legal Code, Attribution 1974 (Cth), s53(g).
6.6 Legal application: How to use Creative Commons?

Permission to apply a Creative Commons licence

Before your agency may legally apply a Creative Commons licence to the material in question, the following matters need to be considered:

A. consent of the copyright owner; and
B. whether the material is already licensed to another party.

These points will be addressed in turn.

A. Consent of copyright owner

Before you apply a Creative Commons licence to a work, ensure that your agency owns copyright or has the consent of the copyright owner to attach the licence.\textsuperscript{154}

\begin{table}
\begin{tabular}{|l|}
\hline
\textbf{Does your agency own copyright?} \\
\hline
\textbf{Has your agency obtained the consent of the copyright owner to apply a Creative Commons licence to the material?} \\
\hline
\textbf{☐ If the answer is YES to either question – can apply a Creative Commons licence.} \\
\textbf{☐ If the answer is NO to both questions – cannot apply a Creative Commons licence.} \\
\hline
\end{tabular}
\end{table}

Material includes a substantial part of another party’s material

Your agency may wish to include another party’s material or a substantial part of that party’s material in or with its PSI in order to create a “collection” or a “derivative work”, which your agency seeks to license under a CC licence.

\begin{table}
\begin{tabular}{|l|}
\hline
\textbf{What is a “collection”?} \\
\hline
A collection is created where you take another party’s material in its complete and unaltered form and include it with your agency’s material.\textsuperscript{155} \\
\hline
\end{tabular}
\end{table}

\textsuperscript{154} If you are unsure who the copyright owner is, see Part 5.3 “Copyright ownership” above.
\textsuperscript{155} See Creative Commons Legal Code, Attribution 3.0 Australia licence (available in Appendix III), clause 1 – Definitions:

\textbf{a. “Collection” means the Work in its entirety in unmodified form along with one or more other separate and independent works, assembled into a collective whole. A Collection may, for example, include a periodical, encyclopedia or anthology. A Collection will not be considered a Derivative Work for the purposes of this Licence.}
What is a “derivative work”?  

A derivative work is created where you:

- take a substantial part (not all) of another party’s material and include that other party’s material with your agency’s material; or
- adapt/modify another party’s material.\(^{156}\)

First of all, you must obtain permission from the copyright owner to copy and include their material or a substantial part of their material with your agency’s material. What you may do subsequently with the collection or derivative work (e.g. making it available under a CC licence), will depend on the terms (e.g. scope) of the permission.

What is a “substantial part”?  

Diagrams/photographs

Each individual diagram or photograph will constitute an individual work in itself. Therefore, if a diagram or photograph has been reproduced in its entirety, it is likely to be a substantial part and the permission of the copyright owner will be required if you wish to license the diagram/photograph under a Creative Commons licence.

Text

If the whole text of a work (for example an entire article) is reproduced in the material, this will be a substantial part and you will require the permission of the copyright owner in order for your agency to be able to license that work under a Creative Commons licence.

However, if anything less than the whole of the text of a work has been included, an assessment needs to be made as to whether this will constitute a substantial part of the work. It is likely that such assessments will need to be determined upon a case-by-case basis. As a general rule, whether something is a substantial part or not is determined by taking into account the quality of the part taken (as opposed to its quantity) and the importance the part taken bears in relation to the work as a whole (for example whether it is an essential or material part of the work).

If you are in any doubt as to whether the part of the text that has been included in the material is a substantial part or not, you should always seek the permission of the copyright owner before applying a Creative Commons licence to the text.

Sound recordings, cinematograph films and sound and television broadcasts

If a whole sound recording, cinematograph film, sound broadcast or television broadcast has been included in the material, this will constitute a substantial part and you will require the permission of the copyright owner before a Creative Commons licence can be applied by your agency to the

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156 See Creative Commons Legal Code, Attribution 3.0 Australia licence (available in Appendix III), clause 1 – Definitions:

  - “Derivative Work” means material in any form that is created by editing, modifying or adapting the Work, a substantial part of the Work, or the Work and other pre-existing works. Derivative Works may, for example, include a translation, adaptation, musical arrangement, dramatisation, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which the Work may be transformed or adapted, except that a Collection will not be considered a Derivative Work for the purpose of this Licence. For the avoidance of doubt, where the Work is a musical composition or sound recording, the synchronization of the Work in timed-relation with a moving image (“synching”) will be considered a Derivative Work for the purpose of this Licence.

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recording, film or broadcast.

However, if something less than the whole of the sound recording, cinematograph film or sound and television broadcast has been included, an assessment will need to be made as to whether this constitutes a substantial part of the work. The factors discussed above in relation to a substantial part of text should be applied. However, you should note that this is an uncertain area of the law and if you are in any doubt, you should consider obtaining the permission of the copyright owner before applying a Creative Commons licence.

In this situation, where a “substantial part” of another party’s material is involved, different scenarios may apply. For example, the other party may:

1. make their material available under a CC licence;
2. give you permission to include their material with your agency’s material;
3. give you permission to include their material with your agency’s material and to release the collective work under a CC licence; or
4. give you permission to include their material with your agency’s material and to make both -
   - the collective work; and
   - their discrete copyright work, available under a CC licence.

Each of these scenarios is explained below.
1) Other party’s material available under a CC licence

Where the other party’s material is already available under a CC licence, you may use the material in accordance with the terms of that licence.

(A) Derivative works

If your agency is seeking to create a derivative work by using its material with the other party’s CC licensed material, the compatibility chart below\(^{157}\) shows which of the six CC licences may be applied by your agency to the derivative work.

<table>
<thead>
<tr>
<th>CC licensing compatibility chart</th>
<th>Terms that can be used for a derivative work</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other party’s material licensed under</td>
<td>BY</td>
</tr>
<tr>
<td>BY</td>
<td>Green</td>
</tr>
<tr>
<td>BY-NC</td>
<td>Green</td>
</tr>
<tr>
<td>BY-NC-ND</td>
<td>Green</td>
</tr>
<tr>
<td>BY-NC-SA</td>
<td>Green</td>
</tr>
<tr>
<td>BY-ND</td>
<td>Green</td>
</tr>
<tr>
<td>BY-SA</td>
<td>Green</td>
</tr>
</tbody>
</table>

The green boxes indicate licence compatibility. That is, you may use an equivalent or more restrictive CC licence for the derivative work (i.e. those at the top row aligned with the green boxes). If you wish to license the derivative work under a less restrictive CC licence (i.e. those licences at the top row aligned with the clear/white boxes), your agency will need to obtain permission from the other party to do so.

In making the derivative work available, your agency should acknowledge the use of that other party’s material and attribute that party, in the way it has indicated, in accordance with the terms of the licence.

(B) Collections

However, if the CC licence applied by the other party to its material carries a No Derivative Works term (ND), your agency may only include the material as is and cannot alter the material or take parts only of the material.\(^{158}\) In this case, your agency may only include the other party’s material in its unaltered form with your agency’s material to create a collection (but you may not create a derivative work).

<table>
<thead>
<tr>
<th>CC licensing compatibility chart</th>
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</tr>
</thead>
<tbody>
<tr>
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<tr>
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<td>Green</td>
</tr>
<tr>
<td>BY-NC</td>
<td>Green</td>
</tr>
<tr>
<td>BY-NC-ND</td>
<td>Green</td>
</tr>
<tr>
<td>BY-NC-SA</td>
<td>Green</td>
</tr>
<tr>
<td>BY-ND</td>
<td>Green</td>
</tr>
<tr>
<td>BY-SA</td>
<td>Green</td>
</tr>
</tbody>
</table>

\(^{157}\) Available at Creative Commons Frequently Asked Question [http://wiki.creativecommons.org/Frequently_Asked_Questions](http://wiki.creativecommons.org/Frequently_Asked_Questions).

\(^{158}\) That is, only exact copies of the work (not derivative works based on the original work) can be made, displayed, distributed and performed. See Part 6.2 “Creative Commons licences” of this Guide.
Where the other party’s material is included by your agency in a collection, the collection may be licensed by your agency under an equivalent or more restrictive CC licence (i.e. those licences at the top row aligned with the green boxes). If you wish to license the collection under a less restrictive CC licence (i.e. those at the top row aligned with the clear/white boxes), your agency would need to obtain permission from the other party to do so.

While the collection may be released under the CC licences indicated by the green boxes, the other party’s material is still licensed, as a discrete copyright work, under the terms of the CC licence applied by the other party. Therefore, your agency must specify which CC licence applies and attribute that material in the way indicated by the other party.

Example scenario 1 (B): Your agency licensing a collection containing its material and material by another party available under a less restrictive CC licence:

2) Other party’s permission limited to inclusion with your agency’s material

Another party may permit your agency to include their material with your agency’s material to create a collection/derivative work. However, they may not want your agency to make their material available as part of the collection/derivative work under a CC licence (or any other licence).

If the other party’s permission is limited to inclusion with your agency’s material and does not approve the subsequent CC licensing of that collection/derivative work, then your agency will need to obtain further permission to release the work under a CC licence.

Therefore, in practice, wherever practicable it is far more efficient to obtain a sufficiently broad permission, in the first instance, to cover various possible future uses of the material.
3) Other party’s permission limited to release as part of a collection or derivative work under CC

Here, the other party has provided a specific and limited authority for its material to be included as part of a collection or derivative work, and for the collection or derivative work to be licensed only under a specific CC licence. No approval is given for the other party’s material (see “X” in the diagram below) to be taken, in whole or in part, from the collection or derivative work, and then to be licensed, separately or in combination with another party’s material, under a CC licence or any other form of licence.

If the other party has expressly permitted your agency to include their material with your agency’s material and to license the resulting collection or derivative work under a CC licence, then your agency may license that collection or derivative work under the specified CC licence.

However, whilst the other party may have permitted your agency to license their work as part of a collection or derivative work under a CC licence, the other party still owns copyright in their work (see “X” in the diagram below).

Your agency is not permitted to make the other party’s original work available, as a discrete or separate copyright work, under a CC licence. Further approval would be necessary before your agency can license the other party’s work separately.

Example scenario 3: Licensing a collection or derivative work.

Other party’s material X

The other party should be attributed (in the way indicated by that party) for their contribution to the collection or derivative work. Their work may not be taken or extracted, in whole or in part, from the collection or derivative work.

[E.g. – “© Other Party (2010). Not to be extracted or licensed separately.”]

Collection or derivative work X + Y (e.g. if permitted to license under CC BY)

A Creative Commons BY licence can be applied to the collection.

[E.g. – “This work is licensed under a Creative Commons Attribution Noncommercial 3.0 Australia licence.”]
4) Permission to release both collection and discrete copyright work under CC

If the other party has expressly permitted your agency to include their work with your agency’s material to create a collection, and also to make their discrete copyright work available under a CC licence, then the collection, including the discrete copyright work of the other party, may be released under that CC licence.

While you should attribute the other party as licensor of their material in the way the other party indicated, there is no need to exclude their work from the application of the CC licence. However, to avoid any doubt, you may wish to specify that the material is available under the same CC licence.

Example scenario 4: Licensing the entire collective work under a CC licence

Other party’s material

Your agency should attribute X to the other party (in the way indicated by that party).

You may specify that X is available under the same licence.

[E.g. - X is licensed by Other Party under a Creative Commons Attribution Noncommercial 3.0 Australia licence.]

Collective work X + Y

A Creative Commons licence may be applied to the entire collective work.

[E.g. – “This work is licensed under a Creative Commons Attribution Noncommercial 3.0 Australia licence.”]

These are mere illustrations of the types of permission you may obtain from another party. This Guide cannot cover every possible type of permission that may be given to you.

In essence, what you may do with another party’s material, and what you may do with the resulting work which includes that other party’s material depends on the scope of the permission from that party.

Important note: Identify what you are licensing

You should be specific about what you are licensing under Creative Commons when you apply a Creative Commons licence to your agency’s material. Which elements of the material are you licensing (all or only some)?
Can a Creative Commons licence be used where the copyright material includes material owned by a third party?

Instructions

Where government copyright material contains material owned by another party (i.e., a third party) this fact sheet can help you to determine whether your agency can apply a Creative Commons licence to the material.

This fact sheet should be used in conjunction with our guide: Fitzerald, Anne M. and Hooper, Neals and Foong, Cheryl (2010) Using Creative Commons 3.0 Australia Licences on Government Copyright Materials [http://prints.qut.edu.au/38364/]. See, in particular, the Checklist for applying a Creative Commons licence to government material.

Start at the green question box and, following the arrows that correspond with your answer, make your way through the pink and blue questions until you reach a red or purple licence box. That box will indicate the right licence for you or what other permissions are needed.

For more information about the CC licences, see [http://creativecommons.org.au/licenses]. For more information about Creative Commons and government in Australia, see [http://creativecommons.org.au/sectors/government].
A. Material already licensed

If the material has already been licensed by the copyright owner to another party, you need to ensure that the terms of the licence do not preclude your agency from subsequently applying a Creative Commons licence to the material.

This may be the case where the material has been licensed under an exclusive licence which means that only the licensee has the rights to use it.

### Exclusive licence vs Non-exclusive licence

A copyright licence can be exclusive or non-exclusive.

An exclusive licence grants the relevant rights to the licensee only, and the licensor (copyright owner) cannot then grant the same rights to anyone else (for example, under a CC licence) or exercise those rights themselves. An exclusive licence must be in writing.

A non-exclusive licence gives permission to the licensee to exercise the relevant rights, but also allows the copyright owner to grant the same permission to others and to continue to exercise those rights themselves.
Can a Creative Commons licence be used on government copyright material that has already been licensed to a third party?

Instructions

Where government copyright material has already been licensed to a third party, this factsheet can help you to determine whether your agency can apply a Creative Commons licence to the material.

This factsheet should be used in conjunction with our guide: Fitzgerald, Anne M. and Hooper, Neile and Foong, Cheryl (2011) Using Creative Commons 3.0 Australia Licences on Government Copyright Materials http://epubs.qut.edu.au/g3-sfu/ (see in particular: the 'Checklist for applying a Creative Commons licence to government material')

Start at the green question box and, following the arrows that correspond with your answer, make your way through the pink and blue questions until you reach a red or purple licence box. That box will indicate the right licence for you or indicate more details are required.

For more information about the CC licences, see http://creativecommons.org.au/licences. For more information about Creative Commons and Government in Australia, see http://creativecommons.org.au/sectors/government.

Fact sheet 3
Copyright licensing statement

A simple summary of the CC licence terms is easily accessible online as a “human-readable summary” if the page is appropriately linked to the material. A government agency which is licensing material under a CC licence may wish to provide an up-front and more explicit statement of the terms of the licence. This may be done by displaying a simple summary of the terms in a prominent place (e.g. at the point of access on the webpage) or by attaching the summary to the material itself. For example, the statement may appear on the cover page of a report. It can also be included in the metadata fields of the material and the Creative Commons licence. In addition, if applicable to a website in general, this statement should be available in the website’s “Copyright” page.

Therefore, before applying a CC licence to the material, you need to decide what copyright licensing statement your agency will use to notify others of the basic attribution requirement and of any other terms of the licence which may apply.

How detailed the copyright licensing statement should be depends on whether the material:

1. is not conveyed electronically or is conveyed electronically but can be used offline (e.g. a file that can be downloaded) (“Offline Work”); or
2. is released electronically (e.g. contained in a website) and is likely to be used primarily online (“Online Work”).

For further guidance on minimum markings, copyright licensing statements and attribution statements for each of the six CC licences see Appendix IV.

Attribution

Each of the six CC licences contains an attribution condition. It is a core requirement of all of the CC licences that users who reproduce and use the work under the licence give attribution to the author or another party that is nominated in the licence. The attribution clause also requires that the CC-licensed work not be falsely attributed to another person (that is, another person cannot be falsely named as author) and not be changed or altered in a way that would prejudice the honour or reputation of its author.

Although the attribution condition is a standard feature of all the CC licences, in circumstances where attribution would be impracticable, authors who distribute their works under CC licences may make it clear that they do not insist on being positively (or expressly) attributed. However, even if positive (explicit) attribution is not required, the attribution clause still enables authors to insist that another person is not falsely attributed as the author and that no changes are made to the CC-licensed work which would detract from their reputation.

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159 See [http://creativecommons.org/licenses/by/3.0/au/](http://creativecommons.org/licenses/by/3.0/au/) accessed on 15 March 2010. See also Screenshot 5 on p 74 of this Guide.
160 See Part 6.8 “Technical application: How to apply Creative Commons?” of this Guide.
161 This copyright licensing statement is not to be confused with a copyright notice (e.g. © State of Queensland 2010) applied to copyright works.
162 See for example, Clause 4B, Creative Commons Legal Code, Attribution 3.0 Australia, licence.
The attribution condition is set out in Clause 4 Restrictions of the legal text of each of the Creative Commons 3.0 Australia licences. Clause 4B of the CC BY 3.0 Australia licence is set out in full below:

4B Attribution and Notice Requirements

a. When You Distribute or publicly perform the Work or any Derivative Work or Collection You must keep intact all copyright notices for the Work.

b. When You Distribute or publicly perform the Work or any Derivative Work or Collection You must provide, in a manner reasonable to the medium or means You are using:
   i. the name or pseudonym (if provided) of the Original Author and/or of any other party (such as a sponsor institute, publishing entity or journal) that the Original Author or Licensor has requested be attributed (such as in the copyright notice or terms of use). In this clause 4B these parties are referred to as "Attribution Parties";
   ii. the title of the Work (if provided); and
   iii. to the extent reasonably practicable, any Uniform Resource Identifier (such as a web link) that the Licensor specifies should be associated with the Work that refers to the copyright notice or licensing information for the Work.

c. For any Derivative Work You Distribute or publicly perform, You must take reasonable steps to clearly identify that changes were made to the Work. For example, a translation could be marked "The original work was translated from English to Spanish".

d. In the case of a Derivative Work or Collection, the above attribution should, at a minimum, appear as part of any credits for other contributing authors and be as prominent as the credits for those other authors.

e. You must, to the extent practicable, remove the above attribution from any Collection or Derivative Work if requested to do so by the Licensor or Original Author.

f. For the avoidance of doubt, You may only use the credit required by this clause 4B for the purpose of attribution in the manner set out above. By exercising Your rights under this Licence, You must not assert or imply:
   i. any connection between the Original Author, Licensor or any other Attribution Party and You or Your use of the Work; or
   ii. sponsorship or endorsement by the Original Author, Licensor or any other Attribution Party of You or Your use of the Work,

without their separate, express prior written permission.

In the interests of clarity and certainty, a government agency should clearly specify how its copyright material should be attributed when the material is reproduced, used and distributed by others. It is advisable to include a clear statement that sets out how the agency requires the material to be attributed, rather than leaving it to users to devise an appropriate attribution statement.

You should include an attribution statement on how to attribute your agency alongside your agency’s copyright licensing statement.

For detailed practical guidance on minimum markings, copyright licensing statements and attribution statements appropriate for each of the six CC licences see Appendix IV.
What if there are many different creators to attribute (the “attribution stacking” problem)?

There may potentially be a multitude of contributors to highly collaborative works (such as large data collections). Where each of the hundreds or even thousands of contributors make their individual contributions available under CC licences, it may be impracticable to expressly attribute all of them in the combined work. The need to give attribution to a very large number of contributors of individual CC-licensed works is referred to as “attribution stacking”.

Government agencies that license their materials using CC licences should consider whether the material will be combined with numerous other CC-licensed works. If attribution of a large number of CC-licensed works is likely to be problematic, there are various potential solutions which can be used to avoid the problem of attribution stacking.

Potential solutions

The attribution condition in CC licences enables the licensor to specify how they are to be attributed and how the work is to be identified. The CC licences do not require attribution to take any particular form and, in fact, the licensor may waive or dilute the attribution requirement by expressly indicating that positive attribution is not required. In other words, it is a matter for the licensor to indicate what form of attribution/wording, if any, is required.

Therefore, the problem of attribution stacking can be resolved using one or both of the following methods:

(a) collective attribution;
(b) creating a list or database of all contributors to the material;
(c) waiver/dilution of attribution requirement.

(a) Collective Attribution

The first solution is the collective attribution of contributors as a single group or class. For example, if the material or datasets are produced by the employees of a particular government agency, it may well be appropriate practice in most cases to simply attribute the agency as a whole, rather than each individual contributor. In such a case, contributors should, at most, require attribution which:

1. identifies the agency as a whole as the data source; and
2. contains the agency’s URI that contains licensing information for the data.

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163 This is particularly likely in relation to scientific, technological or geographical data.
164 See cl 4B(b), Creative Commons Legal Code, Attribution 3.0 Australia licence, available at http://creativecommons.org/licenses/by/3.0/au/legalcode accessed on 27 October 2010.
165 This practice followed would be informed by the applicable department policy on the manner of recognising the contributions of departmental employees.
Where such attribution requirements are established, the agency’s CC licensing statement could, for example, state:

Where a user of this dataset combines some or all of it with other data sources to produce an end product, service or piece of research, the only attribution that [name of agency] requires from the user is a statement to the effect that [name of agency] is a source of data for the user’s product, service or research, together with, where reasonably practicable, a link back to the [name of agency’s] original data source.

A user who develops a web application that combines the CC-licensed dataset with other data sources will then be able to comply with the attribution requirement by attributing it as follows:

This application uses data sourced from [name of department/agency].

The [name of department/agency] could then be deep-linked back to the agency’s webpage on which the original data source can be found.

(b) List/database of contributors

A second solution is to create a list or database of all contributors to the material. For ongoing works, the list could be regularly updated. Ideally, the list or database would be made easily accessible online. Users can then use the URL (or other appropriate reference) to the list/database to attribute the many creators, wherever the licensed material is reproduced. The URL can also appear in the Creative Commons metadata field where the creator’s name would usually appear. An example of this approach is the attribution pages on Wikipedia, some of which list a huge number of individual CC-licensed contributions.

Example: Wikipedia attribution page

An example of a highly collaborative enterprise is Wikipedia.166 Text in Wikipedia, much of which is created by various contributors around the world, is licensed under a Creative Commons Attribution-Share Alike 3.0 Unported Licence.167

Wikipedia's terms of use state:

As an author, you agree to be attributed in any of the following fashions: a) through a hyperlink (where possible) or URL to the article or articles you contributed to, b) through a hyperlink (where possible) or URL to an alternative, stable online copy which is freely accessible, which conforms with the license, and which provides credit to the authors in a manner equivalent to the credit given on this website, or c) through a list of all authors. (Any list of authors may be filtered to exclude very small or irrelevant contributions.)168

Attribution of Wikipedia’s contributors is provided in the form of a History page which lists changes made to the relevant entries. For example, the following is the revision history of the Creative Commons Wikipedia entry:

---

(c) Waiver/dilution of positive attribution requirement

A third solution is for the licensor to minimize or remove any positive attribution requirement from the CC licence when distributing the work.

The attribution clause in all the CC licences states that “You [the licensee] must provide, in a manner reasonable to the medium or means You are using the name or pseudonym (if provided) of the Original Author…” It also states that “You [the licensee] must, to the extent practicable, remove the above attribution from any Collection or Derivative Work if requested to do so by the Licensor or Original Author.”169 The CC licences do not require attribution to take any particular form and the licensor may waive or dilute the attribution requirement by expressly indicating that positive (explicit) attribution is not required.

For example, the licensor may state:

This work is licensed under a Creative Commons Attribution 3.0 Australia licence. To view a copy of this licence, visit http://creativecommons.org/licenses/by/3.0/au.

You are free to copy, communicate and adapt the work, as long as you keep this copyright licensing statement intact and abide by the other licence terms. However, the author does not require attribution as author of the work.

Where the licensor distributes a work under a CC licence in such terms, a user is not required to positively (explicitly) attribute the author or any other nominated person.

169 See cl 4B, Creative Commons Legal Code, Attribution 3.0 Australia, at http://creativecommons.org/licenses/by/3.0/au/legalcode accessed on 26 October 2010.
However, even if positive attribution is not required, the copyright owners may still require that the CC-licensed work is not falsely attributed to another person (by naming another person as the author)\textsuperscript{170} and that the work is not distorted, altered or dealt with such that the author’s reputation is prejudiced.

### Confusing attribution stacking with compilations of different works

Sometimes, the problem of attribution stacking is used as an argument against applying Creative Commons licences to databases and datasets. The argument is that many different data items may be submitted to the database by many different contributors. Some of these contributors will desire individual attribution, some may not, and some may not even want to license their data under a Creative Commons licence. Therefore, a Creative Commons licence cannot be applied to the database.

This argument confuses attribution stacking with a compilation of many different works. The database itself (i.e. the structure and design of the database) may be licensed under a Creative Commons licence quite separately from the items of data included in the database. Where items of data in the database attract copyright protection, they can be licensed individually under Creative Commons licences, as selected by the contributor/depositor of the data. Best practice would be to include a system in which contributors are given the option to license their data at the time of deposit into the database. This would allow each individual contributor to select which licence they would like to apply to their data and how they would like to be attributed under the licence. This licence information would stay with the data item within the database and would be communicated to users upon accessing the data. Therefore, the problem of attribution stacking is avoided altogether.

### Copyright licensing statement: summary

A clear copyright licensing statement on a CC-licensed work should:

- clearly identify what material is being licensed;
- specify which CC licence the identified material is being licensed under;
- provide a simple summary of the terms of that licence;\textsuperscript{171} and
- specify how users of the material should attribute the Original Author or other nominated person (note that in certain circumstances positive (explicit) attribution may not be required).

\textsuperscript{170} This is of crucial importance in the case of many public sector copyright materials, as explained by Judge McGill, Queensland District Court, in a submission to the Copyright Law Review Committee’s review of Crown copyright, submission no 70 at p 2. His Honour noted: “Any judge would be pleased to see his exposition of any particular legal point or principle cited by others, but would I think be less pleased to see it claimed by others as their own.” See Copyright Law Review Committee, *Crown Copyright*, 2005, para 4.71 at p 54, available at [http://www.clrc.gov.au/www/agd/agd.nsf/Page/RWPBB79ED8E48585514CA25735100827559](http://www.clrc.gov.au/www/agd/agd.nsf/Page/RWPBB79ED8E48585514CA25735100827559).

\textsuperscript{171} This is optional for Online Work (i.e. material that is released electronically and is likely to be used primarily online).
Can this copyright material be licensed under a Creative Commons Licence?

Instructions

This fact sheet can help you to determine whether copyright material can be licensed by your agency under a Creative Commons licence.

This fact sheet should be used in conjunction with our guide: Fitzgerald, Anne M. and Hooper, Keale and Hoong, Cheryl (2010) Using Creative Commons v 2.0 Australia Licences on Government Copyright Material: http://prints.qut.edu.au/8/6/ (see in particular, the Checklist for applying a Creative Commons licence to government material).

Start at the green question box and, following the arrows that correspond with your answer, make your way through the pink and blue questions until you reach a red or purple licence box. That will indicate the right licence for you or that a permission is required.

For more information about the CC licences, see http://creativecommons.org/licenses. For more information about Creative Commons and Government in Australia, see http://creativecommons.org.au/sectors/government.

The material may be licensed under Creative Commons

http://creativecommons.org/licenses/

Do you know who created the material?

Yes

Are they a government employee?

No

You must find out and make sure you have authority before you may license this material.

No

Do the usual Crown copyright ownership rules apply?

Yes

(If the material is created by an employee in the usual course of employment, the government will own copyright in the material, unless other arrangements apply)

No

What are the terms of the agreement?

Yes

Is there any agreement between that person and your agency about copyright ownership?

No

What are the terms of the agreement?

Yes

The material may be licensed under Creative Commons

http://creativecommons.org/licenses/

No

Has the government assigned copyright to another party?

No

Government owns copyright

Yes

Individual owns copyright

Permission will need to be obtained from the copyright owner before the material can be licensed under Creative Commons...
6.7 Creative Commons and Social Media

In choosing a licence, copyright owners should consider the purpose of the material being licensed, and be wary of the limitations certain terms may have on the availability of distribution channels for the material.

Non-commercial and No derivative works term

“Commercial” is defined in clause 1(b) of the CC Attribution Non-Commercial No Derivatives (CC BY-NC-ND) 3.0 Australia licence legal code to mean primarily intended for or directed towards commercial advantage or private monetary compensation (see http://creativecommons.org/licenses/by-nc-nd/3.0/au/legalcode).

“Derivative Work” is defined in clause 1(c) to mean material in any form that is created by editing, modifying or adapting the Work, a substantial part of the Work, or the Work and other pre-existing works.

Where a video is posted on a social media platforms such as YouTube under a CC licence carrying the NC or ND term, users should familiarise themselves with any restrictions imposed by the copyright owner. If a user is uncertain about whether their proposed use of a video licensed under CC BY-NC, CC BY-NC-SA, CC BY-ND or CC BY-NC-ND is permitted under the licences, the user should check with the copyright owner. For CC licensed material, the copyright owner should be clearly identified (both by the owner and by the licensee under the minimum attribution (BY) requirement of the CC licence).

If licensing material under a restrictive licence, which does not permit certain uses without explicit authorisation, the copyright owner should include sufficient information about who they are and where they can be contacted (preferably a website/facebook/email contact). This is important if they have included a NC restriction. If they want to be able to license commercial uses, they should ensure that users: (1) can easily contact them for permission to negotiate a fee or (2) are directed to a website where they can purchase a commercial licence online (in line with the CC+ protocol, see http://wiki.creativecommons.org/CCPlus).

YouTube’s Terms of Service and CC licences

A copyright owner has the exclusive right to do a range of acts in relation to their copyright work, and to authorise someone else to do those acts. A Creative Commons licence is copyright licence; it is a permission from the copyright owner which allows others to exercise one or more of their exclusive rights in relation to the copyright material.

By visiting the YouTube website or using any of its functionalities (e.g. uploading a video), the user accepts YouTube’s Terms of Service (http://www.youtube.com/t/terms). The Terms of Service provide:

6. Your Content and Conduct

B. You shall be solely responsible for your own Content and the consequences of submitting and publishing your Content on the Service. You affirm, represent, and warrant that you own or have the necessary licenses, rights, consents, and permissions to publish Content you submit; and you license to YouTube all patent, trademark, trade secret, copyright or other
proprietary rights in and to such Content for publication on the Service pursuant to these Terms of Service.

C. For clarity, you retain all of your ownership rights in your Content. However, by submitting Content to YouTube, you hereby grant YouTube a worldwide, non-exclusive, royalty-free, sublicensable and transferrable license to use, reproduce, distribute, prepare derivative works of, display, publish, adapt, make available online or electronically transmit, and perform the Content in connection with the Service and YouTube's (and its successors' and affiliates') business, including without limitation for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats and through any media channels. You also hereby grant each user of the Service a non-exclusive license to access your Content through the Service, and to use, reproduce, distribute, display, publish, make available online or electronically transmit, and perform such Content as permitted through the functionality of the Service and under these Terms of Service. The above licenses granted by you in video Content you submit to the Service terminate within a commercially reasonable time after you remove or delete your videos from the Service. You understand and agree, however, that YouTube may retain, but not display, distribute, or perform, server copies of your videos that have been removed or deleted. The above licenses granted by you in user comments you submit are perpetual and irrevocable. [emphasis added]

It is important that the copyright owner understands how these terms operate in conjunction with a CC licence applied to the work. The YouTube Terms of Service govern use of the work through YouTube’s functionalities (e.g. to view, hyperlink, embed or download the work).

Beyond YouTube’s functionalities, the CC licence terms cover use of the material that you upload. An example is where a user downloads a video from YouTube and distributes it elsewhere or burns it onto a DVD. These uses require permission beyond the YouTube Terms of Service, i.e. it must be permitted under the CC licence applied. At the same time, any limitations imposed by the licence (e.g. prohibition on commercial use or creation of derivative works) will apply.

Note that under the YouTube Partner Program, video owners are given the ability to allow downloads and share their work under a Creative Commons licence that they select.

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172 See [http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=72851](http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=72851). The Partner Program is only available for United States users.
Wikimedia Commons and CC licences

Some social media/content platforms do not accept materials that are subject to restrictions on use. This is the case with Wikimedia Commons.

Wikimedia Commons in its official terms of use states that all copyright material on the website must be licensed under a free licence which permits publication of a derivative work and commercial use of the work:174

all copyrighted material on Commons must be licensed under a free license that allows anyone to use the material for any purpose. In particular, the license must meet the following conditions:

- Republication and distribution must be allowed.
- Publication of derivative work must be allowed.
- Commercial use of the work must be allowed.
- The license must be perpetual (non-expiring) and non-revocable.
- Acknowledgment of all authors/contributors of a work may be required.
- Publication of derivative work under the same license may be required.
- For digital distribution, use of open file formats free of digital restrictions management (DRM) may be required. [emphasis added]

This means that materials which restrict re-use under the CC NC term or ND will not be accepted by Wikimedia Commons. The terms of use expressly provide that CC Attribution and CC Attribution-ShareAlike licences are preferred.175

175 See http://commons.wikimedia.org/wiki/Commons:Licensing#Well-known_licenses.
6.8 Technical application: How to apply Creative Commons?

**Important note: make sure you have authority**

Before you proceed with applying a Creative Commons licence, you must first ensure that you have the necessary level of authority to do so. If you are in any doubt then you need to check with the appropriate officer before proceeding further and applying the licence.

Once you have determined that a Creative Commons licence can be applied to the material, you will need to select which Creative Commons licence is to be applied. For much government material, the most appropriate licence will be the “Attribution” (CC-BY) licence, the least restrictive of the CC licences. Care needs to be taken before applying a Share-Alike licence as it may produce an unintentionally restricted reuse right.

**Attribution.** You let others copy, distribute, display, and perform your copyrighted work — and derivative works based upon it — but only if they give credit the way you request.

It is important to understand that a Creative Commons licence:

- is a licence to the entire world; and
- does not allow the licensor to terminate the licence at their convenience.\(^{176}\)

**Important note: Understand the CC licence terms before applying the licence**

Before choosing the licence to be applied, make sure you understand the licence terms. See Part 6.2 of this Guide, “Creative Commons licences” and also Appendix II – “Which Creative Commons Licence is right for me?”.

This Part 6.8 explains step by step how to attach a Creative Commons licence to your agency’s material. The steps below illustrate how to apply a Creative Commons Attribution (CC-BY) licence.

1) **Go to the licence generator on the Creative Commons website**

Go directly to the Creative Commons licensing page at:

<http://creativecommons.org/choose/>

\(^{176}\) See Part 6.3 “How Creative Commons licences operate” of this Guide.
2) Answer some simple questions to generate a CC licence

You will be directed to a page where you will be asked to complete a short form (see Screenshot 1 on the next page). By clicking on the answers to questions and inserting some information you can automatically generate a CC licence for use on your agency’s copyright material.

Consider the kinds of uses that your agency wants others to be able to make of the copyright material and select yes or no to the questions:

- allow commercial uses of your work?
- allow modifications of your work?

Choose the jurisdiction of the licence from among the countries listed in the drop down menu. For Australian copyright owners, the correct choice will invariably be “Australia”, so that the Australian version of the CC licence is applied and the licence is governed by Australian copyright law.

On this page, you will also be given the opportunity to provide some additional information (or metadata) about the copyright material, by completing the optional fields. You can insert information about:

- the format of the work (choose from the drop down menu);
- the title of the work;
- how the work is to be attributed, by providing the name that users should attribute and the URL that users should link to;¹⁷⁸
- the URL of the source work from which the work is derived; and
- a URL where users can obtain information about clearing rights that are not pre-cleared under the CC licence. For example, if the work is licensed under a CC-BY-NC licence, you can insert a URL that takes the user to a website with information about who to contact to obtain permission for commercial use of the material. The website should contain a statement such as:

  For permissions beyond the scope of this licence, please contact:

  Officer Title:
  Address:
  Phone:
  Email:

The information that you insert into these fields will be embedded in the HTML code that is automatically generated for the licence.


¹⁷⁸ For more details on attribution, see Part 6.6 “Legal Application: How to use Creative Commons? – Attribution” in this Guide.
License Your Work

With a Creative Commons license, you keep your copyright but allow people to copy and distribute your work provided they give you credit—and only on the conditions you specify here. For those new to Creative Commons licensing, we've prepared a list of things to think about. If you want to offer your work with no conditions attached, or you want to mark a work that is already free of known copyright restrictions and in the public domain, choose one of our public domain tools.

When you choose license, we provide you with HTML you can use to add the license information to your site and information on how to select a license on one of several free hosting services that have incorporated Creative Commons. This is not a registration and we do not retain a record of your selection.

Note: CC0, one of the public domain tools, is not recommended for government copyright material in general. See Part 5.6 "Why a copyright-based licensing approach?" above.
3) Generating the licence and applying it to a website and the copyright material

Once you have completed the form, click Select a License. You will be taken to the following page which has a box containing some HTML code:

![Screenshot 2](image)

**Here is the licence you've chosen**

Choose which style of button you'd like on your webpage:

- [ ] CC BY
- [ ] CC BY-SA
- [ ] CC BY-NC
- [ ] CC BY-NC-SA

Here’s a preview of how your license will appear on your site:

Example Work by Australian Government is licensed under a Creative Commons Attribution 3.0 Australia License.

**Have your own website?**

Copy the text below to your website to let your visitors know what license applies to your works.

```html
<a rel="license" href="http://creativecommons.org/licenses/by/3.0/au/" style="border-width: 0;" doc:"">Example Work</a> by <a href="http://creativecommons.org/licenses/by/3.0/au/" style="border-width: 0;" doc:"">Creative Commons License</a> is licensed under a Creative Commons Attribution 3.0 Australia License.</a>
```

Select the contents of the box above and copy it. Or, have it emailed to yourself.

**Offline Work?**

Mark a document not on the web, add the text to your work.

**Optional next steps**

Register your work with the CC Network

From here you can attach the licence to a website or apply it to the copyright material itself, by:

A. choosing one of the CC icons and copying and pasting the HTML code into your agency’s website; and

B. copying and pasting the licence icon and the licence text onto the copyright material (B1 – Online Work and B2 – Offline Work).  

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179 In this Guide, the term “Online Work” is used to refer to works released electronically (e.g. posted on a website) and which are likely to be used primarily online. The term “Offline Work” is used to refer to works not conveyed electronically, or works conveyed electronically which can be used offline. See also Part 6.6 “Legal Application: How to use Creative Commons? - Copyright licensing statement” of this Guide.

Professor Anne Fitzgerald, Neale Hooper and Cheryl Foong
A. Websites - embedding the HTML code

First, at the top of this page you can choose (by clicking) which one of two the CC licence icons you want to appear on your website (see Screenshot 2). Both icons represent the same CC-BY licence, but differ slightly in appearance.

Next, select the HTML code that appears in the box and paste it into your agency’s webpage or website so that visitors are informed of the licensing terms applying to copyright materials on your agency’s site. Alternatively, you can email the HTML code to yourself by clicking on the words “emailed to yourself” and inserting your email address in the field in the pop up box.

For example, if you were posting the material on a WordPress powered website, you would add the HTML code into the post content screen:

![Screenshot 3]

This is how the post would look when it is published:

![Screenshot 4]
Merely filling in the fields in the standard form (as in Screenshot 1 above) generates HTML code, which when embedded into your agency’s website will produce this basic copyright licensing statement:\(^{180}\)

![Creative Commons License](http://i.creativecommons.org/l/by/3.0/au/88x31.png)

Example Work by Australian Government is licensed under a Creative Commons Attribution 3.0 Australia License.

As discussed above under Part 6.6 “Legal Application: How to use Creative Commons?” above, a clear copyright licensing statement should cover:

- what material is licensed, under which licence, and by whom (if positive attribution is required);\(^{181}\)
- a simple summary of the terms of that licence;\(^{182}\) and
- how users of the material should attribute the licensor (the attribution statement).

The basic copyright licensing statement above covers only the first dot point. In order to provide a more extensive copyright licensing statement (i.e. one which summarises the terms of the licence and specifies what type of attribution is required),\(^{183}\) you may insert additional text at the end of the HTML code (see for example, in bold font below) before embedding the code into the website:

```
<a rel="license" href="http://creativecommons.org/licenses/by/3.0/au/"> <img alt="Creative Commons License" style="border-width:0" src="http://i.creativecommons.org/l/by/3.0/au/88x31.png" /></a><br />
<span xmlns:dc="http://purl.org/dc/elements/1.1/" href="http://purl.org/dc/dcmitype/Text" property="dc:title" rel="dc:type">Example 2</span> by Australian Government is licensed under a <a rel="license" href="http://creativecommons.org/licenses/by/3.0/au/">Creative Commons Attribution 3.0 Australia License</a>. In essence, you are free to copy, distribute and adapt the work, as long as you attribute the work to Australian Government and abide by the other licence terms. The material should be attributed in the following way:

<br />
© Australian Government 2010.
```

Note that the words “Australian Government” (the text entered in the ‘Attribute work to name’ field) are now linked to [http://australia.gov.au/](http://australia.gov.au/) (the URL entered into the ‘Attribute work to URL’ field).

\(^{181}\) See “(c) Waiver/dilution of attribution requirement” at p 59, on instances where positive attribution is not required.

\(^{182}\) This is optional for Online Work (i.e. material that is released electronically and is likely to be used primarily online), because the statement should link to a simple summary of the terms (e.g. [http://creativecommons.org/licenses/by-sa/3.0/au/](http://creativecommons.org/licenses/by-sa/3.0/au/)).

\(^{183}\) See Part 6.6 “Legal Application: How to use Creative Commons - Copyright Licensing Statement” above on the type of information that should be included in the copyright licensing statement.
This is how the more extensive copyright licensing statement would look when it is published:

Example Work by Australian Government is licensed under a Creative Commons Attribution 3.0 Australia License. In essence, you are free to copy, distribute and adapt the work, as long as you attribute the work to Australian Government and abide by the other licence terms. The work should be attributed in the following way:

© Australian Government 2010.

B1. Applying the CC licence to online copyright works

For Online Work, first choose one of the two CC licence icons displayed at the top of the page:

Choose which style of button you’d like on your webpage:

Next, copy and paste the preview text onto your copyright material to indicate that it is licensed under a CC licence:

The text will appear as follows on your document (subject to differences in formatting):

Example Work by Australian Government is licensed under a Creative Commons Attribution 3.0 Australia License.

Note that the icon and the words “Creative Commons Attribution 3.0 Australia License” are linked to the relevant licence terms. For this example, the relevant URL for the Creative Commons Attribution 3.0 Australia licence is

In this Guide, the term “Online Work” is used to refer to works released electronically (e.g. posted on a website) and which are likely to be used primarily online.
<http://creativecommons.org/licenses/by/3.0/au/>. Clicking on the licence icon will bring users to the licence terms.

The easy-to-read version of the licence terms will appear as below (Screenshot 5). A link is also provided to the full legal code of the licence, which sets out the rights and obligations of the licence more comprehensively.\textsuperscript{185}

\textsuperscript{185} See \textit{Appendix III}: CC Legal Code, Attribution 3.0 Australia licence

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## B2. Applying the CC licence to offline copyright works

Where a copyright work is not conveyed electronically or is conveyed electronically but can be used offline (e.g. a file that can be downloaded and printed in hard copy), additional text should be included in the copyright licensing statement.

Under the heading “Offline Work” on the right of the screen, click on the words “add this text” (see Screenshot 6).

### Here is the licence you've chosen

![Screenshot 6]

Learn about other places you can host your licenced files. These sites work with your Creative Commons licence.

- Publish your licensed music or video to the Internet Archive.
- Post your licensed images at Flickr.
- Add a Creative Commons license to your blog.

**Offline Work?**
Mark a document not on the web, add this text to your work.

**Optional next steps**
- Register your work with the CC Network.

---

Need more help? Read our tutorial.

After publishing your license, please consider supporting Creative Commons.
The following window will pop-up. You can copy this text and paste it next to the licence icon.

Users may access the licence terms by typing the URL into the address bar of their internet browser.

You should also set out a brief summary of the main licence conditions. This is because for Offline Work, the easy-to-read version of the licence terms is not linked to the work and is not readily available. For instance, if you are licensing your agency’s material under a CC Attribution (BY) Australian licence, the copyright licensing statement should explain to users that:

In essence, you are free to copy, communicate and adapt the work, as long as you attribute the work to [your agency] and abide by the other licence terms.

Further examples of these copyright licensing statements are set out in Appendix IV.

### Important note: Summary of licence terms for Offline Work

Where the licensed material is likely to be used in the offline environment, the licence terms should be summarised in the copyright licensing statement attached to the material (e.g. on the cover page of a report).  

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186 See Part 6.6 “Legal Application: How to use Creative Commons - Copyright Licensing Statement” above and Appendix IV: Table 1 – Creative Commons 3.0 Australia Licences – Minimum Markings, Copyright Licensing Statement and Attribution Statement.
7 Final checklist

This checklist should be used in conjunction with our guide:

Have you:

☐ Considered all relevant laws, whole of government IP policies and standards, and your agency’s IP policy or standards?
The relevant laws, policies and standards will provide guidance on access and reuse issues and on licence selection.

☐ Determined whether your agency’s material is protected by copyright?
[Go to Factsheet 1]

☐ Ascertained who owns copyright in the material?
[Go to Factsheet 2]

☐ Ascertained whether the copyright material has already been licensed to another party?
[Go to Factsheet 3]
If the copyright material has been exclusively licensed by your agency to another party, the exclusive licensee’s permission will be required before a Creative Commons licence can be applied to the material.

☐ Checked whether the material contains a substantial part of another party’s copyright material?
[Go to Factsheet 4]
If it does, you should distinguish the third party material from your agency’s material and exclude it from the ambit of the Creative Commons (CC) licence, unless your agency has clear entitlement to apply a CC licence to that party’s material.

☐ Determined whether your agency’s copyright material can be licensed under a Creative Commons licence?
[Go to Factsheet 5]
If the copyright owner is a government agency, subject to compliance with applicable laws, IP policies and standards, there should be no impediments to applying a Creative Commons licence to the material.1

If the copyright owner is a non-government party, permission will be required before a Creative Commons licence can be applied to their material.

☐ Decided how the material should be attributed under the Creative Commons licence?
Clearly state how your agency wants to be attributed so that users can give correct attribution when using the material.

☐ If you are authorised by your agency to license the material, visit Creative Commons website http://creativecommons.org/choose, select the appropriate Creative Commons licence (this will usually be the Australian Creative Commons ‘By Attribution’ 3.0 Licence) and attach it to your agency’s material.

Finished! 

1 Please note that this checklist is limited to copyright restrictions, and does not cover privacy restrictions, confidentiality restrictions, contractual restrictions, statutory restrictions, and administrative restrictions.

Prepared by Professor Anne Fitzgerald, Neale Hooper and Cheryl Foong. This checklist is available under a Creative Commons Attribution 3.0 Australia licence: http://creativecommons.org/licenses/by/3.0/au/
8 Factsheets

The following factsheets should be used in conjunction with the Final Checklist for applying a Creative Commons licence to government material and our guide: Fitzgerald, Anne M. and Hooper, Neale and Foong, Cheryl (2010) Using Creative Commons 3.0 Australia licences on Government Copyright Materials http://eprints.qut.edu.au/38364/:

- Factsheet 1: Is this material protected by copyright?
- Factsheet 2: Who owns copyright?
- Factsheet 3: Can a Creative Commons licence be used on government copyright material that has already been licensed to a third party?
- Factsheet 4: Can a Creative Commons licence be used where the copyright material includes material owned by a third party?
- Factsheet 5: Can this copyright material be licensed under a Creative Commons licence?
Fact Sheet 1  Is this material protected by copyright?

This factsheet can help you to determine whether copyright subsists in public sector material which your agency is assessing for applying a Creative Commons (CC) licence.

This factsheet should be used in conjunction with our guide: Fitzgerald, Anne M. and Hooper, Neale and Foong, Cheryl (2010) Using Creative Commons 3.0 Australia licences on Government Copyright Materials http://eprints.qut.edu.au/38364/ (see in particular, the ‘Checklist for applying a Creative Commons licence to government material’).

1. Identify the material (metadata record)

<table>
<thead>
<tr>
<th>Type of material (e.g. text, image):</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Title of material:</td>
<td></td>
</tr>
<tr>
<td>Format (e.g. PDF):</td>
<td></td>
</tr>
<tr>
<td>Where is the material located?</td>
<td></td>
</tr>
<tr>
<td>From which government agency did the material originate?</td>
<td></td>
</tr>
<tr>
<td>For enquiries regarding the material, contact:</td>
<td></td>
</tr>
<tr>
<td>Date created:</td>
<td></td>
</tr>
<tr>
<td>Other relevant information:</td>
<td></td>
</tr>
</tbody>
</table>
Fact Sheet 1

Is this material protected by copyright?

2. Is the material in one of the categories to which copyright can apply?

Is it:

☐ a written/text document (e.g. report)?
☐ a table?
☐ a map?
☐ a photograph?
☐ a visual image?
☐ a sound file?
☐ a film or video?
☐ a multimedia work?
☐ data compilation, dataset or database?  

If YES to any of the boxes above, the material is in a category to which copyright applies.

Go to Question 3.

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1 Copyright protection applies to a data compilation, dataset or database provided it meets the originality threshold required by law.
3. When was the material created/compiled?

☐ Less than 50 years ago

For government material, if YES - Crown copyright is likely to apply
(Go to Question 4).

For non-government material, if YES - copyright is likely to apply
(Go to Question 4).

☐ More than 50 years but less than 70 years ago

For government material, if YES — Crown copyright will have elapsed and
the work is in the public domain (copyright no longer applies).

Where the material is in the public domain, you may
apply a Creative Commons Public Domain Mark
http://creativecommons.org/choose/mark to
certify that the material is already in the public domain.

Check the date the work was made or first published. Crown copyright
expires 50 years after the work is made or first published. BUT if the
work has not yet been published, copyright continues and the copyright term
begins to run from the time the work is published.

For non-government material, if YES — copyright is likely to apply.
(Go to Question 4)

☐ More than 70 years ago

For government material, if YES — Crown copyright does not apply, as the
copyright term has elapsed. BUT if the work has not yet been published,
copyright continues and the copyright term begins to run from the time
the work is published.

For non-government material, if you answered YES — copyright may
apply, or the copyright term may have elapsed. You need to discover
when exactly the material was created.

Where the material is in the public domain, you may
apply a Creative Commons Public Domain Mark
http://creativecommons.org/choose/mark to
certify that the material is already in the public domain.
4. Was it created/compiled in Australia?

☐ Yes — copyright protection under Australian law is likely to apply.

☐ No — If the work was created in a country that is a member of the Berne Convention¹ or the World Trade Organization,² copyright will usually be protected under Australian law.

For more information about the CC licences, see http://creativecommons.org.au/licences.
For more information about Creative Commons and Government in Australia, see http://creativecommons.org.au/sectors/government.

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² See http://www.wto.org/english/tratop_e/whatis_e/tif_e/org6_e.htm
Who owns copyright?

Instructions

This factsheet can help you to determine who owns copyright in the government copyright material your agency is assessing for applying a Creative Commons (CC) licence.

This factsheet should be used in conjunction with our guide: Fitzgerald, Anne M. and Hooper, Neale and Foong, Cheryl (2010) Using Creative Commons 3.0 Australia Licences on Government Copyright Material. [http://eprints.usq.edu.au/26844] (see in particular the 'Checklist for applying a Creative Commons licence to government material').

Start at the green question box and, following the arrows that correspond with your answer, make your way through the pink and blue questions until you reach a red or purple licence box. That box will indicate who owns copyright.

For more information about the CC licences, see [http://creativecommons.org.au/licences]. For more information about Creative Commons and Government in Australia, see [http://creativecommons.org.au/securities/government].

Yes

Start here!

Does this person who created the material work in or with your agency?

The person is a third party

Independent contractor

Is the person your agency's employee or an independent contractor?

Your agency's employee

Was the material created in the course of employment?

Yes

Your agency owns copyright (subject to a written contract to the contrary)†

Is there a written contract?

No

The third party or independent contractor owns copyright.

Is there a written contract?

No

Yes

The employee owns copyright.

Check the contract terms. The contract may specify who owns copyright.

† Note: Your agency holds copyright on behalf of the legal owner, the Crown (the government)
Can a Creative Commons licence be used on government copyright material that has already been licensed to a third party?

Instructions

Where government copyright material has already been licensed to a third party, this fact sheet can help you to determine whether your agency can apply a Creative Commons licence to the material.

This fact sheet should be used in conjunction with our guide: Fitzgerald, Anne M. and Hooper, Neale and Poong, Cheryl (2010) Using Creative Commons 3.0 Australia Licences on Government Copyright Materials http://epir.qut.edu.au/31364/ (see in particular, the 'Checklist for applying a Creative Commons licence to government material').

Start at the green question box and, following the arrows that correspond with your answer, make your way through the pink and blue questions until you reach a red or purple licence box. That box will indicate the right licence for your material, or indicate more details are required.

For more information about the CC licences, see http://creativecommons.org.au/ licences. For more information about Creative Commons and Government in Australia, see http://creativecommons.org.au/sectors/government

Start here!

Has the government copyright material already been licensed to a third party? No

Is the licence still in effect? No

The material may be licensed under Creative Commons (provided your agency owns copyright or has the consent of the copyright owner).

http://creativecommons.org/licenses/

No

Were there any other contractual terms in the licence that might affect whether a Creative Commons licence could be applied to the material?

No

Yes

Your agency may be restricted from applying a Creative Commons licence to the material.
Can a Creative Commons licence be used where the copyright material includes material owned by a third party?

Instructions

Start here!

Does your agency’s material include third party material (i.e., material owned by another party)?

Yes → Is the third party material protected by copyright?

Yes → Is a substantial part of the third party’s copyright material included in your agency’s work?

Yes → The material may be licensed under a Creative Commons licence.

No → You cannot apply a Creative Commons licence to the third party’s material.

(You need to obtain permission from that third party to apply a CC licence.)

No → Does your agency have permission to make the derivative/collective work available under a CC licence?

Yes → Does your agency have permission to include the third party’s copyright material with your agency’s work?

No → You have to obtain permission to include the third party’s material with your agency’s work.

No → No → No → Yes → Does your agency have permission to include the third party’s copyright material with your agency’s work?

Yes → The material may be licensed under a Creative Commons licence.

No → You have to obtain permission to include the third party’s material with your agency’s work.

For more information about the CC licences, see http://creativecommons.org.au/licences. For more information about Creative Commons and government in Australia, see http://creativecommons.org.au/sectors/government.
Can this copyright material be licensed under a Creative Commons Licence?

Instructions

This factsheet can help you determine whether copyright material can be licensed by your agency under a Creative Commons licence.

This factsheet should be used in conjunction with our guide: Fitzgerald, Anne M. and Mcopon, Neale and Foong, Cheryl (2011) Using Creative Commons Licence on Government: Copyright Materials. [http://sprints.qut.edu.au/3146/](http://sprints.qut.edu.au/3146/) (see in particular the Checklist for applying a Creative Commons licence to government materials).

Start at the green question box and, following the arrows that correspond with your answer, make your way through the pink and blue questions until you reach a red or purple licence box. That will indicate the right licence for you or that a permission is required.

For more information about the CC licences, see [http://creativecommons.org/licenses/](http://creativecommons.org/licenses/). For more information about Creative Commons and Government in Australia, see [http://creativecommons.org.au/sectors/government](http://creativecommons.org.au/sectors/government).

Start here!

**Do you know who created the material?**

Yes → **Are they a government employee?**

No → **You must find out and make sure you have authority before you may license this material.**

No → **Do the usual Crown copyright ownership rules apply?**

Yes → **What are the terms of the agreement?**

No → **The material may be licensed under Creative Commons**

Yes → **Has the government assigned copyright to another party?**

Yes → **Permission will need to be obtained from the copyright owner before the material can be licensed under Creative Commons**

No → **Government owns copyright**

No → **Individual owns copyright**

Yes → **Do the usual Crown copyright ownership rules apply?**

No → **What are the terms of the agreement?**

Yes → **Permission will need to be obtained from the copyright owner before the material can be licensed under Creative Commons**

No → **The material may be licensed under Creative Commons**
9 Further information

If you require further information about copyright and Creative Commons licensing, the following resources may be helpful:

- Databases and Creative Commons
  <http://sciencecommons.org/old/databases/>
  Please note that Science Commons has superseded these FAQs with a new Database Protocol. However, for our purposes, these FAQs may still be of assistance.

- Creative Commons Australia – Learn More about Creative Commons
  <http://creativecommons.org.au/learn>

- Creative Commons Version 3.0 Australia Licences – A Brief Explanation
  <http://creativecommons.org.au/learn-more/licences/version3>

- Creative Commons – Before Licensing
  <http://wiki.creativecommons.org/Before_Licensing>

- Creative Commons – Frequently Asked Questions
  <http://wiki.creativecommons.org/Frequently_Asked_Questions>

- Australian National Data Service (ANDS) – Copyright and Data

- Australian National Data Service (ANDS) – Creative Commons and Data

- Australian Bureau of Meteorology – Creative Commons FAQs

  <http://eprints.qut.edu.au/29773/>

- Government 2.0 Taskforce Report, Engage: Getting on with Government 2.0, Appendix D: Troubleshooting concerns about Creative Commons licensing

- Department of Environment and Resource Management – Government Information Licensing Framework (GILF) for Water: Recommended Practice

- A list of Government use of CC Licences worldwide is available at
  <http://wiki.creativecommons.org/Government_use_of_CC_licenses>

Alternatively, if you require further assistance, please contact Creative Commons Australia at info@creativecommons.org.au.
10 Appendices

Appendix I: Intellectual Property Policies and Standards

Select policies, standards and reports which are relevant to the management of government intellectual property in different Australian jurisdictions are outlined below. This is not an exhaustive or definitive list, and there may be other laws, policies or standards relevant to your agency’s activities, which you will need to identify.

Commonwealth Government

Whole of Government: Statement of IP Principles for Australian Government Agencies

The Statement of IP Principles for Australian Government Agencies\(^1\) provides a broad policy framework for IP management by Australian Government agencies. It covers issues such as procurement, record keeping, industry development and broader innovation policy, and public access. 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. The Statement was amended on 1 October 2010 to reflect a formal endorsement of the Government 2.0 Taskforce’s recommendation that agencies should license their PSI under Creative Commons Attribution (BY) license as the default license. IP Principle 11 states:

11. (a) Agencies should encourage public use and easy access to material that has been published for the purpose of:
   - informing and advising the public of government policy and activities;
   - providing information that will enable the public and organisations to understand their own obligations and responsibilities to Government;
   - enabling the public and organisations to understand their entitlements to government assistance;
   - facilitating access to government services; or
   - complying with public accountability requirements.

This includes all materials which agencies are generally obliged to publish or otherwise allow free public access to. This material may also be described as ‘public sector information’. It does not necessarily include materials that have been published for commercial purposes. Nor does it cover materials which are of a sensitive nature, such as information that impacts on national security or information which would destroy the possibility of subsequently obtaining patent protection where such protection is necessary to achieve public benefit.

Permission for public use and re-use of such material should generally be given royalty free and on a non-exclusive basis. Exclusive licences to use such materials should only be given in exceptional circumstances.

11. (b) Consistent with the need for free and open re-use and adaptation, public sector information should be licensed by agencies under the Creative Commons BY standard as the default.

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An agency’s starting position when determining how to license its public sector information should be to consider Creative Commons licences (http://creativecommons.org.au/) or other open content licences.

Agencies should license their public sector information under a Creative Commons licence or other open content licence following a process of due diligence and on a case-by-case basis.

Before releasing public sector information, for which the Commonwealth is not the sole copyright owner, under a Creative Commons BY standard or another open content licence, an agency may need to negotiate with any other copyright owners of the material.

11.(c) At the time at which Commonwealth records become available for public access under the Archives Act 1983, public sector information covered by Crown copyright should be automatically licensed under an appropriate open content licence. Agencies will be responsible for the selection and use of an appropriate licence.

Guidelines on Licensing Public Sector Information for Australian Government Agencies

On 1 February 2011, the Attorney-General’s Department released a draft set of Guidelines on Licensing Public Sector Information for Australian Government Agencies for comment on the AGIMO Blog. The draft guidelines set out a simplified 4-step approach to licensing decisions for agencies:

- Firstly, agencies should become familiar with CC licences and how they differ from other licences;
- Secondly, they should be aware that other forms of open content, standard format licences are available and may be used should a CC BY licence be unsuitable for certain material;
- Thirdly, they should be aware that there are publicly available diagnostic tools to assist them in making licensing decisions, such as the Australian Government Open Access and Licensing framework (AUSGOAL) and resources on the CC Australia website; and
- Finally, agencies should conduct a due diligence process for each PSI item to be released and consider issues such as:
  - Is the licence to apply for the full term of copyright protection?
  - Does the PSI contain third party copyright material?
  - Is there a need for ongoing Commonwealth control of the material?

According to the Commonwealth Attorney-General’s Department, guidance and advice on the IP Principles will be available to agencies in the form of an Australian Government Intellectual Property Manual, due for release early 2011.

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Other relevant policy and practice guidance is found in:

- the Office of Spatial Data Management (OSDM) Commonwealth Policy on Spatial Data Access and Pricing (2001), and

**State and Territory Governments**

**Queensland**

*Queensland Government Enterprise Architecture framework 2.0 (QGEA 2.0)*

The Queensland Government Architecture framework 2.0 (QGEA 2.0) is the collection of ICT policies and associated documents that guides agency ICT initiatives and investments to improve the compatibility and cost-effectiveness of ICT across the government. It is designed for use at a whole-of-Government level and at an agency level.

The Queensland Government Enterprise Architecture (QGEA) Government Information Licensing Framework (GILF) Policy (the QGEA GILF Policy) provides under Policy Requirement 1 that departments must ensure that government information to be released is licensed with one of the Creative Commons licences or a GILF restrictive licence which supports the GILF policy benefits. Further, Policy Requirement 2 mandates that departments make explicit to users the legal uses that can be made of government information.

**Queensland Government Chief Information Office (QGCIO) Information Standards**

Queensland Government Chief Information Officer mandates the implementation of the mandatory principles of Information Standards as key whole-of-Government ICT planning requirements. These Information Standards assist Queensland Government agencies by

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defining and promoting best practice in the acquisition, development, management, support and use of the information systems and technology infrastructure.  

**Information Standard 33: Information access and use**

The mandatory principles contained in *Information Standard 33: Information access and use* state that, when providing access to and use of Queensland Government information, agencies must ensure:

- information is provided to the public to the maximum extent possible;
- information is exchanged between Queensland Government agencies and other governments;
- information is provided to the maximum extent possible free of charge; and
- information is provided with transparent conditions for use.

**Information Standard 46: Use of copyright materials**

*Information Standard 46: Use of copyright materials* highlights certain obligations on the part of Queensland Government agencies under the Copyright Act 1968 (Cth) in relation to third party copyright material. For example, agencies must:

- obtain licences from copyright owners when necessary;
- not do anything which would amount to an infringement of an author's moral rights, and obtain moral right consents when necessary;
- comply with applicable provisions of licences, permissions, consents, etc. on which the agency is relying; and
- obtain necessary copyright approvals from custodial agencies for use of Queensland Government copyright materials.

**Information standard 26: Internet**

Further, Principle 3 of *Information standard 26: Internet* provides that agency internet sites must facilitate the routine disclosure and active dissemination of information and provide a current view of Queensland Government. At a minimum, agency internet site content must, among others requirements:

- include information that falls within the classes of information identified within the agency's publication scheme; and
- present copyright notices in a manner and location that provides customers with reasonable notice of the claim of copyright ownership.

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Victoria

- Government 2.0 Action Plan (Department of Premier and Cabinet, July 2010)\textsuperscript{203}
- Whole of Victorian Government Response to the Inquiry into Improving Access to Victorian Public Sector Information and Data (2010)\textsuperscript{204}
- Economic Development and Infrastructure Committee (EDIC) Inquiry into Improving Access to Victorian Public Sector Information and Data (2009)\textsuperscript{205}
- Victorian Auditor-General’s Office, Managing Intellectual Property in Government Agencies (Performance audit report) (July 2005)\textsuperscript{206}
- Guidelines relating to Victorian Crown copyright (August 1991)
- Victorian State Copyright Management Policy (draft)

New South Wales

- Department of Services, Technology and Administration policy on the Release of Government Information under the GIPA Act 2009 (June 2010)\textsuperscript{207}
- Intellectual Property Management Framework for the NSW Public Sector (February 2005)\textsuperscript{208}

Western Australia

- Government Intellectual Property Policy and Best Practice Guidelines\textsuperscript{209}
- Policy Framework and Standards for the Information Sharing between Government Agencies\textsuperscript{210}

South Australia

- Policy on Information & Communication Technology - OCIO/P3.4 Data and Information, Protection of Intellectual Property Rights, v 2.4 (June 2009)\textsuperscript{211}
- National frameworks endorsed by the SA Cabinet in December 2008 include:
  - National Government Information Sharing Strategy (December 2008); and
  - National Government Information Licensing Framework Government (December 2008)\textsuperscript{212}
- Intellectual Property Policy (2006)\textsuperscript{213}

\textsuperscript{210} Available at http://www.department.dotag.wa.gov.au/_manifest/info_sharing_policy.jmf accessed on 6 January 2011.
Tasmania

- Tasmanian Government Information Licensing Framework, (Version 1.1, 7 January 2010)\textsuperscript{214}
- Communications Toolkit:\textsuperscript{215}
  - Copyright and disclaimer notices: web publishing\textsuperscript{216}
  - Crown Copyright: guidelines for administration V.2.0\textsuperscript{217}

\textsuperscript{215} Available at \url{http://www.communications.tas.gov.au/toolkit} accessed on 22 April 2010.
\textsuperscript{216} Available at \url{http://www.communications.tas.gov.au/toolkit/publishing_print_multimedia_and_web/internet_and_electronic_communications/copyright_and_disclaimer_notices_web_publishing} accessed on 6 January 2011.
\textsuperscript{217} Available at \url{http://www.communications.tas.gov.au/toolkit/publishing_print%2C_multimedia_and_web/publications/crown_copyright_guidelines_for_administration_v.2.0} accessed on 6 January 2011.
Appendix II: Which CC Licence is right for me?

This flowchart, published by the Australian Research Council Centre of Excellence for Creative Industries and Innovation in partnership with Creative Commons Australia, is available at http://creativecommons.org.au/factsheets/licensing-flowchart. It is available under a Creative Commons Attribution 2.5 Australia licence, http://creativecommons.org/licenses/by/2.5/au.
Appendix III: CC Legal Code, Attribution 3.0 Australia licence

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   c. "Distribute" means to make available to the public by any means, including publication, electronic communication, or broadcast.

   d. "Licensor" means the individual, individuals, entity or entities that offer(s) the Work under the terms of this Licence.

   e. "Original Author" means the individual, individuals, entity or entities who created the Work.

   f. "Reproduce" means to make a copy of the Work in any material form (eg storage in digital form).

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3. Licence Grant

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c. Reproduce the Work as incorporated in any Collection;
d. create and Reproduce one or more Derivative Works; and
e. Distribute and publicly perform the Work, a Derivative Work or the Work as incorporated in any Collection.

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e. You must keep intact all notices that refer to this Licence and to the disclaimer of warranties with every copy of the Work You Distribute or publicly perform.
f. When You Distribute or publicly perform the Work, You must not impose any technological measures on it that restrict the ability of a recipient of the Work from You to exercise the rights granted to them by this Licence.
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a. When You Distribute or publicly perform the Work or any Derivative Work or Collection You must keep intact all copyright notices for the Work.
b. When You Distribute or publicly perform the Work or any Derivative Work or Collection You must provide, in a manner reasonable to the medium or means You are using:
   i. the name or pseudonym (if provided) of the Original Author and/or of any other party (such as a sponsor institute, publishing entity or journal) that the Original Author or Licensor has requested be attributed (such as in the copyright notice or terms of use). In this clause 4B these parties are referred to as "Attribution Parties”;
   ii. the title of the Work (if provided); and
iii. to the extent reasonably practicable, any Uniform Resource Identifier (such as a web link) that the Licensor specifies should be associated with the Work that refers to the copyright notice or licensing information for the Work.

c. For any Derivative Work You Distribute or publicly perform, You must take reasonable steps to clearly identify that changes were made to the Work. For example, a translation could be marked "The original work was translated from English to Spanish".

d. In the case of a Derivative Work or Collection, the above attribution should, at a minimum, appear as part of any credits for other contributing authors and be as prominent as the credits for those other authors.

e. You must, to the extent practicable, remove the above attribution from any Collection or Derivative Work if requested to do so by the Licensor or Original Author.

f. For the avoidance of doubt, You may only use the credit required by this clause 4B for the purpose of attribution in the manner set out above. By exercising Your rights under this Licence, You must not assert or imply:

i. any connection between the Original Author, Licensor or any other Attribution Party and You or Your use of the Work; or

ii. sponsorship or endorsement by the Original Author, Licensor or any other Attribution Party of You or Your use of the Work,

without their separate, express prior written permission.

4C Moral Rights

Moral rights remain unaffected to the extent they are recognised and nonwaivable at law. In this clause 4C, "moral rights" means the personal rights granted by law to the Original Author of a copyright work. For example, Part IX of the Copyright Act 1968 (Cth) grants authors the right of integrity of authorship, the right of attribution of authorship, and the right not to have authorship falsely attributed.

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i. the contents or accuracy of the Work;

ii. title, merchantability, or fitness for a particular purpose;

iii. non-infringement;

iv. the absence of latent or other defects; or

v. the presence or absence of errors, whether or not discoverable.

b. The Trade Practices Act 1974 (Cth), and the corresponding State and Territory fair trading legislation, imply certain warranties and conditions in certain circumstances, such as the right to supply or fitness for purpose of goods or services supplied to a consumer. Clause 5(a) cannot and is not intended to exclude, restrict or modify these warranties.

6. Limit of Liability

a. To the full extent permitted by applicable law, and except for any liability arising from contrary agreement, in no event will the Licensor be liable to You on any legal basis (including without limitation, negligence) for any loss or damage whatsoever, including (without limitation):

i. loss of production or operation time, loss, damage or corruption of data or records; or

ii. loss of anticipated savings, opportunity, revenue, profit or goodwill, or other economic loss; or

iii. any special, incidental, consequential, punitive or exemplary damages arising out of or in connection with this Licence or the use of the Work, even if the Licensor has been advised of the possibility of such damages.

b. If applicable legislation implies warranties or conditions, or imposes obligations or liability on the Licensor in respect of this Licence that cannot be wholly or partly excluded, restricted or modified, the Licensor’s liability is limited, to the full extent permitted by the applicable legislation, at its option, to:

i. in the case of goods, any one or more of the following:
the replacement of the goods or the supply of equivalent goods;
the repair of the goods;
the payment of the cost of replacing the goods or of acquiring equivalent goods;
the payment of the cost of having the goods repaired; or

ii. in the case of services:
the supplying of the services again; or
the payment of the cost of having the services supplied again.

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This Licence and the rights granted to You under this Licence shall terminate automatically upon any breach by You of the terms of the Licence. Individuals or entities who have received a Derivative Work or a Collection from You pursuant to this Licence, however, will not have their licences terminated provided they remain in full compliance with those licences. Clauses 6(a) and 6(b) cannot and are not intended to apply in circumstances where it is prohibited by law.

8. Licensor’s Rights Retained

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10. Severability

If any provision of this Licence is invalid or unenforceable under applicable law, it shall not affect the validity or enforceability of the remainder of the terms of this Licence. Without further action by the parties to this agreement, such provision shall be reformed to the minimum extent necessary to make such provision valid and enforceable.

11. Waivers and Consents

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Creative Commons may be contacted at http://creativecommons.org/.
Appendix IV: Table 1 – Creative Commons 3.0 Australia Licences – Minimum Markings, Copyright Licensing Statement and Attribution Statement

This table sets out the mandatory minimum markings, and recommended copyright licensing statements and recommended attribution statements. The markings should be included in a prominent position when making PSI available under a Creative Commons licence. The table sets out, in turn, the mandatory minimum markings and the optional copyright and attribution statements for each of the six CC licences.

At the very least, your agency should include the information in the mandatory “Minimum markings” column (i.e. Copyright statement, Licence image and Licence URL link) to notify others that your agency or government owns copyright in the material. The further information shown in the optional “Copyright licensing statement” column is recommended to provide a clear statement on how the PSI may be reused under the CC licence selected. In addition to the “Copyright licensing statement”, the optional “Attribution statement” may be included to prescribe how your agency wishes to be attributed where information is redistributed or reused. Note however, that agencies are not obliged to require attribution statements from licensees and may, if they wish, expressly waive them (see (c) Waiver/dilution of positive attribution requirement at page 62 of the Guide).

Where material is being made available online, licence icons should be hyperlinked to the relevant license URL (e.g. should be hyperlinked to http://creativecommons.org/licenses/by/3.0/au). Also, the name of the agency should be hyperlinked to the agency’s webpage that contains or links to the source material.
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<td>This is the minimum required to license a copyright work under this CC licence.</td>
<td>The portion in square brackets in each A, B and C, “[In essence, ... other licence terms/in any way]” is recommend, but optional. If included, remove the square brackets. Insert the name of the agency/licensor as appropriate.</td>
<td>Where material is made available online on your agency’s website, this generic statement should be included within the website’s “Copyright” or “Attribution policy” section.218</td>
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<td>1. Creative Commons Attribution</td>
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218 If your agency already has an appropriate website statement addressing these issues, then this generic statement would not be necessary.

219 Note that there is an explicit ‘non-endorsement statement’ (i.e. the licensee is not entitled to suggest in any way, by words or by conduct, that your agency endorses the licensee or the licensee’s use of the work) in the human readable summary and in clause 4B(f) of the Creative Commons Legal Code, Attribution 3.0 Australia licence.
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| [http://creativecommons.org/licenses/by-nc/3.0/au/](http://creativecommons.org/licenses/by-nc/3.0/au/) |

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### OR:

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**For Federal government agencies the following wording is suggested:**


**OR**

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