

# ACCESSING AND REUSING COPYRIGHT GOVERNMENT RECORDS

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*The common policy objectives in modern liberal democracies of promoting open and accountable government and of preserving national culture and heritage are reflected in the provision of access to, and the preservation of, unpublished and published works held by government. A wide spectrum of social enquiry is in whole or in part dependent on these government preserved holdings.*

*The policy objectives in Australia are manifested in two ways. One is in government archival practices and laws.<sup>1</sup> The other is in the provisions in the Australian Copyright Act 1968 (Cth) facilitating access to, and the preservation of, unpublished and published works held by archives and libraries. While preservation of these works and the costs associated with it are in themselves a recognition of the public interest in accessing works held by archives and libraries, existing laws and practices facilitating access should be reviewed in the light of technological changes in way we access, create and communicate works and in the light of further moves towards openness in government.<sup>2</sup>*

*This article outlines present archival practices and laws in Australia, and the scope of Copyright Act provisions, before turning to reform. The focus will be on the Australian federal sphere.<sup>3</sup>*

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<sup>1</sup> ACT Auditor-General's Office, Performance Audit Report, *Records Management in ACT Government Agencies* (June 2008) [3]

<<http://www.audit.act.gov.au/auditreports/reports2008/Report%203-2008%20-%20Records%20Management.pdf>>. '1.5 The Records Act establishes a framework for the management and administration of government records. Under Part 1 the principal purposes of the Act are:

(a) to encourage open and accountable government by ensuring that Territory records are made, managed and, if appropriate, preserved in accessible form; and  
(b) to preserve Territory records for the benefit of present and future generations; and  
(c) to ensure that public access to records is consistent with the principles of the *Freedom of Information Act 1989*.'

<sup>2</sup> Refer, for example, the *Freedom of Information Amendment (Reform) Act 2010* (Cth) and amendments to the objects of the *Freedom of Information Act 1982* (Cth) contained in s 3 of that Act, and to the widening of the open access period under the *Archives Act 1983* (Cth).

<sup>3</sup> The federal archival bodies focusing on the collection of non-government records such the National Film and Sound Archives, (which collects the products of Australian private sector media industries)

## I GOVERNMENT ARCHIVAL PRACTICES AND LAWS

A *Archival Practices*1 *Nature and Composition of Archives*

Archives are not peculiar to governments and have been part of human civilisation for millennia.<sup>4</sup> However, governments have preserved records on a greater and more comprehensive scale than any other institution in society. Over the last few centuries in Anglo-Australian history, most of these records have been created by officials in government through filed correspondence, briefings, internal working documents and other material. Some of this government archival material originates from other sources such as letters, submissions and representations received from individuals, corporations, other governments and community groups. Other material preserved in archives includes architectural plans, photographs, films and sound recordings, made by government officials or commissioned by government. A small proportion of the material is published. Some unpublished records have been donated to archival institutions from non-government sources such as the personal records of public figures.<sup>5</sup> While Australian archival records are predominantly on paper, most government record-keeping is now in electronic form.

2 *Development of Australian Archives*

The collection and preservation of archival material by government in Australia has not been coherent. Creation and acquisition of records has been less systematic and more piecemeal, preservation of those documents has sometimes been poor and the destruction of archived records has continued spasmodically until quite recently.<sup>6</sup> Notwithstanding these weaknesses, a valuable heritage of records presently exists back to the beginnings of the British colonisation of Australia.<sup>7</sup>

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and the Noel Butlin Archives at the Australian National University (which collects business records) have been excluded from this discussion.

<sup>4</sup> 'The Sumerians in southern Mesopotamia were using cuneiform markings on clay tablets by the fourth millennium BC and written records were also used by the Egyptian and Persian empires. The records documented a wide range of financial, administrative, property, genealogical and religious matters and both the Egyptian and Persian empires maintained repositories of records', Australian Law Reform Commission, *Australia's Federal Record: A Review of Archives Act 1983*, Report No 85 (1998) [2.1]. The Domesday Book - a survey of landholding and tax liability - is the earliest British public record to survive - E M Hallam, 'Nine Centuries of Keeping the Public Records', in GH Martin and P Spufford (eds), *The Records of the Nation: The Public Record Office 1938-1988*, (The Boydell Press, 1990) 23, 24.

<sup>5</sup> National Archives of Australia, 'Kirby's Personal Records Saved' (2010) 38 *Memento* 30.

<sup>6</sup> During the Wilson enquiry hearings into the separation of Aboriginal and Torres Strait Islander children from their families in July 1996, for example, 'no one could explain the 1938-48 gap in NSW Aboriginal Welfare Board records, but according to State Archives no proof of a rumoured fire in 1952 could be found'; M Piggott, 'The History of Australian Record Keeping: A Framework for Research' in BJ McMullin (ed), *Coming Together. Papers from the Seventh Australian Library History Forum* (Melbourne, 1997) 33, 36. Piggott also cites the shredding of records during an inquiry ordered by the Goss government in Qld in 1990 into the administration of the Wacol youth centre.

<sup>7</sup> Records held by the British Public Record Office and other British institutions including missionary societies relating to Australia and the Pacific were copied under the Australian Joint Copying Project which began in 1945 and concluded in 1997. See National Library of Australia, *What We Collect, Australian Joint Copying Project* <<http://www.nla.gov.au/collect/ajcp.html>>.

The written record was central to the British colonial administration of Australia from planning and colonisation onwards. In its review of the *Archives Act 1983* (Cth) in 1998, the Australian Law Reform Commission stated:

The colonial administrations were involved not only in the broad management of the colonies' politics, finances and development but also in many of the affairs of individual citizens. In particular, the convict system and the gradual subdivision of the continent into freehold and leasehold properties generated extensive records. In consequence, most aspects of colonial life were reported on in detail and large volumes of written records accumulated in both London and the colonial capitals.

The process by which the accumulations of records in colonial administrative offices were gradually transformed into what are now the various state archives was a long and haphazard one. Some valuable records were lost through neglect or deliberate destruction.<sup>8</sup>

The Commonwealth Government inherited some substantial functions and their records from the states upon federation and the two world wars heightened the need for a coordinated archival function. For many years this was shared between the Commonwealth National Library and the Australian War Memorial. Archival institutions in the states developed out of their library systems and both Commonwealth and the states archival activities are now subject to what has been described as second generation legislation,<sup>9</sup> characterised by:

- mandatory transfer of records to the archival authority, usually after 25 or 30 years,
- some provision for the regulation or guidance of agency record management practices, and
- a public right of access to records after a specified period.

At the Commonwealth level the provision of a public right of access to records after a specified period has mirrored those rights of access, and appeal from decisions on access, that are available under the Commonwealth *Freedom of Information Act 1982*. Under state archival laws rights of access generally complement rights of access under freedom of information laws.<sup>10</sup> These laws reflect a consistent policy towards openness of government.

### 3 *Modern Practices of Selection and Maintenance of Archives*

Good records management is the foundation of the effective management of information by government. As the ACT Auditor-General stated in 2008:

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<sup>8</sup> Australian Law Reform Commission, above n 4, [2.5], [2.6].

<sup>9</sup> Ibid [2.9].

<sup>10</sup> NSW: *State Records Act 1998* (NSW) s 56; TAS: *Archives Act 1983* (Tas) ss 18, 15; Commonwealth: *Archives Act 1983* (Cth) ss 18, 16; Qld: *Public Records Act 2002* (Qld) ss 17, 18, 16; Victoria: *Public Records Act 1973* (Vic) ss 10, 10AA, 10A; South Australia: *State Records Act 1999* (SA) s 26; ACT: *Territory Records Act 2002* (ACT) ss 27, 26 and 28. The Northern Territory Archives Service (NTAS) has no independent statutory existence and is part of a Department of the Northern Territory Government. Access to government archives held by the NTAS is determined in accordance with s 142 of the *Information Act 2002* (NT). Section 141 of the *Information Act* provides for the transfer of government archives over 30 years old to the NTAS, where they become part of territory Archives.

1.2 Good records management is a fundamental element of good governance, in particular with respect to transparency and accountability. Good recordkeeping supports efficiency and accountability through the creation, management and retention of meaningful, accurate, reliable, accessible and durable records of government activities and decisions.

1.3 Poor recordkeeping practices negatively affect government administration, and projects are often difficult to implement and sustain effectively in the absence of well-managed records.<sup>11</sup>

There is a cycle of activity in modern archival practice which begins with the capture of full and accurate records of government activity and operations and the classification, appraisal and storage of records by government agencies, and then to the transfer and preservation of records by archival institutions, and the provision of public access to them. Effective access to government information through freedom of information and archival laws is dependent on the observance of these steps.

Recordkeeping is the subject of Australian and international standards which set out a methodology for managing records known as AS ISO 15489-2002. This is augmented by a process model for designing and implementing record systems known by the acronym of DIRKS.<sup>12</sup> DIRKS includes a framework for adopting appropriate metadata standards for the control and retrieval of electronic records. Both the federal and state governments have adopted DIRKS process methodology. Guidance to public servants on record-keeping and observance of record-keeping requirements includes web-based material and ultimate responsibility for the observance of the standards rest with the Chief Executive Officer of the government agency.<sup>13</sup>

The eight step DIRKS methodology<sup>14</sup> contemplates the capture of records relating to the government agencies' identified business activities and operations (which in turn determines some selection of material captured) but ultimately on an appraisal of the retention period for each class of record, with the object of preserving records of enduring value in archives. So faced with a mass of material, classification and selection are intrinsically part of the archival process. As the NSW State Archives has stated:

It is not in the interest of the government or the community to retain records for longer than they are reasonably required to support identified needs. To attempt to preserve and maintain accessibility to all state records indefinitely would be prohibitively expensive and impractical to manage. Even in the electronic environment, where data storage costs continue to fall, the full cost of cataloguing, maintenance, migration and accessibility makes it impossible to keep all state records forever. Moreover, there are certain types of records, such as those containing sensitive personal information, which the community expects will be disposed of when they are no longer required for the purpose for which

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<sup>11</sup> ACT Auditor-General's Office, above n 1, [3].

<sup>12</sup> An acronym for 'designing and implementing recordkeeping systems'.

<sup>13</sup> In addition to the *Archives Act 1983* (Cth), record-keeping requirements are contained in other Commonwealth Acts, standards, policies and guidance including the *Electronic Transactions Act 1999*; the *Evidence Act 1995*; the *Freedom of Information Act 1982*; the *Privacy Act 1998*; the *Protective Security Manual*; and the *Australian Government Information and Communications Security Manual* (ACSI 33).

<sup>14</sup> National Archives of Australia, *The DIRKS Methodology: A Users Guide* (September 2001, rev July 2003) [1.2], [5] <[http://www.naa.gov.au/Images/dirks\\_part1\\_tcm2-935.pdf](http://www.naa.gov.au/Images/dirks_part1_tcm2-935.pdf)>.

they were created or for related administrative purposes and where there are no other overriding factors requiring their retention.

All records are created for an identifiable business or administrative purpose and the majority of these records can be disposed of by destruction once that purpose has been fulfilled and all legal and accountability requirements for their retention have been met. There are some types of records however, because of the purpose for which they were created, the activity they document and the information they contain, that have enduring value to the Government, to the community at large or to individuals or groups within it. These records are kept as state archives.<sup>15</sup>

Both good records management and appropriate policies for the preservation of, and public access to, government records are important to the transparency and accountability of government.

## B *Access Provisions under the Archives Act 1983 (Cth)*

At the Commonwealth level, modern organisation, coordination and access to archival records were brought into statutory form by the *Archives Act 1983 (Cth)*. Unpublished Commonwealth documents in the open access period are subject to public access under that Act under a regime similar to public access under the *Freedom of Information Act 1982 (Cth)*. There are also special access provisions under the *Archives Act 1983 (Cth)* which enable researchers to access more recent government documents subject to certain conditions.

The types of access under the *Archives Act 1983 (Cth)* to preserved records fall into two categories:

- open access period (s 3(7)), and
- access outside the open access period (s 56 access).

The Act has only limited application to documents outside the open access period.

### 1 *Open Access Period*

The *Archives Act 1983 (Cth)* provides a legally enforceable public right of access to Commonwealth records in the open access period under the Act.<sup>16</sup> The open access period is defined by s 3(7) of the *Archives Act 1983 (Cth)*. In 2010 this period of open access was widened from 30 years to 20 years over nearly all Commonwealth records through a 10 year transition period commencing from 1 January 2011 and ending on 31 December 2020.<sup>17</sup>

<sup>15</sup> New South Wales, State Records, *Building the Archives: Policy on Records Appraisal and the Identification of State Archives* (June 2001), [3,4]  
<<http://www.records.nsw.gov.au/recordkeeping/government-recordkeeping-manual/documents/recordkeeping-policies/Building%20the%20Archives.pdf>>.

<sup>16</sup> Refer *Archives Act 1983 (Cth)* s 31.

<sup>17</sup> *Freedom of Information Amendment (Reform) Act 2010 (Cth)* sch 3, pt 1. Sections 22A and 22B of the *Archives Act 1983 (Cth)* provide separate periods for cabinet notebooks (expanded progressively from 50 years to 30 years) and for records which contain census information from a particular census (99 years) before these records fall into open access.

The widening of access is being implemented progressively over the transition period depending on the date the record came into existence. This widening of access was part of a package of legislative measures contained in the *Freedom of Information Amendment (Reform) Act 2010* (Cth) intended to promote a pro-disclosure culture across government and to build a stronger foundation for more openness in government arising from the Rudd government's 2007 election commitment to do so. Among the policy objectives expressed in the Act is to increase recognition that information held by the government is a national resource to be managed for public purposes. Both the Commonwealth *Freedom of Information Act 1982* and the *Archives Act 1983* contain exemptions from disclosure for government records, and the exemptions from disclosure of open period access records under the *Archives Act 1983* have largely paralleled exemptions from disclosure under the *Freedom of Information Act 1982*.<sup>18</sup>

Thus, when a member of the public requests to see archives which are in the open access period the National Archives of Australia is required by s 35 of the *Archives Act 1983* (Cth) to first examine the records to determine whether any exemptions should be claimed. Ideally this should be done just before records are in the open access period, but it is normally left to a request. An exception exists in respect of Cabinet records, which are made public at the beginning of the open access period. An appeal lies to the Administrative Appeals Tribunal in respect of decisions on exempt records.

Under the *Archives Act 1983* (Cth), public access may be given in one of the following forms:

- inspection of the record;
- a copy of the record;
- access to the record through use of computer, projector or other equipment;
- a written transcript of a sound record, shorthand or codified record.<sup>19</sup>

## 2 Access outside the Open Access Period

Section 56 (1) and (2) of the *Archives Act 1983* (Cth) specify two types of closed period access.

'Accelerated release' under s 56(1) enables all records of a certain kind or on a certain subject to be available to the public – for example, records consulted by the Royal Commission into British Nuclear Tests in Australia (covering the period from the mid 1950s to the 1980s), and East Timor records dating from the 1970s.

Special access under s 56(2) contemplates access to a person within the closed period.

<sup>18</sup> Refer to the *Archives Act 1983* (Cth) s 33. *Freedom of Information Act* exemptions have been amended by the *Freedom of Information Amendment (Reform) Act 2010* (Cth) to include an overriding public interest test for some exemptions, which have not been matched by amendments to s 33 of the *Archives Act 1983* (Cth). Claims for exemption from disclosure of documents held by archives are fewer due to their age.

<sup>19</sup> *Archives Act 1983* (Cth) s 36(2). Where the giving of access in one form would unreasonably interfere with the operations of the archives or of another Commonwealth institution that has custody of the record, or would not be appropriate having regard to the physical nature of the record or would be detrimental to the preservation of the record or would, but for the Act, involve an infringement of copyright not owned by the Commonwealth, State or Territory, access may be refused and access given in another form (*Archives Act 1983* (Cth) s 36(4)).

An example would be the grant of access to a retired politician to research records for a memoir or a biography.

‘Special access’ and ‘accelerated release’ must be authorised by the responsible minister in accordance with arrangements approved by the Prime Minister.<sup>20</sup> Conditions may be imposed with the grant of special access and the Act provides a penalty for breach of those conditions.<sup>21</sup>

### 3 *Legal Protection for the Giving of Access*

Section 57 of the Act provides protection against actions for infringement of copyright, defamation and breach of confidence by the giving of access under the Act. It expressly covers acts of infringement as well as authorising acts of infringement of copyright and protects officers of the National Archives, the Commonwealth or any other person concerned in the giving or authorising of access.<sup>22</sup> It also protects the author of the record against actions in defamation and breach of confidence for supply of the record to the Commonwealth.<sup>23</sup> No subsequent protection is provided by the *Archives Act 1983* (Cth) to the publisher of a record which is accessed under the Act.<sup>24</sup>

Provisions dealing with the preservation, reproduction and communication of archival and library material are found in the *Copyright Act 1968* (Cth).

## II PROVISIONS IN THE COPYRIGHT ACT 1968 FACILITATING ACCESS TO, AND THE PRESERVATION OF, UNPUBLISHED AND PUBLISHED WORKS HELD BY ARCHIVES AND LIBRARIES

The basis, history and importance of the provisions of the *Copyright Act 1968* (Cth) dealing with the library deposit of Australian publications have been discussed in a previous issue of this journal.<sup>25</sup> Included as part of this library deposit process are publications of state and federal governments. Deposit of publications and the harvesting of material electronically published on government and other web sites take place across all jurisdictions in Australia. Deposit libraries and other Australian libraries are rightly concerned to facilitate access to those collections by researchers and to preserve their collections from deterioration and loss. Most major public libraries in Australia also have donated or acquired collections of unpublished papers or have compiled oral histories of significant public figures, accessible to researchers.

<sup>20</sup> *Archives Act 1983* (Cth) s 56(1), (2).

<sup>21</sup> *Archives Act 1983* (Cth) s 56(3) prescribes a penalty of 20 penalty units. One penalty unit is \$100.

<sup>22</sup> *Archives Act 1983* (Cth) s 57(1)(a). Protection also extends to persons authorising or giving access for criminal offences (s 57(1)(c)).

<sup>23</sup> *Archives Act 1983* (Cth) s 57(1)(b).

<sup>24</sup> However, after access is given to a record, publishing (or other use) of that record is subject to the laws of copyright, defamation and breach of confidence; refer *Archives Act 1983* (Cth) s 57(2) - ‘The giving of access to a record (including an exempt record) under this Act shall not be taken, for the purposes of the law relating to defamation or breach of confidence, to constitute an authorisation or approval of the publication of the record or of its contents by the person to whom the access was given’.

<sup>25</sup> J Gilchrist, ‘Copyright Deposit, Legal Deposit or Library Deposit?: The Government’s Role as Preserver of Copyright Material’ (2005) 5(2) *QUT Law and Justice Journal* 177.

## A *Access and Preservation under the Copyright Act 1968*

Division 5 of pt III of the *Copyright Act 1968* (Cth) contains provisions enabling libraries and archives to reproduce and communicate both published and unpublished works in their collections for their users and for other libraries or archives. These provisions facilitate access to copyright material held by those institutions. The Act also contains provisions enabling the reproduction and communication of works by archives and libraries of works held by them for preservation and other purposes. All the division 5 provisions are exceptions to infringement. No remuneration is payable to the relevant copyright owners.

### 1 *Accessing Works by Users*

Division 5 of pt III of the *Copyright Act 1968* (Cth) is headed ‘copying of works in libraries or archives’ and ss 49 and 50 contained within it enable copying of published works for users and for other libraries or archives.<sup>26</sup>

Copying of published works by librarians or archives for users under s 49 does not represent any radical departure in the law or a significant shift in the balance between the owners of copyright and the users of copyright material. Copying by libraries and archives for users under s 49 ‘is analogous to copying by individual persons under the fair dealing concept’<sup>27</sup> and emanates from it.<sup>28</sup> The reproduction permitted under s 49 covers up to the whole of a journal article or a reasonable portion of another published work.<sup>29</sup> More than a reasonable portion of another work may be reproduced where the work is not commercially available.<sup>30</sup> The section enables both hard copy reproduction and electronic transmittal of reproductions to users of the library or archives.<sup>31</sup> But s 49 applies only where the user declares that the copy is for the user’s research or study.<sup>32</sup>

Section 50 of the *Copyright Act 1968* (Cth) facilitates inter-library and inter-archive loans.<sup>33</sup> It enables a library or archives, upon request, to supply a copy of a periodical publication or other published work within the same limits as s 49 to another library or archives for users of that recipient library or archives or for the collection of that

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<sup>26</sup> The Franki Committee recommended the extension to archives of what had hitherto been simply library copying provisions. The Franki Committee, Australia, *Report of the Copyright Law Committee on Reprographic Reproduction* (1976) 36, 40.

<sup>27</sup> Ibid 32.

<sup>28</sup> The Gregory Committee, United Kingdom, *Report of the Copyright Committee* (1952) 17; Spicer Committee, Australia, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in The Copyright Law of the Commonwealth* (1959) 28, 29.

<sup>29</sup> *Copyright Act 1968* (Cth) s 49(5)(a).

<sup>30</sup> *Copyright Act 1968* (Cth) s 49(5)(b).

<sup>31</sup> Online user access is limited to the premises of the library or archives, *Copyright Act 1968* (Cth) s 49(5A).

<sup>32</sup> All reproduction and communication permitted under *Copyright Act 1968* (Cth) s 49 must be in response to a request and declaration by a user that he or she requires the reproduction for the purpose of research or study and has not been previously supplied with a reproduction of the same work by the library or archives.

<sup>33</sup> Unlike most provisions in div 5 of pt III, where the phrase ‘library or archives’ is used, *Copyright Act 1968* (Cth) s 50 uses only the term ‘library’ and defines it to include ‘an archives all or part of whose collection is accessible to members of the public’.



recipient library or archives. The user must fulfil the declaration requirements under s 49.

Section 50 facilitates access to published works for users at some distance from the library or archives, which is of important practical benefit to libraries and archives given the rationalisation and collaboration of libraries in collection acquisitions and the focus of their collections.<sup>34</sup> Networking of libraries and archives assists both users and the library and archival institutions themselves. The provision enables electronic transmittal of reproductions between libraries or archives.

Section 51 enables the reproduction or electronic communication of an unpublished work kept by a library or archives where it is open to public inspection. The reproduction or communication must be for the purposes of research or study of the user or with a view to publication but is of limited application because the provision only applies where the author of the work in question has been dead for more than 50 years.

## 2 *Preserving Works*

Section 51A enables the reproduction and communication of unpublished and published works held as part of the collection of a library or archives for preservation and other purposes. The section specifically enables the reproduction, or communication,<sup>35</sup> of:

- a work in manuscript form or of an artistic work for the purpose of preserving that work against loss or deterioration, or for the purpose of research carried out in that or another library or archives;<sup>36</sup>
- a work in published form that has been damaged or has deteriorated, or has been lost or stolen, for the purpose of replacing the work provided it is not commercially available;<sup>37</sup> and
- a work for administrative purposes.<sup>38</sup>

Additionally, wider reproduction rights are available to key cultural institutions' collections under s 51B. That provision applies to bodies administering a library or archives which have under a law of the Commonwealth or state the function of developing and maintaining the collection, and to other prescribed bodies and, in either case, where the work in the collection is of historical and cultural significance to Australia. The provision enables the making of up to three reproductions of a manuscript, artistic work, or published work for the purposes of preserving those works against loss or deterioration. This defence to infringement is only available in the case of artistic and published works where a copy of the work<sup>39</sup> cannot be obtained within a

<sup>34</sup> The policy behind *Copyright Act 1968* (Cth) s 50 is to 'facilitate interlibrary loans particularly in a country, which, as is the case with Australia, is situated at a great distance from many of the centres of publication, and which is so large as to make it obviously impossible to provide elaborate library facilities in the widely separated towns which exist'. The Franki Committee, above n 26, 37.

<sup>35</sup> The term 'communication' enables electronic transmittal of a work, or the making of digital copies available online within the premises of the library or archives.

<sup>36</sup> *Copyright Act 1968* (Cth) s 51A(1)(a).

<sup>37</sup> *Copyright Act 1968* (Cth) s 51(1)(b), (c).

<sup>38</sup> *Copyright Act 1968* (Cth) s 51(2), (3). Defined to be 'directly related to the care and control of the collection', *Copyright Act 1968* (Cth) s 51B(6).

<sup>39</sup> In the case of an artistic work, a photographic reproduction cannot be obtained within a reasonable time at a normal commercial price.

reasonable time at an ordinary commercial price (in loose terms is not commercially available). As Hudson has pointed out, the wording of the provision suggests a maximum of three copies can be made, not that only three copies can be held at any one time<sup>40</sup> and if that is its proper construction, that would restrict the effectiveness of the section. Further, the use of different digital proprietary record-keeping systems by government agencies and the need to convert them to long term archival format and to back up through different servers,<sup>41</sup> coupled with the need to translate them to different formats as technology changes, suggests a need for further copies for the purposes of preserving works against loss or deterioration.

Section 51AA is directed specifically at the National Archives of Australia. It contains rather narrow and detailed provisions enabling the National Archives of Australia to make or communicate a single copy of a work (published or unpublished) kept in the collection of that archives, where it is open for public inspection, in various circumstances that extend beyond defences otherwise provided in div 5. They are, the making or communicating of a single:

- working copy of a work;<sup>42</sup>
- reference copy of the work for supply to the central office of the archives;<sup>43</sup>
- reference copy of that work for supply to a regional office;<sup>44</sup>
- replacement copy of a work for supply to a regional office;<sup>45</sup> and
- replacement copy of a work for supply to the central office.<sup>46</sup>

Section 51AA enables the network of National Archives of Australia offices to behave as one central repository. This facilitates access by individuals to archival records in the major cities of Australia which host regional offices of the National Archives of Australia. While copyright in most of these works will reside in the Commonwealth, a proportion of works kept in the collection of the archives will be the subject of other copyright ownership. However, given the nature of the holdings and the purpose for which they are used, the limitations of the defence to a single copy appear unnecessarily restrictive. It appears inconsistent with the wide protection given to the National Archives of Australia from infringement of copyright through the giving of access to records under the *Archives Act 1983* (Cth).

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<sup>40</sup> E Hudson, 'The Copyright Amendment Act 2006 - The Scope and Likely Impact of New Library Exceptions' (2006) *University of Melbourne Law School Research Series 5* <<http://www.austlii.edu.au/au/journals/UMelbLRS/2006/5.html>>.

<sup>41</sup> The National Archives of Australia converts Microsoft word documents into a long term open system format and uses more than one server (SUN and LINUX); Interview with Messrs Paul Dalglish and Adrian Cunningham (National Archives of Australia, 6 August 2010).

<sup>42</sup> That is, 'a reproduction of the work made for the purpose of enabling the National Archives of Australia to retain the copy and use it for making reference copies and replacement copies of the work': *Copyright Act 1968* (Cth) ss 51AA(1)(a), 51AA(2).

<sup>43</sup> That is, 'a reproduction of a work from a working copy ... for use by that office in providing access to the work to members of the public': *Copyright Act 1968* (Cth) ss 51AA(1)(b), 51AA(2).

<sup>44</sup> Upon a written request by a regional office, provided that the officer in charge is satisfied that a reference copy has not been previously supplied to that regional office: *Copyright Act 1968* (Cth) s 51AA(1)(c).

<sup>45</sup> Upon a written request by a regional office, provided that the officer in charge is satisfied that a reference copy of the work is lost, damaged or destroyed: *Copyright Act 1968* (Cth) s 51AA(1)(d).

<sup>46</sup> Upon a written request by a regional office, provided that the officer in charge is satisfied that a reference copy of the work is lost, damaged or destroyed: *Copyright Act 1968* (Cth) s 51AA(1)(e).

3 *The 'Flexible Exception'*

Another exception to infringement which may be relied on by archives and libraries is s 200AB of the *Copyright Act 1968* (Cth). It is intended to provide 'a flexible exception to enable copyright material to be used for certain socially beneficial purposes, while remaining consistent with Australia's obligations under international copyright treaties'.<sup>47</sup> The provision applies to libraries and archives, educational institutions and use by, or for, persons with a disability and to published and unpublished works.

The relevant parts of the section applicable to libraries and archives provide:

**200AB Use of works and other subject-matter for certain purposes**

(1) The copyright in a work or other subject-matter is not infringed by a use of the work or other subject-matter if all the following conditions exist:

- (a) the circumstances of the use (including those described in paragraphs (b), (c) and (d)) amount to a special case;
- (b) the use is covered by subsection (2), (3) or (4);
- (c) the use does not conflict with a normal exploitation of the work or other subject-matter;
- (d) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.

*Use by body administering library or archives*

(2) This subsection covers a use that:

- (a) is made by or on behalf of the body administering a library or archives; and
- (b) is made for the purpose of maintaining or operating the library or archives (including operating the library or archives to provide services of a kind usually provided by a library or archives); and
- (c) is not made partly for the purpose of the body obtaining a commercial advantage or profit.

...

*This section does not apply if under another provision the use does not, or might not, infringe copyright*

(6) Subsection (1) does not apply if, because of another provision of this Act:

- (a) the use is not an infringement of copyright; or
- (b) the use would not be an infringement of copyright assuming the conditions or requirements of that other provision were met.

...

*Cost recovery not commercial advantage or profit*

(6A) The use does not fail to meet the condition in paragraph (2)(c), (3)(c) or (4)(c) merely because of the charging of a fee that:

- (a) is connected with the use; and
- (b) does not exceed the costs of the use to the charger of the fee.

*Definitions*

(7) In this section:

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<sup>47</sup> Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) 108.

***conflict with a normal exploitation*** has the same meaning as in Article 13 of the TRIPS Agreement.

***special case*** has the same meaning as in Article 13 of the TRIPS Agreement.

***unreasonably prejudice the legitimate interests*** has the same meaning as in Article 13 of the TRIPS Agreement.

***use*** includes any act that would infringe copyright apart from this section.

The Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement is annex 1C of the Marrakesh Agreement Establishing the World Trade Organization;<sup>48</sup> and art 13 of that agreement referred to in s 200AB(7) sets out a three-step test for exceptions to infringement of copyright. This requires countries bound by the agreement, such as Australia, to confine limitations or exceptions to the exclusive rights of the copyright owner to: (1) certain special cases; (2) which do not conflict with a normal exploitation of the work; and (3) do not unreasonably prejudice the legitimate interests of the right holder. The wording of the three-step test is reflected in s 200AB(1) which in turn governs the application of s 200AB(2-4)). The origins of the three-step test for limitations and exceptions lie in the Paris Act of the *Berne Convention for the Protection of Literary and Artistic Works*, which also binds Australia.<sup>49</sup>

Under s 200AB(2), library or archival use must be ‘made for the purpose of maintaining or operating’ the library or archives and must not be made partly for commercial advantage or profit. Otherwise the operation of s 200AB(2) is governed by the three-step test, which is aimed at conformity with Australia’s obligations under the TRIPS Agreement.

The three steps are cast in wide and general terms which are cumulative in nature and lack clarity in their application to libraries and archives.<sup>50</sup> To overcome the lack of clarity and complexity of s 200AB, some independently produced guides have been published to assist those wishing to understand its scope, such as that published by the Australian Libraries Copyright Committee and the Australian Digital Alliance.<sup>51</sup> There is no Australian case law on s 200AB to support these guides. The Australian Copyright Council has set out a number of factors likely to influence the legitimacy of reliance on the section including the view that it is unlikely to apply if the use is not for a specific and identified need or request, and is more likely to apply if the number of people the use is for is small, the time-frame is short and the proportion of the work used is

<sup>48</sup> The Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement is annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed at Marrakesh, Morocco on 15 April 1994, see World Trade Organization, *Agreement on Trade Related Aspects of Intellectual Property Rights* (1994) <[http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf)>.

<sup>49</sup> Article 13 of the TRIPS Agreement follows the wording of art 9 of the Paris Act of the *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 24 July 1971, 1161 UNTS 30 (entered into force 15 December 1972). Australia became bound by the Paris Act of the *Berne Convention* on 3 January 1978.

<sup>50</sup> For a discussion on what Ricketson describes as ‘problems of interpretation’ of the three-step test in art 9(2) of the *Berne Convention for the Protection of Literary and Artistic Works*, see S Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London Centre for Commercial Law Studies, 1987) 482-9; and on art 13 of the TRIPS Agreement, see D Gervais, *The TRIPS Agreement: Drafting History and Analysis* (Sweet and Maxwell, 3<sup>rd</sup> ed, 2008) 239-43.

<sup>51</sup> Australian Libraries Copyright Committee and Australian Digital Alliance, *A User’s Guide to the Flexible Dealing Provision for Libraries, Educational Institutions and Cultural Institutions* (2008).

small.<sup>52</sup> An example where s 200AB(2) may apply is in enabling archives and libraries to use orphan works (where copyright owners cannot be identified or located) such as digitisation and placement online.<sup>53</sup>

While the scope of the provision is yet to be tested, it remains a last resort defence to infringement for archives and libraries concerned about their exposure to infringement for use that is not governed by other sections of the *Copyright Act 1968* (Cth). By virtue of s 200AB(6), the section does not apply if, under another provision of the Act, the use does not, or would not, (assuming the conditions of that other provision were met) be an infringement. Accordingly, where there are express provisions already in the *Copyright Act 1968* (Cth) that may be relied on by archives or libraries as defences to infringement, archives or libraries are not entitled to augment the scope of those provisions by reliance on s 200AB. It would seem that if the government archive were copying ‘for the services of the Commonwealth or state’ reliance on s 200AB would not be possible. The ‘flexibility’ of the exception for government archives and libraries is thus limited.

### III REFORM

#### A *Legal and Policy Aspects of Access*

##### 1 *General Considerations*

One theme of the 1976 recommendations of the Franki Committee was the Committee’s concern for the free flow of information. To quote from s 1 of the Committee’s Report ‘Australia is geographically isolated from the major centres of scientific and industrial research and ... the vast area of the Australian continent raises special problems in relation to the dissemination of information, particularly in the remoter parts’.<sup>54</sup> There are a number of references in the Report to the public interest in ensuring the free flow of information for education and for the scientific, technical and social development in Australia. The concern about the free flow of information was and is a concern in Australia and worldwide. We now use the term ‘access to information’ to describe it.

In his second reading speech on the Copyright Amendment Bill (No 2) 1979 the Minister noted that the Franki Committee viewed libraries as information resource centres with a legitimate need to copy material.<sup>55</sup> It was an example of copying of a public benefit nature provided as part of the balance of interests between owners of copyright and users of copyright material.<sup>56</sup> The provisions have since been amended to enable electronic access and communication of material.

The provisions of the *Copyright Act 1968* (Cth) dealing with library and archive copying and the transmission of copyright material represent a traditional legislative response to the need for access to copyright material and a balancing of the interests of users for access to copyright material against owners of copyright. The scope of the

<sup>52</sup> Australian Copyright Council, *Section 200AB: the 'Special Case' or 'Flexible Dealing' Exception* (2009) <<http://archive.copyright.org.au/information/cit028/wp0030>>.

<sup>53</sup> Australian Libraries Copyright Committee and Australian Digital Alliance, above n 51, 5,17.

<sup>54</sup> The Franki Committee, above n 26, 15.

<sup>55</sup> Australia, *Parliamentary Debates*, Second Reading Speech, Senate, 4 June 1979, 2534 (Senator Chaney, Minister for Aboriginal Affairs).

<sup>56</sup> *Ibid* 4.

provisions is based on notions of infringement of private property rights and not unfairly prejudicing the interests of those copyright owners in the exploitation of those rights.

In so far as government archives are concerned the provisions are largely concerned with government copyright material. The provisions of the *Copyright Act 1968* (Cth) do not reflect the broader policy objectives of freedom of information reforms<sup>57</sup> and technological change in accessing material. Thus a tension has arisen between the public interest in ensuring the widest possible access to government information and the copyright interests in that information.

It is evident that the concept of the role of government has been a changing one particularly over the last three decades. And while the demand for access to copyright material and government copyright material in particular is not likely to diminish but to grow, government response to that demand and its need to manage information raise questions beyond simply the balancing of interests within the provisions of the *Copyright Act 1968* (Cth). The question of access is not simply a legislative one, whether the material is government owned or not.<sup>58</sup> And the question is not simply a copyright one. Freedom of information and archive laws do not purport to be a complete code of access to documents in the possession of government. Neither is copyright law a complete code of interests in the legitimate use of copyright material. The former contemplates the granting of access outside the Act.<sup>59</sup> The latter contemplates the giving of permission to do acts comprised in the copyright beyond the exceptions to infringement contained in the Act.<sup>60</sup>

The resolution of the public interest in accessing and reusing the archival material of government involves issues of law and policy. The public interest in accessing this material is reflected in the principles of open government espoused in the *Archives Act 1983* (Cth) and the *Freedom of Information Act 1982* (Cth). The material in the possession of these institutions is essentially old unpublished material. It is mostly government copyright material. However, a significant proportion is copyright material vested in other persons. Any reform must therefore take into account the interests of other copyright owners. The government cannot lawfully sanction the use of material in which it does not own copyright, without legislation legitimising this use.

## 2 *Access and Copyright Law*

The law should be reformed to enable an archival institution to reproduce or communicate a reproduction a work housed within it for its own internal purposes. This includes preservation, replacement, reference, and fixation in another medium, without

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<sup>57</sup> Section 3(3) and (4) of the *Freedom of Information Amendment (Reform) Act 2010* (Cth) provides: (3) 'The Parliament also intends, by these objects, to increase recognition that information held by Government is to be managed for public purposes, and is a national resource'; and: (4) 'The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.'

<sup>58</sup> For example, as government policy reflected in the UK Treasury Minutes of 1887 and 1912 shows. United Kingdom, *XLIX Accounts and Papers (House of Commons)* No 335 (1887); United Kingdom, *LXIX Accounts and Papers (House of Commons)* No 292 (1912–13).

<sup>59</sup> Refer to the *Freedom of Information Act 1982* (Cth) s 14; and the *Archives Act 1983* (Cth) s 58.

<sup>60</sup> Refer to the *Copyright Act 1968* (Cth) s 196(4).

limit on number. For clarity it may simply be effected through an inclusive definition of 'internal purposes' to express the scope of copying.

This reform would not economically harm the copyright owner since the works involved are largely unpublished, or would otherwise unfairly prejudice the interests of the copyright owner in the works – whether private or government – and the restraints of administrative cost, time and space and the desire to preserve the original would impose practical limits on how much was copied and how many copies were made. It would promote the preservation of, and access to, archival works. It would simplify aspects of the application of the *Copyright Act 1968* (Cth) to archives.

The *Copyright Act 1968* (Cth) should also be clarified to ensure government archival institutions may rely fully on those provisions of the Act applicable to archival institutions, including s 200AB, without recourse to the government statutory licence regime - the Crown use provision s 183 - of the *Copyright Act 1968* (Cth). Section 183 should augment and not override the provisions generally applicable to libraries and archives. Government archives should be entitled to rely on all the defences applicable under the Act to non-government archives. The public interest in the effective maintenance of government archives and in the copyright defences available to government archives is at least as compelling as that for non-government archival institutions.

However of most importance is the reform of the law to facilitate electronic access to government information: '[i]n the online world the development of virtual archives is not only desirable, but also essential for continued relevance and survival.'<sup>61</sup>

The rights of access to government records should encompass the technology that enables it. Consistent with the principles of open government, and consequent upon the lawful capacity of archives to supply published and unpublished works to users of the archives under ss 49 and 51 of the *Copyright Act 1968* (Cth) and s 57 of the *Archives Act 1983* (Cth), government archives should be able to make available, online, all records which are open to public inspection, that is, material which is in the open access period and for which no exemption to access under the *Archives Act 1983* (Cth) may be claimed, without infringement of copyright. The protection provided by s 57 of the *Archives Act 1983* (Cth) against actions for defamation, breach of confidence and infringement of copyright through the giving of access under the Act should extend to the making available of records online. This reform is consistent with the 2010 amendments to the *Freedom of Information Act 1982* (Cth) mandating the publication of documents to which access has been given under the Act and expanding the protection from civil actions for defamation, breach of confidence and infringement of copyright under ss 90 and 91 of that Act to include both the giving of access and publication of those documents by government under the Act. Measures under the *Freedom of Information Amendment (Reform) Act 2010* (Cth) which require agencies to publish information, which includes accessed information under the *Freedom of Information*

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<sup>61</sup> A Cunningham, *Archives - Encyclopedia of Library and Information Science* (3<sup>rd</sup> ed, 2010) Informaword/Taylor & Francis 1:1 [203] 192-207  
<[http://pdfserve.informaworld.com.ezproxy1.canberra.edu.au/91012\\_751308040\\_917625626.pdf](http://pdfserve.informaworld.com.ezproxy1.canberra.edu.au/91012_751308040_917625626.pdf)>.

*Act 1982* (Cth) to enable downloading from a website,<sup>62</sup> have not been matched by reforms to the *Archives Act 1983* (Cth). The use of website technology in this way is a sensible and significant aid to public access to government records.

It also seems unnecessary, and inconsistent with the principles of public access to government information, for a declaration of use for research or study by the person accessing those government records. Nonetheless such a requirement could be facilitated electronically as a condition of the search for, and access to, those archival records.<sup>63</sup>

Consistent with protection given to the National Archives of Australia under s 57 of the *Archives Act 1983* (Cth), it would be desirable to amend s 51 of the *Copyright Act 1968* (Cth) to make the period of access to unpublished works for other archival institutions consistent with the period in which these works are open to public inspection. That period may vary under the terms of an acquisition or bequest. The period of access should not be dependent on the period of more than 50 years after the death of the author of the work. These reforms in the copyright law would not, it is suggested, be a breach of the three-step test contained in art 13 of the TRIPS Agreement.<sup>64</sup> Given the nature of the records and their age, the reforms would not conflict with a normal exploitation of a work or unreasonably prejudice the legitimate interests of the copyright owner.

While these reforms seek to improve the preservation of, and access to, archival works, the re-use of works released under the open access period raises wider issues of reform.

### 3 *Re-Use and Copyright Law*

There are demonstrable public benefits in facilitating the re-use of government information.<sup>65</sup>

Once accessed, copyright law contemplates the re-use of accessed material – whether government and other copyright works – equally.<sup>66</sup> Section 52 in particular sets out a

<sup>62</sup> Refer to the *Freedom of Information Act 1982* (Cth) s 11C. This provision is not to commence until 6 months after s 3 of the *Australian Information Commissioner Act 2010* (Cth) commences (scheduled 1 May 2011).

<sup>63</sup> For example, if it was thought necessary to conform to the three-step test of art 13 of the TRIPS Agreement.

<sup>64</sup> European Commission, *Green Paper - Copyright in the Knowledge Economy* (16 July 2008) <[http://ec.europa.eu/internal\\_market/copyright/copyright-info/copyright-info\\_en.htm#greenpaper](http://ec.europa.eu/internal_market/copyright/copyright-info/copyright-info_en.htm#greenpaper)>; Intellectual Property Office, *UK Government Response to European Commission's Green Paper – Copyright in the Knowledge Economy* (December 2008), [4,5] <<http://www.ipo.gov.uk/c-eupaper.pdf>>.

<sup>65</sup> Refer, for example, Australian Government, Department of Innovation, Industry, Science and Research, *Venturous Australia – Building Strength in Innovation: (Report on the Review of the National Innovation System)* (2008), [95] <<http://www.innovation.gov.au/innovationreview/Pages/hom.aspx>>; Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions* (2009) [12], [13] <<http://www.dbdce.gov.au/?a=117295>>. United Kingdom: Office of Fair Trading, *The Commercial Use of Public Information (CUPI)* (2006) [1.4] <[http://www.offt.gov.uk/advice\\_and\\_resources/publications/reports/consumer-protection/oft861](http://www.offt.gov.uk/advice_and_resources/publications/reports/consumer-protection/oft861)>; United Kingdom: Cabinet Office, *The Power of Information: an Independent Review by Ed Mayo and Tom Steinberg* (2007) Office of Public Sector Information, [14-16], [26-38] <<http://www.opsi.gov.uk/advice/poi/index.htm>>.



formal procedure for the publication of unpublished orphan works. In so far as government copyright material is concerned and where access is granted to material in the open access period, governments can facilitate wider dissemination by the grant of creative commons or similar forms of open content licences for reproduction and publication of government material. This is consistent with the established principles of open government espoused in the *Archives Act 1983* (Cth) and the *Freedom of Information Act 1982* (Cth)<sup>67</sup> and the May 2010 announcement in the *Government Response to the Report of the Government 2.0 Taskforce*:

The Australian government will amend Australia's copyright policy to ensure that, at the time at which Commonwealth records become available for public access under the *Archives Act 1983*, works covered by Crown copyright are automatically licensed under an appropriate open attribution licence. The selection and use of an appropriate open attribution licence will remain the responsibility of agencies on a case-by-case basis. Agencies can use the National Government Information Licensing Framework (nGILF) tool to assist them making information licensing decisions.<sup>68</sup>

This is a matter of policy and requires no legislative amendment. Moreover policy may be implemented through open content licences to take into account the different interests of government in a diverse range of government material and may be adjusted expeditiously in the light of changes in government activities and priorities. In particular, while access to government works is facilitated by div 5 of pt III of the *Copyright Act 1968* (Cth) and ss 31, 3(7) and 57 of the *Archives Act 1983* (Cth), open content licences can facilitate the re-use of published as well as unpublished government material held by archives and libraries by persons accessing those works.

While it is commonly argued government ownership of copyright impedes access to government information, open content attribution licensing conveniently identifies the source and ownership of information and enables a level of assuredness about the re-use of that information. In particular, material in the public domain may be not sourced and may in itself become the subject of third party ownership claims whether in the published edition or in the edited form of the material.<sup>69</sup> Further, such licensing can provide some control over the integrity of material when it is disseminated so that users receive it in its original, unaltered form and as a consequence can place appropriate reliance on it.<sup>70</sup>

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<sup>66</sup> Refer to the *Copyright Act 1968* (Cth) ss 51, 52.

<sup>67</sup> Refer A Fitzgerald and K Pappalardo, *Report to the Government 2.0 Taskforce: Project 4 Copyright Law and Intellectual Property* (Dec 2009), [16]-[18] <<http://gov2.net.au/projects/>>, where the authors argue that the government's exercise of copyright should be consistent with established policy on open access to, and reuse of, public sector information.

<sup>68</sup> Australia: Department of Finance and Deregulation, *Government Response to the Report of the Government 2.0 Taskforce* (May 2010), [10] <<http://www.finance.gov.au/publications/govresponse20report/doc/Government-Response-to-Gov-2-0-Report.pdf>>.

<sup>69</sup> The dissemination of federal US legislation and case law is dominated by private suppliers who strongly assert copyright in their marked up versions of these laws.

<sup>70</sup> Parliament of Victoria, Economic Development and Infrastructure Committee, *Inquiry into Improving Access to Victorian Public Sector Information and Data: Public Hearings and Transcripts*, (12 August 2008), 9 <[http://www.parliament.vic.gov.au/archive/edic/inquiries/access\\_to\\_PSI/transcripts/EDIC\\_080812\\_A\\_Fitzgerald.pdf](http://www.parliament.vic.gov.au/archive/edic/inquiries/access_to_PSI/transcripts/EDIC_080812_A_Fitzgerald.pdf)>.

An open content attribution licence for government information may however be limited to actions for infringement of copyright. It is questionable whether the protection afforded by s 57 of the *Archives Act 1983* (Cth) to protect the government and its officers from actions for defamation and breach of confidence should extend further to protect persons who wish to communicate or publish government copyright material more widely. While it is not likely there would be a basis for an action for breach of confidence for the publication of unpublished government material given the age of open access material, that may not be the case with an action for defamation and if such an action might arise it would seem equitable for it to be the responsibility of the publisher and not the government. That is, it should be the responsibility of the person publishing or communicating the accessed information to the public.

## B *Access and Information Management*

While the economic value of information in the possession of government is likely to be higher for current or recent material than material in archives, ultimately what is common and important in the achievement of access and better, accountable government is good record-keeping, and the identification, coordination and management of records by government.

Record-keeping is an integral part of information management and is its a critical first step. Its importance is reinforced by the Australian Standard on Records Management:

Records contain information that is a valuable resource and an important business asset. A systematic approach to the management of records is essential for organisations and society to protect and preserve records as evidence of actions. A records management system results in a source of information about business activities that can support subsequent activities and business decisions, as well as ensuring accountability to present and future stakeholders.<sup>71</sup>

Under the *Archives Act 1983* (Cth) the National Archives of Australia issues guidelines and principles for record-keeping, but that body has no coercive powers over government agencies, and responsibility for each agency's conformance with its guidelines rests on the Chief Executive Officer of the agency.

In its 1998 review of the *Archives Act 1983* (Cth), the Australian Law Reform Commission pointed to the 'parlous state of recordkeeping' in many Commonwealth agencies. Since then there have been a number of reviews by the Commonwealth Auditor-General on recording-keeping in Commonwealth organisations. Two expressed concern about the non-capture of records<sup>72</sup> and the failure of physical records to be kept in compliance with National Archives standards, and the third, in 2006, concluded:

20. The audit also found that improvements were required in each of the entity's electronic and paper based recordkeeping practices. This included, in particular, the need to develop further guidance on circumstances where records are created, received and maintained by the entity having regard to its legal and business requirements.

<sup>71</sup> Standards Australia, *Australian Standard for Records Management AS ISO 15489* (2002) 1, 4.

<sup>72</sup> The first audit was Australia: Australian National Audit Office, *Recordkeeping, Audit Report No 45 2001-02* (1 May 2002) <<http://www.anao.gov.au/director/publications/auditreports/2003-2004.cfm>>; the second was *Recordkeeping in Large Commonwealth Organisations, Audit Report No 7 2003-04* (24 September 2003) <<http://www.anao.gov.au/director/publications/auditreports/2003-2004.cfm>>.

21. The ANAO considered that entities needed to give ongoing, and in some cases, increased commitment to meeting their recordkeeping responsibilities. This is particularly the case for those records that are created electronically, including records held in electronic systems.<sup>73</sup>

While the *Archives Act 1983* (Cth) defines a 'record' to include a document in electronic form,<sup>74</sup> most Commonwealth agency files are still paper-based, that is, most Commonwealth agencies are still printing to file.<sup>75</sup> In an electronic environment that poses risks to good record-keeping, simply because it is reliant on the business area's full and faithful observance of that manual task. In addition, the increasing use of web-based records and electronic interactive sites by agencies of government such as blogs,<sup>76</sup> to promote community engagement suggests the classification and appraisal of records needs to be carefully worked through by agencies with training and other systemic approaches to ensure the intelligent appraisal and retention of agency records in this format. One particular concern is that more web-based information is likely to be ephemeral and hard copy equivalents of that information may not be available.

The present use of different digital proprietary record-keeping systems by government agencies and the need to convert them to long term archival format, coupled with the need to translate them to different formats as technology changes, pose not simply immediate and medium term preservation needs, but more substantial and costly ongoing preservation challenges than the use of the vellum, parchment or non-acidic paper based media of the past. This in turn raises data storage and management issues for government to overcome the impact of technological redundancy.

Another concern for the National Archives is that records generated by government agencies using third party sites for the purposes of collaboration, service delivery or information dissemination may not be captured as Commonwealth records. This suggests that the definition of record in the *Archives Act 1983* (Cth) be widened along the lines recommended in the *Report of the Government 2.0 Taskforce* to encompass 'any information created or received by the Commonwealth in the course of performing Commonwealth business.'<sup>77</sup> Unless valuable information in electronic form is preserved it will not be accessible to future generations.

Archives New Zealand (as well as government archival institutions in most Australian states) has standard-setting powers, with which agencies are bound to comply.<sup>78</sup>

<sup>73</sup> Australia: Australian National Audit Office, *Recordkeeping Including the Management of Electronic Records, Audit Report No 6 2006-07* (12 October 2006), Summary and Key Findings [18] <<http://www.anao.gov.au/director/publications/auditreports/2006-2007.cfm>>.

<sup>74</sup> **Record** means a document, or an object, in any form (including any electronic form) that is, or has been, kept by reason of:

- (a) any information or matter that it contains or that can be obtained from it; or
- (b) its connection with any event, person, circumstance or thing (*Archives Act 1983* (Cth) s 3).

<sup>75</sup> Interview with Messrs Paul Dalglish and Adrian Cunningham (National Archives of Australia, 6 August 2010).

<sup>76</sup> For example, Australia: AGIMO, *Government 2.0 Taskforce* (5 May 2010) <<http://gov2.net.au/>>; and Department of Finance and Deregulation, *AGIMO blog* (5 May 2010) <<http://agimo.govspace.gov.au/2010/05/05/now-for-the-main-event-you/>>.

<sup>77</sup> Australia: AGIMO, *Engage: Getting on with Government 2.0: Report of the Government 2.0 Taskforce* (11 April 2010), 73 <<http://gov2.net.au/report/>>.

<sup>78</sup> Refer to the *Public Records Act 2005* (NZ) ss 17-18, 27, 29, 32, 61-2; and, for example the *Public Records Act 2002* (Qld) ss 24, 46-8, 56.

However there are no similar provisions in the *Archives Act 1983* (Cth) and the National Archives of Australia simply consults with Commonwealth agencies on their compliance under the Act. If there are continuing failures to meet record-keeping responsibilities by Commonwealth agencies, more regular audits conducted by the Commonwealth Auditor-General and a 'name and shame' sanction of reporting to Parliament, could first be considered. If this is less than effective, the interests of promoting an open and accountable government and of preserving national culture and heritage may require the establishment of a compliance monitoring and enforcement arm in the National Archives and the inclusion of an offence provision in the *Archives Act 1983* (Cth) to improve compliance with archival standards.<sup>79</sup> In the deepest sense what is needed is an inculcation of the value of good record-keeping amongst all agency personnel.

It is also important that that government identifies and coordinates access to all its public sector information, as the *Government Response to the Report of the Government 2.0 Taskforce* points out,<sup>80</sup> in order to accelerate the opportunity to achieve a more open, accountable, responsive and efficient government through Web 2.0 technology. This is important for all agencies of government for current and recent records and for those agencies and the National Archives for archival records.

#### IV CONCLUSION

Existing laws and practices dealing with accessing and re-using copyright government records should be reviewed in the light of further moves to openness of government and technological changes in the way we access, create and communicate works. Technology now enables greater interaction and greater sharing of information with and within government. Interaction with the community and the sharing of information with the public aids democratic values and has wider cultural, social and economic benefits, and the sharing of information within agencies and between governments provides governments at all levels with improved coordination and effectiveness.<sup>81</sup>

A key element of sound modern public administration and democratic accountability lies in the proper recording and preservation of, and the giving of public access to, the business of government. To the extent that this element is not realised these goals are diminished.

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<sup>79</sup> For example, similar to that for the unauthorised destruction of archives (*Archives Act 1983* (Cth) s 24).

<sup>80</sup> Department of Finance and Deregulation. *Response to the Report of the Government 2.0 Taskforce*, above n 68, [11].

<sup>81</sup> Australia: Department of Finance and Deregulation (AGIMO), *National Government Information Sharing Strategy: Unlocking Government Information Assets to Benefit the Broader Community* (August 2009), [7], [2.4.2] <<http://www.finance.gov.au/publications/national-government-information-sharing-strategy/docs/ngiss.pdf>>.