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Open Source and the Public Sector:
Challenges in the Development and Implementation of Policy and Law[†]
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Introduction

On 10 December 2003, the ACT Legislative Assembly passed the *Government Procurement (Principles) Guideline Amendment Act 2003*, regarding the use of open source software by ACT government entities.[1] The new Act requires ACT government entities to consider open source software in their IT procurement activities, and to avoid procuring software:

- that does not comply with open or ISO standards; or

- for which support or maintenance is provided only by a software vendor who exercises exclusive control over its sale or distribution.

The ACT Act parallels the introduction by the Australian Democrats of similar Bills in the Commonwealth Senate and the South Australian upper house. Legislation has also been foreshadowed in New South Wales.

Notwithstanding the passage of the ACT Act:

- the analogous Bill proposed for South Australia has failed to pass on the two occasions on which that legislature has had opportunity to consider it (and the Government's proposal of a new procurement framework in that State makes the passage of this Bill even more unlikely); and

- the analogous Bill proposed for the Commonwealth is unlikely to pass in the absence of Federal government support.

Moreover, having regard to the specific provisions of the ACT Act and the procurement framework within which it operates, the immediate practical effects of the ACT Act might be limited. The significance (and intent) of these developments, however, is that they herald a move towards the legitimisation of open source as a development and licensing tool. Like it or not, there is likely to be increasing pressure on IT consultants and project leaders to consider the alternatives to proprietary software, particularly when advising in the public sector.

Summary

This paper:

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- begins with a very short description of open source licensing, in the sense discussed in the paper;

- summarises the South Australian, Commonwealth and ACT legislative proposals, and their rationale;

- describes the Australian and international policy experience in relation to open source software;

- suggests some lessons for the Australian experience arising from the international experience;

- evaluates the challenges in applying the South Australian, Commonwealth and ACT legislative proposals within their respective legislative procurement frameworks; and

- identifies some further policy/legal challenges to the rendering of a "level playing field" for open source software in Australian governments.

Some background… What is an open source licence?

In simple terms, an open source licence involves the provision of software (including the code) free of charge on condition that the recipient likewise makes the software and any modifications available to third parties free of charge if the recipient chooses to supply the software, or a derivative product, to a third party. The key feature of an open source licence will be the stipulation that the product may be resupplied to third parties, but only on condition that the third party accepts identical licence terms. In such circumstances, the licensee will be entering into a licence agreement with the original licensor.

A fuller description of the commonly accepted criteria for open source software is the "Open Source Definition" specified by **opensource.org**, the American oversight organisation for the open source movement. The latest version of the Open Source Definition (Version 1.9) contains the following 10 elements:[2]

> *"1. Free Redistribution*
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> *The license shall not restrict any party from selling or giving away the software as a component of an aggregate software distribution containing programs from several different sources. The license shall not require a royalty or other fee for such sale.*
>
> *2. Source Code*
>
> *The program must include source code, and must allow distribution in source code as well as compiled form. Where some form of a product is not distributed with source code, there must be a well-publicized means of obtaining the source code for no more than a reasonable reproduction cost preferably, downloading via the Internet without charge. The source code must be the preferred form in which a programmer would modify the program. Deliberately obfuscated source code is not allowed. Intermediate forms such as the output of a preprocessor or translator are not allowed.*
>
> *3. Derived Works*
>
> *The license must allow modifications and derived works, and must allow them to be distributed under the same terms as the license of the original software.*
>
> *4. Integrity of The Author's Source Code*
>
> *The license may restrict source-code from being distributed in modified form* only

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[2] http://www.opensource.org/docs/definition.php (last visited 9 December 2003).

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if the license allows the distribution of "patch files" with the source code for the purpose of modifying the program at build time. The license must explicitly permit distribution of software built from modified source code. The license may require derived works to carry a different name or version number from the original software.

5. No Discrimination Against Persons or Groups

The license must not discriminate against any person or group of persons.

6. No Discrimination Against Fields of Endeavor

The license must not restrict anyone from making use of the program in a specific field of endeavor. For example, it may not restrict the program from being used in a business, or from being used for genetic research.

7. Distribution of License

The rights attached to the program must apply to all to whom the program is redistributed without the need for execution of an additional license by those parties.

8. License Must Not Be Specific to a Product

The rights attached to the program must not depend on the program's being part of a particular software distribution. If the program is extracted from that distribution and used or distributed within the terms of the program's license, all parties to whom the program is redistributed should have the same rights as those that are granted in conjunction with the original software distribution.

9. License Must Not Restrict Other Software

The license must not place restrictions on other software that is distributed along with the licensed software. For example, the license must not insist that all other programs distributed on the same medium must be open-source software.

10. License Must Be Technology-Neutral

No provision of the license may be predicated on any individual technology or style of interface."

Opensource.org has certified almost 50 licence forms as complying with the above definition of "open source".[3] The Free Software Foundation, another widely recognised promoter of the open source movement, lists many more licence forms described as "free software" licences[4] - some of these licences comply with all the elements of the above definition but many more do not.

The South Australian Bill

On 30 April 2003, the Hon. Ian Gilfillan introduced the *State Supply (Procurement of Software) Amendment Bill 2003* (SA) into the South Australian Legislative Council. In its original form, the Bill proposed a new section 17A of the *State Supply Act 1985* (SA), providing that:

"a public authority must, in making a decision about the procurement of computer software for its operations, have regard to the principle that, wherever practicable, a public authority should use open source software <u>in preference</u> to proprietary software." (emphasis added)

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[3] See http://www.opensource.org/licenses (last visited 9 December 2003).

[4] See http://www.fsf.org/licenses/license-list.html (last visited 9 December 2003).

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The original form of the Bill contained a broad definition of open source software, that appears to describe public domain software rather than open source software in the generally accepted industry sense. Open source software is not the same as public domain software. With the exception of certain minimum terms which might be implied on the reasoning adopted by the Federal Court in a 1996 decision on a "share ware licence",[5] the owner of public domain software does not purport to impose restrictions on who can use the software or the circumstances in which it may be distributed. Open source licences, on the other hand, whilst granting liberal rights of reproduction to the licensee, nevertheless impose conditions on the licensee's right to modify and distribute.

The point of confusion in the original Bill appears to have arisen because both open source and public domain software generally involve substantially lower upfront licensing costs than comparable proprietary software. By focussing on the upfront costs of acquisition, the original form of the Bill oversimplified the issues involved in introducing open source software into public sector IT environments. However, the non-financial conditions attached to open source software have more profound downstream effects on the further development of the software in question, affecting:

- the kinds of developers who will be induced or attracted to support or further develop the software;

- the degree of support or further development that will result, with direct consequences on the rate of change in the software; and

- the degree to which the software development will "fork" into different (and potentially incompatible) versions.

Following its introduction, the Bill was subjected to some criticism (see below). The Bill lapsed on 31 July 2003, but was re-introduced by the Democrats on 24 September 2003 in an amended form. Notably, the proposed section 17A was then amended to read:

"A public authority must, in making a decision about the procurement of computer software for its operations—

(a)   consider the procurement of open source software; and

(b)   as far as practicable, avoid the procurement of—

(i) software that does not comply with open standards; and

(ii) software for which support or maintenance is provided only by a person or body who has the right to exercise exclusive control over the sale or distribution of the software." (emphasis added)

Further, the definition of "open source software" was changed to refer to the Open Source Definition maintained by opensource.org (described above).

Nonetheless, on 3 December 2003, a majority (comprising both Labor and Liberal members) of the South Australian Legislative Council, voted against the South Australian Bill. In the debate preceding the vote, a member of the Labor Government stated:[6]

"The government does not object to the aim of the amendment, but believes that there are more effective mechanisms for ensuring that the government can use all effective available technology, including open source software.... the changes being proposed ... can be facilitated through procurement policy rather than

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[5] In *Trumpet Software Pty Ltd & Anor v OzEmail Pty Ltd & Ors* [1996] 560 FCA 1 (10 July 1996), available at http://www.austlii.edu.au.

[6] South Australia, *Parliamentary Debates*, Legislative Council, 3 December 2003 (the Hon. J. Gazzola, in debate on the *State Supply (Procurement of Software) Amendment Bill*).

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through legislation. The outcome will be the same as that proposed by the Hon. Mr Gilfillan. It is not necessary to legislate for specific products or services that can or should be used by government, nor is legislation deemed appropriate or a practical mechanism to mandate particular goods or services."

The South Australian (Labor) government therefore proposed, as an alternative to supporting the Democrats' Bill, a reform of the South Australian legislative procurement framework to facilitate decisions regarding open source to be made as a matter of policy rather than under legislation (see below for a particular analysis of the proposed legislative changes).

Interestingly, the Liberals agreed in the debates with the Labor Government regarding the lack of necessity for a legislative amendment like the Democrats' Bill:[7]

"The reasons why we will not support this bill is that we do not believe that a strong case has been made by the mover for the necessity for legislative intervention in what is essentially a procurement policy. As the Hon. John Gazzola said when speaking on behalf of the government, "The government is adopting procurement policies through measures other than legislation.' We believe that it is inappropriate to put procurement policies of this kind into the strictures and sort of straitjacket embodied in this bill."

The Commonwealth Bill

On 18 September 2003, the Australian Democrats also introduced into the Senate a Bill dealing with open source software. The *Financial Management and Accountability (Anti-Restrictive Software Practices) Amendment Bill 2003* (Cth) purports to require all Commonwealth government agencies, wherever practicable, to procure and use open source software in preference to proprietary software.

The Commonwealth Bill follows the content of the Democrats' original South Australian Bill, rather than the amended, re-introduced version. So, for instance:

- the definition of "open source software" used in the Commonwealth Bill is the same broad (non-standard) definition used in the original South Australian Bill; and

- the Commonwealth Bill requires a "preference" for procurement of open source software wherever practicable, just like the original South Australian Bill.

However, the Commonwealth Bill also contains some additional disclosure and reporting provisions requiring Commonwealth agencies to report on all occasions on which they procure proprietary software instead of open source software (within the Bill's definition of that term) and an explanation of matters such as why proprietary software was instead procured and the person who advised for it to be procured.

The ACT Act

On 27 August 2003, Democrat Ms Roslyn Dundas introduced the original form of the *Government Procurement (Principles) Guideline Amendment Bill 2003* (ACT) into the ACT Legislative Assembly. The original form of the ACT Bill was substantially the same as the Commonwealth Bill and the original form of the South Australian Bill. So, for instance, it also required open source software (broadly defined in a non-standard way) to be preferred over proprietary software, wherever practicable.

As noted at the beginning of this paper, the ACT Bill was enacted on 10 December 2003 as the *Government Procurement (Principles) Guideline Amendment Act 2003* (ACT). In

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[7] South Australia, *Parliamentary Debates*, Legislative Council, 3 December 2003 (the Hon. R.D. Lawson, in debate on the *State Supply (Procurement of Software) Amendment Bill*).

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its enacted form, the legislation is significantly different from the original, following amendments moved by the Democrats to bring it closer to the amended form of the South Australian Bill, and further amendments by the Liberals and an independent. In summary, the ACT Bill introduces a new clause 6A to the *Government Procurement (Principles) Guideline 2002 (No 2) DI2002-58* (ACT), that:

- changes "preference" for open source software procurement to mere "consideration" of it in the procurement process;

- ensures that the definition of "open source software" used is the one published by the Open Source Initiative in force from time to time;

- adds an explicit requirement to avoid procuring software that does not comply with open or ISO standards, or for which support or maintenance is provided only by a software vendor who exercises exclusive control over its sale or distribution; and

- imposes a three year "sunset clause" expiry period on the new clause 6A.

Rationale for legislative proposals

The general rationale given by the Democrats for their legislative proposals is that a small number of (out-of-jurisdiction) software manufacturers are considered to have a disproportionate and restrictive hold on the supply, use and development of software within the Australian public sector. Introducing the Commonwealth Bill, Senator Greig complained that:[8]

> *"the closed shop that exists at the moment means that those departments currently saving data in proprietary file formats, such as Microsoft's Word software, are risking locking themselves into using that software indefinitely"*

and that:

> *"control over Australian data should rest with Australia and not with the shareholders of the company that is owned, operated and controlled offshore".*

Similarly, on the day prior to the passage of the ACT Bill, Ms Dundas, who introduced that Bill, reportedly stated that:

> *"if this bill passes, it will encourage open source software producers in the ACT to develop new products suitable for use by the government, because they will know they have a reasonable chance of winning software tenders".[9]*

The critics of these Bills have responded by asserting that governments should (at most) aim to promote "neutral public procurement rules that allow governments to select software that offers them the greatest value",[10] rather than mandating a preference for software based on its development or licensing methodology.

The amendments in the ACT Act and the South Australian Bill appear to be addressed at some of the criticisms levelled at the original forms of those Bills. Thus, the amended provisions no longer expresses a "preference" for idiosyncratically defined categories of

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[8] Commonwealth, *Parliamentary Debates*, Senate, 18 September 2003, 15521 (Senator Greig (Western Australia)).

[9] S Varghese, "ACT set to adopt open source bill", *Sydney Morning Herald*, 10 December 2003.

[10] Microsoft, *Government and Policy*, available at http://www.microsoft.com/resources/sharedsource/Government/default.mspx. See also the Initiative for Software Choice (ISC) homepage, available at http://www.softwarechoice.org, which describes the ISC as "a global initiative promoting neutral government procurement, standards and public R&D policies for software".

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software, and now merely requires "consideration" of an industry-standard category of open source software and practicable avoidance of non-open standards software. Nonetheless, do the amendments adequately answer all those criticisms? Further, apart from those criticisms, is legislation– in either the original form or the amended form of the legislative proposals – the (or an) appropriate instrument for promotion of open source software in the public sector?

Other Australian policy experience

At the Commonwealth level, the National Office for the Information Economy (NOIE) has reportedly stated that "The Australian Government's position on open source is benevolent neutrality".[11] Speaking at a conference recently held in Sydney, the General Manager of Information Strategy and Governance, NOIE stated that although there were opportunities to use open source in Federal government agencies, the "government will not legislate on open source or any other sort of software".[12] Consistent with this approach, NOIE maintains resources focussing on open source software and is engaged in relevant research,[13] and has focussed its efforts to date on raising awareness of open source software issues in Commonwealth agencies (such as through seminar presentations and by showcasing of the open source software experiences of individual agencies) so as to facilitate agencies making their own individual assessments of open source technology in the context of particular projects.[14]

The New South Wales[15] and Victorian[16] governments are currently engaged in open source use and policy reviews, but no results of those reviews have yet been circulated. The Queensland Minister for Innovation and the Information Economy is reported as stating that the Queensland government "did not intend to not encourage departments or agencies to consider open-source technology, but would instead let them make decisions "on the technical merits of the available options ... There's certainly no mandate that we do or don't have an open-source regime.".[17]

The South Australian government is currently engaged in formulating a policy statement on open source software, assisted by research by the IT Council for South Australia.[18] On 3 December 2003, in response to a Parliamentary question, the Minister for

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[11] Kelly Mills, "Canberra won't back open move", *The Australian*, 9 September 2003. See also Nadia Cameron, "Government takes cautionary stance on open source software", *Computerworld*, 3 September 2003, reporting on the same comments by NOIE.

[12] Ibid.

[13] Conversation by author with NOIE personnel, 10 December 2003.

[14] See "NOIE Open Source Software webpages at http://www.noie.gov.au/projects/egovernment/Better_Infrastructure/OSS/Index.htm ("This NOIE site is designed around the concept of providing and sharing information about Open Source Software.").

[15] See "Open Source Software", at NSW Department of Commerce, Office of Information and Communications Technology website, at http://www.oit.nsw.gov.au/pages/1.7.news.htm#ope.

[16] A Victorian government representative was recently reported as saying, "The Victorian Government has recently launched an open-source policy development program ... The program will investigate the existing use of open-source software within State Government departments, and will attempt to quantify potential savings the platforms and applications may deliver.": see Nathan Cochrane, "Open source group poised to white-ant Microsoft", *Sydney Morning Herald*, 25 November 2003.

[17] David Crowe, "No Mandate on Open Source, Says Qld", *Australian Financial Review*, 22 July 2003.

[18] IT Council for South Australia, *Position Statement on Open Source Software by the IT Council for South Australia & Input to South Australian Government Policy Statement* (draft provided to author by Denis Wall, IT Council for South Australia).

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Administrative Services stated that:[19]

> *"Open source software is increasingly providing realistic alternatives to this package software. Regardless of whether it is open source or proprietary product, we will be focusing on the total cost of the product, that is, the cost over the whole of the life of the product. The other area of our focus is in major applications. Most software is adapted or developed to meet the specific needs of government, and this is where open standards provide the basis for the development of software that can be shared and reused across government agencies in a way which can make real value for money opportunities for government. Open source licensing can enable the sharing of code developed for agencies, and it supports our government's vision for having a seamless capacity to deliver services for all South Australians.*
>
> *In support of this, the government is undertaking four separate approaches. The first is a trial to demonstrate opportunities for open source software in the education and corporate government environments. The second is a survey of open source software to see what is out there in terms of what is capable of being offered for the South Australian public sector. <u>The third is to develop a consolidated government approach to the whole issue of open source software.</u> The final approach is collaborating with other governments to hear and find out what is going on interstate. Open source software and open standards will continue to develop and mature, and this government will be taking a considered approach to enjoying the benefits that they may give us in achieving our core government objectives." (emphasis added)*

The Minister's comments indicate that, at least in South Australia, the Government is not averse to the development of a whole-of-government approach to open source software, particularly by rationalising it within the broad context of the general procurement framework. In this context, the South Australian government has thus introduced new procurement legislation that appears to form a framework within which the above approaches to open source software can be developed into procurement policy directions and statements (see below for detailed consideration of the proposed legislation).

What about International Developments?

It is important to note that the approaches to promotion of open source in the Australian public sector taken in the legislative proposals described above are by no means alone in the world. Significantly, the policy proposals have already been suggested, and in some cases adopted, by the public sector in other countries. Key instances that bear comparison to the Australian public sector environment are as follows:

The United States – Federal level

In October 2000, the President's Information Technology Advisory Committee (PITAC) had issued a report[20] recommending that:

- the US Federal Government should aggressively encourage the development of open source software for high end computing;

- a "level playing field" be created within the government procurement process to facilitate open source development; and

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[19] South Australia, *Parliamentary Debates.* Legislative Assembly, 3 December 2003, (the Hon. J.W. Weatherill, Minister for Administrative Services, in response to a question relating to Information Communication Technology).

[20] PITAC Report to President Clinton, "Developing Open Source Software to Advance High End Computing", October 2000, available at http://www.ccic.gov/pubs/pitac/pres-oss-11sep00.pdf.

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- an analysis of open source licensing agreements was needed, with an ultimate goal of agreeing upon a single common licensing agreement for open source software applications.

However, with a change of the US Federal government, the events and aftermath of 11 September 2001 and growing concerns voiced by vendors of proprietary software and their representatives, there appears to have been no direct whole-of-government policy outcome of the PITAC report recommendations. More recently, the US State Department responded on 29 May 2003 to a statement in the March 21 2003 "Draft Declaration and Action Plan" for the UN-organised World Summit for the Information Society (WSIS), on open source and open standards,[21] with the following:[22]

> *"It is important to draw a distinction between open source software and open standards. The WSIS documents currently discuss the two issues in a manner that creates confusion. Open standards generally refer to technical standards or specifications that are developed through a well-defined process. Open standards can improve interoperability and may facilitate interactions ranging from information exchange to international trade, thus fostering market competition. Because of these benefits, the use of open standards is encouraged whenever practicable. Open source software is a term used to describe software that is intended to be openly distributable, under a variety of different licensing arrangements. The United States recognizes that open source software can contribute to increased access and diversity of choice but it is only one of many possible models for the development of software. The WSIS documents should not promote one over the other (i.e. open source vs. proprietary), but should instead foster the availability of diverse alternatives and the freedom to choose among those alternatives. In short, the WSIS should remain neutral with respect to different technologies and modes of technology development."[23]*

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[21] The 21 March 2003 version of the WSIS Draft Declaration of Principles stated:

> "24. **Open standards and open source**: Open standards and open source software are basic elements in the development of a more affordable access to ICTs.
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> ...
>
> 42. **Standardization**: Standardization is one of the essential building blocks of the Information Society. International policy dialogue at global, regional and sub-regional levels should promote the identification and application of interoperable standards, the transfer of know-how and the provision of technical assistance. The development and use of open standards are particularly important for developing countries. In this regard the increased use of open-source software can contribute greatly to increasing access and to adding to the diversity of choice of software for consumers."

[22] United States of America Comments on the March 21st Version of the WSIS Draft Declaration and Action Plan (29 May 2003), available at http://www.state.gov/e/eb/rls/othr/21083.htm.

[23] The official US comments bear a marked resemblance to the International Intellectual Property Alliance Response to State Department's Request for Comments on WSIS Documents (1 May 2003), available at http://www.state.gov/e/eb/rls/othr/20649.htm, which notes that:

> " an open standard is a technical specification, whereas "open source" refers to a specific method of software development which, like any other software development model, may or may not implement open standards. Standards do not require either proprietary or open source software for their adoption or utility, and in some cases may combine technology or intellectual property developed under both software development models. When these standards are open and available to all through reasonable and non-discriminatory licensing, they help all developers create products that interoperate with each other."

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Nonetheless, Federal agencies such as the US Department of Agriculture, the Federal Aviation Administration, the US Department of Energy and Defence agencies have for some years been quietly implementing and promoting open source software development, procurement and distribution practices within their portfolio responsibilities. In recent times, these open source initiatives have become the subject of systematic consideration and analysis within their organisations, leading to the development of policies that specifically attempt to rationalise open source software deployment within the context of that agency's objectives, operations and environment. Two particular examples are worth noting:

1.   US Department of Energy (November 2003)

The Assistant General Counsel for Technology Transfer and Intellectual Property for the US Department of Energy recently presented a comprehensive position on the legal and business issues arising from open source software for his agency, having studied the issue since 2000.[24] Amongst other things, he valuably notes that:[25]

- •   open source issues arise for his agency from two general sources:

  - •   dissemination of software produced with government funding; and

  - •   use by the government and its contractors of software produced by others.

- •   Governments have three basic dissemination choices to make for government funded software:

  - •   dedication to the public domain, so that there are no conditions attached to its use at all (ie "No Rights Reserved");

In the final version of the Declaration of Principles adopted by WSIS on 12 December 2003 (available at http://www.itu.int/wsis), the previous references to open source and standards have been replaced with the following:

"27. Access to information and knowledge can be promoted by increasing awareness among all stakeholders of the possibilities offered by different software models, including proprietary, open-source and free software, in order to increase competition, access by users, diversity of choice, and to enable all users to develop solutions which best meet their requirements. Affordable access to software should be considered as an important component of a truly inclusive Information Society.

...

44. Standardization is one of the essential building blocks of the Information Society. There should be particular emphasis on the development and adoption of international standards. The development and use of open, interoperable, non-discriminatory and demand-driven standards that take into account needs of users and consumers is a basic element for the development and greater diffusion of ICTs and more affordable access to them, particularly in developing countries. International standards aim to create an environment where consumers can access services worldwide regardless of underlying technology."

The Australian government has endorsed the above Declaration of Principles: see http://www.dcita.gov.au/Article/0,,0_1-2_1-4_117540,00.html and http://www.noie.gov.au/projects/access/Connecting_Communities/wsis.htm.

[24] See, for instance, the Supercomputing Conference 2003 panel session held in late-November 2003 in Phoenix, Arizona, referred to at http://www.sc-conference.org/sc2003/inter_cal/inter_cal_detail.php?eventid=10729.

[25] The following notes are taken from his slide presentation, available at http://www.hpcc.gov/iwg/20030611_gottlieb_os.pdf.

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- under restrictive, royalty bearing licences, like those traditionally used in commercial "technology transfer" arrangements (ie "All Rights Reserved"); or

- as open source software (ie "Some Rights Reserved").

- When procuring use of software produced by others, the agency must (amongst other things):

  - assess overall program/project impact of the procurement; and

  - assess the impact of future licensing plans by the agency, including redistribution of the original or derived works.

- In some areas of high performance and scientific computing, there is now an interested, worldwide community of qualified developers of open source software, so that it makes sense to make government funded software in those areas available on open source software licence terms – "now we're just like everyone else!".

- On the other hand, in other high performance areas (such as bioinformatics), there are views that there should be no government requirement of open source distribution for government funded software for those areas, because the complexity inherent in such software dictates that no single distribution model is appropriate for all projects.

2. US Department of Defense (January-May 2003)

In January 2003, the MITRE Corporation released a 168 page report prepared by it for the Defense Information Systems Agency, regarding use of Free and Open-Source Software (FOSS) in the US Department of Defense (DOD).[26] Amongst other things, the report identified at least 5 possible policy approaches to FOSS in DOD, being:

Option 1:   Ban all DOD use of FOSS;

Option 2:   Limbo Status (ie, neither approve nor disapprove it, as per the then current *de facto* policy of DOD towards FOSS);

Option 3:   Selective DOD approval of specified FOSS (eg only well-known and well-established products such as Apache, OpenBSD and Red Hat Linux);

Option 4:   DOD approval for use of FOSS in 4 general areas (Infrastructure Support, Software Development, Security and Research) by providing:

  (a)   broad guidelines for selecting FOSS products in each general area; and

  (b)   specific lists of pre-approved FOSS products;

Option 5:   Advocating FOSS Products (ie, forcing DOD use of FOSS products)

The MITRE report recommended that DOD take the following three policy-level actions to help promote optimum DOD use of FOSS:

- Create a "Generally Recognised as Safe" list of FOSS applications that are

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[26] The full report is available at http://www.egovos.org/pdf/dodfoss.pdf. A slide presentation summary by Mitre of the report is available at http://www.web-services.gov/UACEW_FOSS.ppt. The following points are extracted from both the full report and the Mitre summary.

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> commercially supported, widely used and have proven track records of security and reliability;

- Develop broader generic policies (as well as specific Infrastructure, Development, Security and Research policies) to promote broader, more effective use of FOSS, and to encourage commercial products that work well with FOSS (such as Windows Services for UNIX; and

- Encourage use of FOSS to promote product diversity, through acquisition diversity (aimed at reducing cost and security risks) and architectural diversity (aimed at reducing the risk of catastrophic cyber attacks arising from single product deployment).

The MITRE report recommendations have not (yet) been adopted. Instead, DOD has since issued a Memorandum (in May 2003) reiterating its current (de facto) policy preserving the "Limbo Status" of FOSS within DOD but providing additional guidance on the acquisition, use and development of FOSS within DOD.[27] The Memorandum specifically requires that:

> *DoD Components acquiring, using or developing OSS must ensure that the OSS complies with the same DoD policies that govern Commercial off the Shelf (COTS) and Government off the Shelf (GOTS) software.....*
>
> *...*
>
> *DoD Components acquiring, using, or developing OSS must comply with all lawful licensing requirements. As licensing provisions may be complex, the DoD Components are strongly encouraged to consult their legal counsel to ensure that the legal implications of the particular license are fully understood.*

The United States – State level

On 24 November 2003, the Commonwealth of Massachusetts released a public review draft of its " Enterprise Open Standards and Open Source Policy".[28] Importantly, the draft policy distinguishes between "open source" and "open standards", and has at its core the following requirements:

- All prospective IT investments are to comply with open standards referenced in the current version of the Commonwealth's Enterprise Technology Reference Model.

- Existing IT systems are to be reviewed for open standards compatibility and will be enhanced to achieve open standards compatibility where appropriate. Open standards solutions will be selected when these systems need major enhancements or retirement.

- All prospective IT investments are to consider both open standards compliant open source and proprietary software as part of a best value evaluation of potential solutions. A best value evaluation should consider at a minimum total cost of ownership, fit with identified business requirements, reliability, performance, scalability, security, maintenance requirements, legal risks, and ease of customization.

- For existing proprietary IT systems, open source alternatives are to be considered as part of a best value evaluation of potential solutions when these systems need major enhancements or retirement.

Prior to the Massachusetts draft policy's release, critics of "open source software

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[27] See DOD Memorandum, "Open Source Software (OSS) in the Department of Defense (DOD)", 28 May 2003, available at http://iase.disa.mil/oss-in-dodmemo.pdf.

[28] Available at http://www.state.ma.us/itd/openstandards.htm.

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mandates" had expressed concern that the draft policy would express a preference for "open source software" per se.[29] The draft policy attempts to address this concern by requiring both open source and proprietary software to be open standards compliant before they will be considered, and by subjecting both open source and proprietary IT systems to a general test of "best value evaluation of potential solutions".

Legislative proposals in other US States - such as Texas, California, Delaware and Oregon – appear to have stagnated. At least one of those proposals goes beyond "preference" for open source procurement and actually mandates use of open source software;[30] other proposals appear to have been similar to the Massachusetts draft policy, in avoiding stating a "preference" for open source software and instead attempting to establish a "level playing field" for open source and proprietary software procurement, based on "best value for money" considerations.[31]

The United Kingdom

In July-August 2002, the Office of the e-Envoy issued the UK Government's Open Source Software Policy, which has as its fundamental policy a commitment to create "a level playing field" between open source software from a range of suppliers and proprietary software within UK Government procurement.[32] More specifically, the UK Policy states that:

- UK Government will consider OSS solutions alongside proprietary ones in IT procurements. Contracts will be awarded on a value for money basis.

- UK Government will only use products for interoperability that support open standards and specifications in all future IT developments.

- UK Government will seek to avoid lock-in to proprietary IT products and services.

- UK Government will consider obtaining full rights to bespoke software code or customisations of COTS (Commercial Off The Shelf) software it procures wherever this achieves best value for money.

- UK Government will explore further the possibilities of using OSS as the default exploitation route for Government funded R&D software.

The above policy needs to be read in conjunction with:

(1)   The UK Government's e-Government Interoperability Framework (e-GIF),[33]

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[29] See http://www.softwarechoice.org/download_files/MassGovLetter.pdf (letter by the Initiative for Software Choice to the Governor of Massachusetts) and http://www.softwarechoice.org/download_files/MassKrissLtrFinal.pdf (letter by the Initiative for Software Choice to the agency Secretary).

[30] See the California proposal (posted at http://www.redhat.com/opensourcenow/bill_opensource.html) that was never introduced into the Legislature.

[31] See for instance, the Texas Bill (SB 1579), available at http://www.capitol.state.tx.us/cgi-bin/db2www/tlo/billhist/billhist.d2w/report?LEG=78&SESS=R&CHAMBER=S&BILLTYPE=B&BILLSUFFIX=01579, and the Oregon Bill (HB 2892), available at http://www.leg.state.or.us/03reg/measures/hb2800.dir/hb2892.intro.html, which are in similar terms to each other.

[32] See Office of the e-Envoy, "Open Source Software: Use within UK Government", available at http://www.e-envoy.gov.uk/Resources/FrameworksAndPolicy/fs/en.

[33] The latest available draft of e-GIF (April 2003, Version 5) is available at http://www.e-envoy.gov.uk/Resources/FrameworksAndPolicy/fs/en. A further version was due to be published in October

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> which mandates the general adoption of open standards and specifications in all UK public sector agencies; and

(2) European Commission's "eEurope 2005" initiative, which aims to facilitate European governmental interoperability at a technical level, through promotion of open source and open standards, [34] and specific initiatives under the auspices of its "Interchange of Data between Administrations" (IDA) program.[35] Most recently, IDA has published a set of Open Source Migration Guidelines[36] designed to help public administrators decide whether to migrate office applications, calendaring, e-mail and other standard applications to OSS and to describe, in broad technical terms, how such a migration could be carried out.

At the UK agency level, various agencies and local councils have participated and expressed interest in open source software procurement and development. So, for instance, the UK Defence Scientific Advisory Council (DSAC) is reported as recently issuing a report suggesting that open source should be the default mechanism for exploiting software research funded by the UK Ministry of Defense (although it appears that this suggestion has not so far been adopted).[37]

Japan

On 15 August 2003, the Ministry of Economy, Trade and Industry (METI) of Japan issued a 117 page "Investigation Report on the Current Utilisation Status and Introduction Guidelines of Open Source Software",[38] that:

- summarises the definition and background of open source software generally;

- summarises the background of open source software in Japan;

- identifies the actual situation and issues with respect to utilisation of open source software in Japan;

- identifies particular problems to be solved in the future with respect to open source software;

- sets out guidelines for examination of the introduction of open source software for general users, business users and developers;

- summarises and compares the various open source software licences; and

- specifically analyses legal issues with respect to the GPL.

More recently, METI has participated in China-Japan-Korea intergovernmental discussions to enhance collaboration for OSS development and deployment in those

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2003 but was not publicly available as at 9 December 2003.

[34] See the "eEurope 2005 Action Plan", available at http://europa.eu.int/information_society/eeurope/2005/all_about/action_plan/index_en.htm.

[35] See http://europa.eu.int/ISPO/ida/jsps/index.jsp?fuseAction=home.

[36] The IDA Open Source Migration Guidelines, 8 November 2003, available at http://europa.eu.int/ISPO/ida/jsps/index.jsp?fuseAction=showDocument&parent=news&documentID=1647 .

[37] See http://www.mod.uk/issues/dstis4/opensource.htm.

[38] METI press release for the report is available at http://www.meti.go.jp/kohosys/press/0004397/0/030815soft.htm (Japanese language only), and the report itself is available at http://www.meti.go.jp/kohosys/press/0004397/1/030815opensoft.pdf (Japanese language only). Partial (unauthorised) English translation on file with author.

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countries.[39] There therefore appears to be a clear policy in Japan for the promotion of open source software not only in government but in the wider Japanese business and consumer community.

Other Countries

In New Zealand, a March 2003 briefing paper from the Director of the E-Government Unit to the Minister of State Services recommended that although government agencies should be "encouraged to assess open source alternatives", the principles of "value for money" and "fitness for purpose" should "continue to underlie any software procurement decision."[40] The Associate IT Minister hinted in mid-October 2003 that the NZ government is reviewing its current IT procurement policies with a view to encouraging procurement of more local products and services,[41] leading to some speculation that promotion of open source software procurement might form part of the outcomes of that review.[42]

In South Africa, the National Advisory Council on Innovation and the Government Information Technology Officers' Council have conducted extensive research into the benefits of open source software in their public sector, resulting in a proposed strategy[43] that recommends (amongst other things):

- the avoidance of discrimination and prejudice in software procurement procedures, so that choices are based on merit, thus giving OSS and proprietary software (PS) equal opportunities to be selected;

- that open standards should be a prerequisite for all software development, thus contributing to the ease with which OSS can be implemented and adapted; and

- that where no inhibiting factors exist, the OSS model should be adopted for development of Government systems, and such systems should be developed to run on OSS platforms.

Again, however, no decision on this issue appears to have been made as yet by the South African government.

For sake of completeness, we should also note various more radical policy proposals by other governments, particularly those in less developed economies, to both mandate governmental use of open source software alternatives and to fund open source software development in competition with proprietary software.[44] These proposals appear to be less

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[39] See http://www.meti.go.jp/english/information/data/IT-policy/oss6.htm.

[40] See B Boyle, " Open source software: briefing to the Minister of State Services - March 2003", dated 4 March 2003, available at http://www.e-government.govt.nz/docs/open-source-200303/index.html.

[41] See http://www.computerworld.co.nz/news.nsf/UNID/9859BEF8AA80166ACC256DBF00174666?OpenDocument.

[42] See, for example, http://www.nzoss.org.nz/portal/modules.php?name=News&new_topic=8.

[43] "Using Open Source Software In The South African Government: A Proposed Strategy Compiled By The Government Information Technology Officers' Council" (16 January 2003), available at http://www.oss.gov.za/docs/OSS_Strategy_v3.pdf.

[44] See, for instance, the Asian initiatives profiled at the Asian Open Source Centre website at http://www.asiaosc.org; the African initiatives profiled at the Free Software and Open Source Foundation for Africa website at http://www.fossfa.org/tiki-index.php; and, Brazil's strategic plan for free software technical implementation, Guidelines, Objectives and Priority Actions, dated 2 October 2003 (available at http://www.funredes.org/mistica/english/cyberlibrary/participants/docuparti/PlanejamentoSWLivreAprovad oF_EN.pdf) and other South American (eg, Peru and Argentina) legislative initiatives.

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directly relevant to the Australian public sector environment, in that it appears that one or more of the following factors strongly influence adoption of open source-specific proposals in each of those cases:

- the relatively recent cultural acceptance of strong intellectual property protection for software, manifesting itself in a relative lack of deference to the concerns and interests of proprietary software vendors (for instance, by widespread software piracy not only in the private sector but also in the public sector)[45] – subscription to open source ideals enables governments in this position to simultaneously affirm an international commitment to intellectual property protection[46] and avoid over-commitment to (foreign) proprietary IT interests;

- significant difficulties in maintaining the probity and integrity of IT procurement processes[47] –procurement and internal development of open source software offers, publicly at least, the opportunity to sidestep some of the "probity perils" involved in procuring proprietary software;

- the relatively high economic burden (including but not limited to payment of development, licensing and support costs) for less developed economies of importing software;[48] and

- relatively high levels of nationalist resistance to foreign (particularly US) software vendor interests.[49]

Whilst it is instructive to note the substantive content of such other proposals, their applicability to and practicability within Australian government procurement conditions is arguably limited by the relative weakness of the above considerations in Australia and the relative maturity of our local procurement policy framework and practices (see below).

International lessons for the Australian experience?

It should be clear from the above survey of public sector policy developments at an international level that the original approach in the ACT and South Australian Bills, as replicated in the current Commonwealth Bill, represents only one of a number of possible policy options. Further, it is also apparent that this approach – preferment at a legislative level of "open source software" – has been adopted or recommended in only a relatively small number of instances.

Some might argue that the primary reason why the "preference" and "mandatory" policy options for open source software procurement have enjoyed such limited international success is because of the lobbying efforts of proprietary software vendors and their representatives.[50] A similar and related reason for the lack of success that has been put, is

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[45] See, for example, William P Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilisation*, (1995, Stanford University Press).

[46] Since open source software ultimately relies on an effective legal regime of contractual and intellectual property rights.

[47] This is not to say that Australian claims of actual or potential political interference in the probity of IT procurement are not made or given as reasons for corrective legislative action: see, for instance, the Second Reading Speech for the introduction of the South Australian *State Procurement Bill 2003* (SA).

[48] Again, this is not to say that high costs of licensing and support for (foreign-sourced) proprietary software are not customarily given in Australia as reasons for supporting corrective legislative action: see, for instance, the debates regarding introduction of the new ACT Act.

[49] Ibid.

[50] See note 10. See also responses by supporters of open source software such as the US-based Center of

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that these options relate to unfamiliar circumstances and novel subject matter, causing government officials discomfort in dealing with them:

> *"I think it might not be generally recognised that, although there may not be an overt and tangible policy which favours Microsoft and other proprietary products, the culture, generally, through government agencies and departments is to stay within the comfort zone."[51]*

Without dismissing the above arguments, it is worth noting that a substantive, underlying reason for the limited success to date of the "preference" and "mandatory" policy options overseas, in comparable governments and governmental agencies, might well be the ill-defined relationship between open source software promotion and procurement principles already well established in those places, notably (but not exclusively) the seemingly universal principle of "best value for money" and "fitness for purpose" procurement. Insofar as critics draw attention to existence of those established procurement principles and to the necessity for reconciling them with open source software promotional policies, they can hardly be faulted. Similarly, it might be expected that government officials responsible for procurement will be wary of claims for the advantages and benefits of open source software, to the extent that the relationship of open source software promotion to those established procurement principles remains murky.

It should come as no surprise, therefore, that the rhetorical strategies that have led to actual or recommended adoption of open source software policies in comparable international situations:[52]

- distinguish promotion of "open standards" from promotion of "open source software".

- try to explicitly establish a "level playing field" relationship between open source and proprietary software, by requiring mere "consideration" of (rather than "preference" for) open source software.

- argue for benchmark criteria perceived as "neutral" in order to set that "level playing field", specifically:

  - **technical benchmark criteria** of open standards and interoperability for software procurement (regardless of whether those open standards are achieved through proprietary software or open source software development/procurement); and

  - **business/financial benchmark criteria** of "best value for money" (regardless of whether that value for money is delivered through proprietary software or open source software development/procurement).

- generally acknowledge that it is currently necessary for individual agencies to consider, and tailor the application of, open source policy guidance for specific projects on a case-by-case basis.

As a starting point for considering the above rhetorical strategies within the Australian context, it is telling that the recent ACT Act adopts, expressly or implicitly, all of the above rhetorical strategies. The realisation of rhetorical strategy remains problematic. Significantly, the current procurement policies of the ACT and other Australian governments remain firmly wedded to an over-arching principle of "value for money",

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Open Source & Government, at http://www.egovos.org.

[51] The Hon. Ian Gilfallan, Second Reading Speech, 24 September 2003, introducing the *State Supply (Procurement of Software) Amendment Bill 2003* (SA).

[52] See particularly the references above to the DOD, DOE, Massachusetts and UK government positions.

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along with other apparently neutral principles such as management of risk and local industry development. Indeed, these core principles have a broader legislative procurement basis that needs to be explicitly factored into the analysis of open source policy development and implementation. The following brief survey of the legislative procurement frameworks for ACT, Commonwealth and South Australian illustrates that the translation by Australian government agencies of rhetorical strategy for procurement policy into practical implementation of procurement policy might well present a greater challenge than appears to have been previously acknowledged:

ACT procurement framework and considerations

For ACT government entities, the primary legislation governing their procurement activities is the *Government Procurement Act 2001* (ACT), which constitutes the Australian Capital Territory Government Procurement Board[53] and empowers the Board to make procurement guidelines about the procurement of goods, services and works by ACT government entities.[54] Relevantly, the *Government Procurement (Principles) Guideline 2002 (No 2) DI2002-58* (ACT) is the guideline made by the Board that sets out a set of procurement principles that an ACT government entity "must apply" in undertaking a procurement activity.[55] These procurement principles, set out in clause 6 of the Guideline, are:

(a)   value for money;

(b)   open and effective competition;

(c)   probity and ethical behaviour;

(d)   environmental sustainability;

(e)   local industry development; and

(f)   management of risk.

The requirements of the above procurement principles are further explained in the Guideline.[56]

From a legal draftsperson's perspective, the new ACT Act on open source software procurement[57] is curious in some respects. First, the only indication in the new ACT Act that the new clause 6A added by it is actually a "procurement principle" (like the above procurement principles) is the heading of clause 6A: "Principle about procurement of computer software". This is because clause 6A does not add a new procurement principle to the "laundry list" of procurement principles in clause 6 and does not state in itself that it is a "procurement principle" or even a "principle". Fortunately, other generally applicable ACT laws provide that the headings to a statutory instrument such as the Guideline are part of the instrument, so that they form part of the law created by the instrument.[58] Nonetheless, it is not entirely satisfactory that this important symbolic question – the status of clause 6A as a procurement principle –be determined so elliptically, and it would be clearer if clause 6 had also been amended to include reference

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[53] *Government Procurement Act 2001* (ACT), section 5.

[54] *Government Procurement Act 2001* (ACT), sections 6(c) and 7.

[55] *Government Procurement (Principles) Guideline 2002 (No 2) DI2002-58* (ACT), clause 6.

[56] *Government Procurement (Principles) Guideline 2002 (No 2) DI2002-58* (ACT), clauses 7 to 12.

[57] *Government Procurement (Principles) Guideline Amendment Act 2003* (ACT).

[58] *Legislation Act 2001* (ACT), section 126 (applying to headings inserted into a statutory instrument after 1 January 2000).

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to the content of new clause 6A.[59]

The above issue is not entirely a legally pedantic one, as it leads to a second, more important, issue: how do the new clause 6A "open source/open standards" provisions actually relate to the items on the clause 6 "laundry list"? How should an ACT government entity be "considering" open source/open standards software (under clause 6A) at the same time as it applies procurement criteria such as "value for money", "open and effective competition", "local industry development" and "management of risk"?

The first clues to answering this question come from the text of clause 6A itself. The "consideration of open source software" and "avoidance of non-standards compliant software" requirements in clause 6A(1) only apply "as far as practicable" for the agency to apply them. Moreover, clause 6A(2) clarifies that clause 6A(1) "is in addition to the procurement principles to be applied under clause 6", one of which is "value for money". Strikingly, clause 7 expressly mandates that an ACT government entity <u>must</u> be able to demonstrate "value for money" in its procurement, defined to mean the "best available procurement outcome" as determined on an assessment of (amongst other things) "all relevant risks, costs and benefits on a whole of life basis". From a standpoint purely of statutory interpretation, there therefore appear to be good arguments that clause 7 (via the references to "value for money" in clause 6, the "as far as practicable" limitation in clause 6A(1) and the effect of clause 6A(2)) continues to operate in full effect notwithstanding the introduction of a new "open source" procurement principle in clause 6A. In other words, "consideration as far as practicable" of open source software and "avoidance as far as practicable" of non-standards compliant software procurement will not over-ride the mandatory requirement in clause 7 for an ACT government entity to be able to ultimately demonstrate "value for money". Neither will it avoid the necessity for an ACT government entity to also:

- ensure effective competition (including by open source and proprietary software vendors);

- give consideration to maximising the opportunities for local industry development (including by open source and proprietary software vendors); and

- implement sound risk management strategies (including for risks arising from open source software procurement),

all as already required by clauses 8, 11 and 12.

Moreover, consideration and avoidance "as far as practicable" could reasonably be interpreted to mean something substantially less than a requirement that ACT government entities actively seek out or positively encourage open source software solutions to be tendered to them. Clause 6A, on its terms, certainly does not expressly require such a level of promotion of open source software.

It is also possible that the "avoidance" principle in clause 6A(1)(b)(ii) may have unintended results, that simultaneously allow large software vendors to escape its operation whilst working against the interests of small or medium size enterprises

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[59] Another legal drafting curiosity is that the new ACT Act is a Parliamentary amendment of a Guideline issued by the Board. Such legislative intervention in the ordinary discretions granted to a statutory body with functions and duties defined by its constitutive statute is noteworthy. This can be compared to the South Australian situation, where one of the reasons given for a new procurement Bill is to set a formal legislative framework that prevents secrecy and political influence that could expose government to "allegations of partiality, favouritism, patronage and corruption": South Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 2003, 766 ((the Hon. J.W. Weatherill, Minister for Administrative Services, in the Second Reading speech for *State Procurement Bill 2003* (SA)).

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(**SMEs**). The wording of clause 6A(1)(b)(ii)[60] effectively requires an ACT government entity to avoid (as far as practicable) procurement of software which is exclusively sold or distributed by the same entity that provides support and maintenance for that software. This requirement is quite mechanistic and may inadvertently discriminate between different proprietary software products, depending on the sales and distribution structures used by the owner of the software. On the one hand, where a software owner (as many do) appoints a number of sales agents or distributors in a territory, but retains for itself the exclusive right to maintain and support its software, it will arguably be not subject to this "avoidance" requirement. On the other hand, where a software owner appoints only one exclusive distributor or is itself the only vendor for its software, then ACT government entities must, as far as practicable, avoid procuring its software. Thus, it may be possible that large proprietary software vendors with multiple distribution channels in the territory escape the "avoidance" principle, whilst SMEs could be forced by it into larger-scale business models (such as appointing multiple sales agents or disclosing the software to third parties to enable them to also provide support or maintenance) for which they might be ill-prepared and in situations in which they might not have substantial commercial leverage to negotiate financial terms with third parties that are conducive to their long term business viability.

In summary, to the sceptical, the new clause 6A does not on its face require substantial and immediate changes in the procurement practices of ACT government entities, other than perhaps an express reference to the terms of clause 6A in the evaluation criteria of forthcoming ACT government tenders. The new provision may also have inadvertent adverse consequences for SMEs.

Of course, the above analysis is purely one of the strict "letter of the law". There is no doubt that the ACT Act has symbolic significance for Territorians, and more broadly in Australia and overseas. Insofar as a level of local, multi-partisan enthusiasm and goodwill is associated with the passage of the new ACT Act, and transmits itself to specific procurement projects by individual ACT agencies, it may well be that open source software producers will now have a greater chance of winning ACT government software tenders. Whether or not these greater chances amount to a "level playing field" remains to be seen. In any case, it would be in the interests for both ACT government entities and the IT industry for further policy work to be done, to give greater certainty to the practical application of new clause 6A within the framework of the other procurement principles.

Commonwealth procurement framework and considerations

For Commonwealth agencies that handle public money[61] and public property,[62] the legislative foundation for software procurement is the *Financial Management and Accountability Act 1997* (Cth) (the **FMA Act**). This Act has imposes several requirements relevant to this analysis. First, the FMA Act imposes an over-arching statutory obligation on each Chief Executive of such Commonwealth agencies to promote "efficient, effective and ethical use" of Commonwealth resources for which the Chief Executive is responsible. Secondly, the FMA Act (via regulations made pursuant to it)[63] authorises the Finance Minister to issue guidelines (the **Commonwealth Procurement**

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[60] This wording was replicated in section 17A(1)(b)(ii) of the amended form of the South Australian Bill.

[61] Defined in section 5 of the *Financial Management and Accountability Act 1997* (Cth) to mean, in summary, money in the custody or control of, or a person acting for or on behalf of, the Commonwealth (including Commonwealth Departments and some (but not all) Commonwealth agencies).

[62] Defined in section 5 of the *Financial Management and Accountability Act 1997* (Cth) to mean, in summary, property in the custody or control of, or a person acting for or on behalf of, the Commonwealth (including Commonwealth Departments and some (but not all) Commonwealth agencies).

[63] *Financial Management and Accountability Regulations 1997* (Cth) (the **FMA Regulations**).

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Guidelines or **CPGs**) about matters relating to the procurement of property and services,[64] and requires Commonwealth officials performing procurement duties to "have regard" to the CPGs.[65] Importantly, an official who "takes action that is not consistent" with the CPGs must make a written record of his or her reasons for doing so, and there may be circumstances in which these records are publicly accessible.

Against this legislative background, the CPGs[66] establish "value for money" as "the core principle" governing Commonwealth procurement, underpinned by four supporting principles:

- Efficiency and Effectiveness;

- Accountability and Transparency;

- Ethics; and

- Industry Development.

These principles are also complemented by other Government policies. "Value for money" is further detailed in the CPGs and associated procurement guidance documents. So, for instance, the CPGs state that:

> *"Officials buying goods and services need to be satisfied that the best possible outcome has been achieved taking into account all relevant costs and benefits over the whole of the procurement cycle. Accepting the lowest price is not necessarily an indicator of best Value for Money."[67]*

For present purposes, it suffices to note that a web of other Commonwealth procurement requirements (manifest in other FMA Regulations, FMA Orders and Chief Executive Instructions) and guidance documents (such as Procurement Circulars and Procurement Guidance) contextualises and details the core "value for money" principle and its supporting principles.

A related feature of the FMA Act with implications for open source software procurement is the complex set of requirements it establishes for approval of proposals to spend public moneys. Significantly, FMA Regulation 9 prohibits an approver from approving such a proposal unless the approver is satisfied, after making such inquiries as are reasonable, that the proposed expenditure (amongst other things):

(a)   is in accordance with the policies of the Commonwealth; and

(b)   will make efficient and effective use of the public money.[68]

The Commonwealth Bill proposes to introduce into the above legislative procurement environment a new section 43A of the FMA Act enshrining at the highest legislative level

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[64] FMA Regulation 7.

[65] FMA Regulation 8(1).

[66] February 2002 edition, available at http://www.finance.gov.au/ctc/publications/purchasing/cpg/commonwealth_procurement_guide.html.

[67] See also the "Value for Money" Procurement Guidance issued by the Department of Finance and Administration, available at http://www.finance.gov.au/ctc/toolkits/valueformoney/value_for_money.html.

[68] FMA Regulation 10 also imposes a requirement that unless the relevant appropriation of money is authorised by an existing or proposed law, the Finance Minister must give written authorisation for the approval for the spending proposal. This in turn (via FMA Regulation 13 requirements) has lead to a complex structure of Finance Circulars, Finance Management Guidance, and Ministerial delegations, directions and determinations governing how, when and by whom matters such as exclusion or limitation of contractor liability, and contingent liabilities can be approved.

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an "open source software preference" principle. Even assuming that amendments are made to the Commonwealth Bill to make it consistent with the "open source software consideration" principles of the new ACT Act and the amended South Australian Bill, at least the following major issues would need to be addressed before agencies subject to the FMA Act requirements will be able to apply such a new section 43A of the FMA Act:

- how would a new section 43A interact with the existing over-riding responsibilities of Chief Executives under section 44 to promote "efficient, effective and ethical use" of the Commonwealth resources? Would section 43A qualify the requirements of section 44, or be "in addition" to section 44 in some way? What would that "addition" mean?

- would the CPGs need to be rewritten to accommodate such a new section 43A? In particular, would the new section 43A principle effectively over-ride the existing core "Value for Money" principle altogether, because it sits higher up the hierarchy of legislative requirements? If so, how would agencies pursue a workable "Value for Money" evaluation (including assessment of the other supporting procurement principles)?

- even if the new section 43A principle is to be subject to the CPGs (rather than the other way round), similar issues to those arising under the new ACT Act arise, regarding the relationship of the new procurement principle to the existing core+supporting procurement principle framework. Moreover, the existing web of procurement requirements and guidance might well require substantial review and revision.

- similarly, how would the existing FMA Act requirements relating to approval of spending proposals for public moneys be reconciled with the more idiosyncratic features of open source software licensing or procurement?

Having regard to the substantiality of the above issues, it seems reasonably clear that the practical impact on the legislative procurement environment of the Commonwealth Bill in its current form would be one or more magnitudes greater than the impact of the new ACT Act in the ACT legislative procurement context. Even if the proposed open source procurement principle was devolved to the level of change only to the CPGs, analogous issues to those raised above would still arise and require some degree of resolution before FMA Act agencies could consistently and practically apply the new open source procurement principle.

South Australian procurement framework and considerations

For South Australian public authorities, the primary legislation that currently governs their procurement activities is the *State Supply Act 1985* (SA), which constitutes a State Supply Board[69] and empowers the Board to make policies, principles and guidelines (and give directions) relating to the supply operations of South Australian public authorities.[70] In this, it parallels the comparable ACT procurement legislation. The South Australian legislation also expressly binds each public authority (including every member or officer of the authority) to comply with any directions given or policies, principles or guidelines issued to the public authority by the Board in the performance of its functions.[71]

Like the comparable Commonwealth procurement legislation, the South Australian legislation also expressly makes the chief executive officer of a public authority responsible for "the efficient and cost effective management of the supply operations of

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[69] *State Supply Act 2001* (SA), section 6.

[70] *State Supply Act 2001* (SA), section 13(1)(b).

[71] *State Supply Act 2001* (SA), section 14.

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the authority", subject to and in accordance with the policies, principles, guidelines and directions of the Board.[72]

Like the ACT Board and the Commonwealth Finance Minister, the South Australian Board has issued several relevant Policies,[73] that (in summary):

- detail the policy responsibilities to be discharged by Chief Executives.

- establish eight key purchasing principles:

  - Value for money in the expenditure of public funds;

  - Open and fair competition;

  - Professional integrity and probity;

  - Client service;

  - Management of risk;

  - Accountability;

  - Simplicity; and

  - Local industry sourcing where local suppliers can demonstrate competitiveness and capability.

- contain further detail regarding the "value for money" and other purchasing principles, consistent with the details described above in relation to the like ACT and Commonwealth requirements.

- detail contracting approval policies that (amongst other things) set requirements for acquisition plans and purchase proposals.

Like the Commonwealth Bill, the South Australian Bill proposed to introduce into the existing legislative procurement environment a statutory provision (a new section 17A of the *State Supply Act*) enshrining at the highest legislative level an open source software procurement principle.

It should be readily apparent, from the similarity of the above scenario to the ACT and the Commonwealth scenarios, that policy reconciliation and application issues comparable to those arising in the ACT and Commonwealth arose in the South Australian context under the South Australian Bill, whether in its original form or its amended form. To this extent, there appears to be a cogent basis for concerns raised by the Labor and Liberal members participating in the debate on the South Australian Bill, prior to that Bill being defeated.

As mentioned above, the South Australian government has now proposed a new legislative framework for procurement in that State. On 12 November 2003, the Government tabled the *State Procurement Bill 2003* (SA) (the **new procurement Bill**), which repeal the existing *State Supply Act*. The new procurement Bill retains (with small amendment) salient features of the *State Supply Act*, such as:

- the State Supply Board, which continues and is re-established as the State Procurement Board under the new procurement Bill;[74]

- empowering the Board to make policies, principles and guidelines (and give directions) relating to the procurement operations of South Australian public

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[72] *State Supply Act 2001* (SA), section 14A.

[73] Notably, State Supply Board Policy No. 1 – Policies (May 1998) and Policy No. 2 – Contracting Approvals and Processes (June 2000).

[74] *State Procurement Bill 2003* (SA), section 6.

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authorities;[75]

- expressly binding each public authority (including every member or officer of the authority) to comply with any applicable directions, policies, principles, standards or guidelines issued tor given by the Board;[76]

- expressly making the principal officer of a public authority responsible for "the efficient and cost effective management of the procurement operations of the authority", subject to and in accordance with the policies, principles, guidelines, standards and directions of the Board.[77]

Relevantly, the new procurement Bill also includes the following features not forming part of the *State Supply Act*:

- An express statement that the "object" of the new procurement Bill is to advance government priorities and objectives by a system of procurement for public authorities directed towards:

   (a)   obtaining value in the expenditure of public money (not defined in the Bill); and

   (b)   providing for ethical and fair treatment of participants; and

   (c)   ensuring probity, accountability and transparency in procurement operations,[78]

   and requiring the Board and the relevant Minister to "have regard to and seek to further those objects" in their administration of the new legislation;[79]

- A definition of "procurement operations" that has the effect that the Board can issue binding policies on matters including the procurement of intellectual property;[80]

- Provisions that enable the Minister to give general directions both to the Board[81] and (when the Minister is acting on the advice or recommendation of the Board) to bind public authorities, but otherwise providing that the Board (and, effectively, public authorities in relation to procurement matters, to the extent inconsistent with an authorised direction of the Board) is not subject to Ministerial control or direction.[82]

On paper, at least, the changes in the new procurement Bill, insofar as they are relevant to government procurement of open source software, do not appear radical. Nonetheless, the South Australian government has taken the opportunity presented by the new procurement Bill, to articulate a number of guiding principles of its implementation that might provide a framework for further policy development by the Board on the open source procurement issue. Relevantly, in the debate prior to the defeat of the Democrats' South Australian Bill in December 2003, the Government referred to the new

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[75] *State Procurement Bill 2003* (SA), sections 12(1)(b) and (d).

[76] *State Procurement Bill 2003* (SA), section 18(1).

[77] *State Procurement Bill 2003* (SA), section 19.

[78] *State Procurement Bill 2003* (SA), section 3(1).

[79] *State Procurement Bill 2003* (SA), section 3(2).

[80] *State Procurement Bill 2003* (SA), section 4.

[81] These general directions may nevertheless require the Board "to take into account a particular government policy or a particular principle or matter": *State Procurement Bill 2003* (SA), section 20(2).

[82] *State Procurement Bill 2003* (SA), sections 18 and 20.

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procurement Bill and stated:[83]

> *"The policy approach has several advantages over the legislative [open source software] solution proposed, such as:*

> - *it enables the board to support the policies of the day;*

> - *the policy can be more easily and quickly developed and/or modified to accommodate changes to procurement practices and/or strategies;*

> - *the policy tends to be more flexible and is seen as a vehicle or mechanism that can facilitate and respond to change.*

> *As part of the review of current legislation, it is proposed that obtaining value in the expenditure of public money for all goods and services will be a key objective of any new procurement legislation. This will provide the flexibility required to include OSS as a procurement option by policy. An administrative rather than a legislative approach is preferred because the IT field changes rapidly and it is difficult to change legislation quickly to keep up with developments in IT."*

Concluding thoughts

The challenges to effective implementation of legislative proposals for public sector procurement such as those described above would seem to apply – to a greater or lesser degree – to all the various Australian government procurement environments, given the similarities between those environments. Their manifestation in each Australian government is complicated by the manner in which, and extent to which, development, control and implementation of IT procurement policy occurs at a whole-of-government level (and the degree of agency autonomy on this issue) in each government. Moreover, anecdotal evidence suggests that the extent to which an Australian government is moving towards or away from centralised or devolved IT policy development and implementation (whether in the procurement sphere or otherwise) also strongly influences the combination of action or inaction at a legislative or administrative level that will be practicable within that government regarding promotion of open source software in that government.

Apart from the challenges described above, many (but not all) of which arise from the form in which the changes are proposed rather than their particular content, there remain other policy/legal challenges to the rendering of a "level playing field" for open source software in Australian governments, such as:

- the reconciliation of government-funded open source software development projects with Government IT/IP commercialisation[84] and public-private sector-partnership (PPP)[85] policies;

- assessment of the adequacy of current Crown laws for IT/IP to protect governmental interests arising from open source development and procurement

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[83] South Australia, *Parliamentary Debates*, Legislative Council, 3 December 2003 (the Hon. J. Gazzola, in debate on the *State Supply (Procurement of Software) Amendment Bill*).

[84] For instance, the *Commonwealth IT IP guidelines: Management and commercialisation of Commonwealth intellectual property in the field of information technology* (February 2001), available at http://www.dcita.gov.au/Collection/CollectionPage/0,,0_1-2_12-3_466,00.html.

[85] Compare *Interim Research Report 4: What role should the private sector play in HealthConnect* (January 2003), produced by the Commonwealth Health*Connect* project (available at http://www.health.gov.au/healthconnect/consult.html), which contains an analysis of different models for public-private sector involvement in a project that includes (amongst other things) promotion of open source software and open standards in electronic health records systems.

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     (for instance, under sections 176 (Crown copyright) and 183 (Crown use of copyright) of the *Copyright Act 1968* (Cth));[86]

- development of standardised risk assessment and management methodologies (for instance, ones consistent with AS/NZ 4360:1999)[87] that can be usefully applied to the evaluation of the licensing/liability aspects of open source software development/procurement;

- evaluation of whether common government IT contracting forms (such as the various Commonwealth and State variants of GITC, and common government funding contract templates) raise "mountains" or "molehills" for the development and/or procurement of open source software; and

- deeper consideration of the extent to which the particular terms of various free and open source licences are consistent and compatible with each other and with IT procurement and deployment by governments seeking to promote interoperable and/or integrated solutions.[88]

It is beyond the scope of this paper to do more than raise these other challenges. For present purposes, it suffices to note that these challenges arise because of actual or potential differences between open source software and proprietary software practices when considered in relation to the above issues, and will challenge (to a greater or lesser extent) all public sector agencies.

Nonetheless, the time appears ripe for mature exploration by the Australian public sector of all these challenges.

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[86] On 20 November 2003, the Federal Attorney-General announced a new reference to the Copyright Law Review Committee, to examine government ownership of copyright material: see terms of reference at http://www.clrc.gov.au/www/clrHome.nsf/AllDocs/RWP3C2E5B1D1B98D6FACA256DE3000E9471?OpenDocument. This reference may provide an opportunity for some of the IP issues relevant to open source software development and use by Australian governments to be considered.

[87] Note, for instance, that the Procure-IT contracting framework being implemented by the States of New South Wales and Queensland in late 2003 requires risk assessment and management in accordance with this Australian Standard prior to a NSW government agency agreeing to a limitation of contractor's liability, and "encourages" such assessment and management for alternative intellectual property arrangements: see clause 8.6.1 of the Procure IT Agreement: Pilot Version, available at http://www.supply.dpws.nsw.gov.au/Procure+IT/Procure+IT.htm, and more generally at http://www.supply.dpws.nsw.gov.au/Procure+IT. Similarly, at the Commonwealth level, the FMA Act Reg 10 approval process for FMA Act agencies explicitly requires a risk assessment to be done in similar circumstances.

[88] For instance, not-for-profit licensing schemes such as the Creative Commons project (http://creativecommons.org) and AEShareNet (http://www.aesharenet.com.au) enable licensing options for documentary and other materials that include (but are not limited to) ones that fit within the technical meaning of "open source". It is to be anticipated that non-software materials licensed under these other schemes will increasingly be included in, and potentially be integrated into, open source software distributions.

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Annexure A

**Clause 6A of *Government Procurement (Principles) Guideline 2002 (No 2)
DI2002-58* (ACT),**

**inserted by
*Government Procurement (Principles) Guideline Amendment Act 2003
(ACT)***

6A   Principle about procurement of computer software

(1)   In the procurement of computer software, a Territory entity should, as far as practicable—

    (a)   consider open source software; and

    (b)   avoid the procurement of—

        (i)   software that does not comply with open standards or standards recognised by the ISO; and

        (ii)   software for which support or maintenance is provided only by an entity that has the right to exercise exclusive control over its sale or distribution.

(2)   This is in addition to the procurement principles to be applied under clause 6.

(3)   For section (1) (b) (i), software does not ***comply with open standards*** unless the specifications for data representations used by the software (including, for example, file formats for data storage, transmission and network protocols) are completely and accurately documented and available to the public for use, application or review without restriction.

Note An example is part of the instrument, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(4)   In this section:

ISO means the International Organization for Standardization.

Note ISO standards are available on the internet at the web site www.standards.com.au.

open source definition means the document of that name published by the open source initiative, as in force from time to time.

Note 1 The text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or at a particular time, is taken to be a notifiable instrument if the operation of the Legislation Act 2001, s 47 (5) or (6) is not disapplied (see s 47 (7)).

Note 2 A notifiable instrument must be notified under the Legislation Act.

open source initiative means the non-profit incorporated organisation of that name dedicated to managing and promoting the open source definition for the good of the community.

open source software means software that is the subject of a licence that complies with the open source definition.

(5)   This section expires 3 years after the day it commences.