Open Source Industry Australia Limited
ACN 109 097 234
Level 8, 33 Berry Street
North Sydney 2060

30 May 2008
Brendan Scott
Open Source Industry Australia Limited
ACN 109 097 234
brendan@osia.net.au

Secretariate to the ICT Review
Review of the Australian Government's use of Information and Communication Technology
Department of Finance and Deregulation
By email: ICTReview@finance.gov.au

Dear Secretariate,

Submission to Review of the Australian Government's use of Information and Communication Technology

1. Introduction

1.1 Open Source Industry Australia Limited (OSIA) is grateful for the opportunity to make a submission to this review.

1.2 This submission has three major parts:

(a) an introduction and information about the submission, disclosure and information about OSIA;

(b) recommendations;

(c) some discussion of problems motivating the recommendations.

2. Information About OSIA

2.1 I am a director of OSIA. I make this submission on behalf of that company. OSIA is a company limited by guarantee established in 2004 to represent the interests of the open source industry in Australia. All of OSIA's members are businesses. OSIA membership comprises mostly SMEs from around Australia, but it also counts large organisations and several multinationals among its membership. All of OSIA's members are copyright owners. The exploitation of copyright is a critical component of the business of all OSIA members, primarily through the exploitation of Free, Libre and Open Source Software (FLOSS).

3. Recommendations

3.1 In order to promote better procurement and use of ICT the government should:

(a) use open data formats (eg odf) for Government data that is intended to be retained for extended periods or used for interchange with the public. Recent developments at ISO indicate that ISO approval is not sufficient for a format to qualify as "open";

(b) eliminate existing discrimination against FLOSS in its metrics, tender procedures and approaches to purchasing;

(c) have no closed source dependencies for the access to services or data – in particular no such dependencies should be present for regulatory, corporate or tax authorities or departments (eg ACCC, ASIC and ATO);

(d) interact with business and consumers on a technology neutral basis either through the use of established open standards, or on a very technologically conservative basis with an emphasis on documented, widely accessible and interoperable formats;

(e) maintain a publicly available portal detailing its use and contribution to FLOSS;

(f) discard existing metrics for innovation and implement metrics which measure the value of technology or the value to society as a whole of technology (taking into account additional costs or cost savings rather than simply on revenue or GDP). For more details see: http://brendanscott.wordpress.com/2008/04/23/tradegy-of-the-anti-commons/;

(g) not discriminate against open source in Government tenders, Government purchasing or Government grants. Discrimination against open source includes specification of products rather than requirements, and specification of requirements which are an implicit specification of a product. Grant conditions should not discriminate against FLOSS commercialisation of outputs. Grants should be made preferentially for those projects which promote interoperability between Government and FLOSS operating systems;

(h) prefer technologies for which there are multiple providers/supporters which are not contracted to a single ultimate source for the supply of the technology over those which are;

(i) contribute to FLOSS development by adapting the existing payment system for copyright works to fund the development of the FLOSS industry. Such a system would involve voluntary payments based on usage of FLOSS to a collecting society specifically created for FLOSS, such money to be spent on FLOSS related industry development;

(j) commercialise publicly funded innovation under a FLOSS licence (although it may also be commercialised under other non-FLOSS licences). Publicly funded development should not be exclusively licensed;

(k) ensure that the acquisition by Government of software permits Government to freely redistribute that software to all citizens. Failing that, the Government should mandate in procurement of software that the Government can on-sell or on-supply copies of software it has acquired (including, but not limited to at the end of life of the software), and must be able to do so independent of any hardware acquired in conjunction with such the software. For example, if the Government acquires 10 copies of software, it must at a minimum be able to on-supply each of those 10 copies (possibly on the basis that it deletes that number of copies from its own system). Similarly, whole of Government contracts must permit each copy acquired under the contract to be on-supplied.

3.2 All of these things can be achieved over the medium to long term by a change in government action or by encouraging industry to voluntarily adopt licensing overlays on existing legislative entitlements. In each case this is without coercion of any industry participant.

4. Discussion – Metrics

4.1 Metrics must be reengineered to account for the value of FLOSS. A whole range of existing metrics used for policy formulation are clearly wrong in the FLOSS context. For example, metrics which focus on revenue implicitly assume value is generated through sale of a product. However, FLOSS products generate value by providing an opportunity to use or by providing a cost saving. For any organisation which uses FLOSS there may be no direct impact on revenue, but rather an impact on profit, or, alternatively the revenue of the organisation will be better utilised (eg savings from FLOSS may be spent on development).

4.2 Measuring the benefits and costs of technology should be focussed on whole of community cost or benefit and not on the benefit to government or benefit to department. Subsidised use by specific departments impose costs on the wider community. These costs must be taken into account when evaluating tenders. This is particularly important for key public resources such as libraries, galleries, public transport information etc.

5. High Level Issues – FLOSS Methods

5.1 The obvious solution to government inefficiencies in the procurement and implementation of ICT is the adoption of FLOSS (in the case of software) and FLOSS like technologies in other fields.

5.2 As FLOSS is necessarily developed in a distributed environment, all FLOSS technologies are of their nature interoperable, modular, and customisable. This extreme flexibility of the technologies inherently reduces duplication and inefficiencies in government use of ICT. To the extent that requirements across agencies differ the agencies can both customise off an existing base. Those customisations can be contributed back to the pool, thus driving further standardisation across government. Moreover, successful FLOSS implementations will give an incentive for other governments to implement the same solution, creating more peers with which customisations can be exchanged. FLOSS offers the promise of not only encouraging standardisation within government, but also across different governments.

5.3 Further, the adoption of FLOSS technologies will reverse the existing incentives within industry and, over the longer term, restructure the ICT industry from being fundamentally balkanised into fundamentally interoperable.

6. Discussion – Redirecting Subsidies to Distributors

6.1 The main block on effective ultilisation of ICT is the absence of incentives (and in many cases explicit disincentives) to promote interoperability and the implementation and incremental improvement of existing technology.

6.2 Optimal utilisation of ICT is currently strangled by an unwarranted attachment to a model of technology acquisition which is 50, if not 200, years out of date. Indeed, policy in this area has become more backward looking over the last 20 years, with the rapid expansion of legislative monopolies. It does this by giving monopolies (primarily through patent and copyright law) on the distribution of technology. In essence, the current framework subsidises distributors on the assumption that distributors will use those subsidies to enhance ICT and interoperate. However, the “winner take all” nature of these monopolies creates strong incentives to avoid or subvert interoperability because if a technology becomes

entrenched, the technology owner can charge others for the ability to interoperate with it while similtaneously charging the Government a premium for interoperability. Government acquistion policies effectively balkanise technology development and marketing.

6.3 These subsidies come at a high cost – the opportunity cost of lost interoperation and therefore of dead weight loss of (use of) technology. This policy choice is wrong.

6.4 The canard that software, as a public good, presents a particular problem of financing must be expressly rejected. The argument goes – how will these innovations be funded if anyone is able to free ride on them? If they can't be funded these technologies will be lost to society. This argument may have been credible 30 years ago, it is patently false now. For the specific example of word processing there are multiple word processors which are available free of charge. For the more general case all of the (exponentially growing) content on the internet is the counter example.

6.5 Moreover, by subsidising distributors Australia backs the wrong horse – as there are no major Australian owned distributors of technology. The innovation system implicitly requires Australian innovators to sell their techonology to foreign owned distributors, thus permitting the majority of profits from government purchases of technology to be exported.

6.6 FLOSS is underrepresented in government purchasing partly because of the lack of large marketing budgets to advocate the benefits of FLOSS to relevant decision makers. Rather than providing indirect subisidies to closed source distributors through the Copyright Act government should instead be providing direct subsidies to FLOSS organisations for the purpose of evangelising successful government FLOSS implementations, for educating government as to the comparative benefits of FLOSS technologies, and for acting as a clearing house for government related FLOSS development or customisation.

7. Discussion – Copyrights, Software Patents

7.1 The structure of the Copyright and Patent Acts (and similar legislation) and the decision of parliament to exclude much of the exercise of entitlements under these Acts from the purview of the Trade Practices Act has rendered competition policy irrelevant to the future of at least the technology sector of the economy – and through it, any sector of the economy which can be structured so as to be reliant on technology. In our view, over the medium term this will encompass the majority of the economy. Reduced competition necessarily leads to increased costs and decreased quality.

7.2 As recently as two decades ago it would have been anathema to allow vendors to have legal control of aftermarkets for their products. Legislative changes in that time have reversed that, with the legislature practically endorsing such practices (eg: technological protection measure legislation). Technological protection measures are a particularly egregious example as they represent an explicit government endorsement of active schemes to prevent interoperability.

7.3 The Copyright Act is a vast array of ad hoceries. This ad hoc structure is a substantial problem for SMEs. It requires them to acquire specialised legal advice and its complexity means that legal advice is difficult to be definititve. This is a major risk for SMEs. The Act is in desperate need of simplification. In particular entitlements relating to rights of access

control protection measures and authorisation should be either removed or substantially limited.

7.4 The patent system for software is broken. Not only is it prohibitively expensive for an SME to conduct any sort of patent search, such searches are by their nature inconclusive. Patents which are found may be invalid because of prior art, or the search may fail to identify patents which read against the SME's product or service. If patent searching is prohibitively expensive, patent litigation is at least three orders of magnitude moreso. Patenting of inventions is an additional burden (roughly AU$20,000 per patent per jurisdiction of coverage) which must be borne by SMEs – particularly those wishing to raise investor capital. In most cases this is a wasteful allocation of resources.

7.5 The patent system creates a general preference in favour of larger (and therefore likely foreign) companies who are able to either defend a patent claim, or are able to licence the relevant rights. Any commercial activity by any SME is currently likely at the pleasure of at least one undisclosed patent holder. These systems need to be overhauled to permit SMEs to be free to compete without the patent spectre hanging over them. Where SMEs are free to participate they will bring with them competition and innovation which will flow through to the rest of the economy.

8. Conclusion

Please call me if you would like clarification on any issues identified above.

Yours faithfully,

[by email 30 May 2008]

Brendan Scott,
Director
Open Source Industry Australia Limited