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NHMRC Open Access Policy Consultation (April 2021)

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We welcome the opportunity to comment on the NHMRC's proposed amended Open Access Policy and Further Guidance. We are a group of academics with combined decades of experience in copyright law and open access policy. This submission is based on research conducted as part of an ARC Discovery Project, 'Producing, Managing and Owning Knowledge in the 21st Century University', DP200110578.

Our submission raises some legal and practical issues with the NHMRC's proposed amended Open Access Policy and Further Guidance. We would like to stress, however, that none of the issues we raise are insurmountable. We support the NHMRC's move towards a stronger Open Access Policy, and would welcome any opportunity to assist the NHMRC in overcoming the issues we have identified, in order to advance a more complete open access agenda.

Overview: Our Position on the Proposed Changes

We note that the draft amendments seek to strengthen the open access (OA) mandate, by requiring that peer reviewed journal publications and peer-reviewed conference papers funded through the NHMRC, and associated metadata, be made OA immediately upon publication, without any embargo period. Funded researchers will also be encouraged to make *other* publications (scholarly books; scholarly book chapters; edited research books; and other research outputs) OA where possible.

To achieve this goal, the NHMRC draft states that researchers are required to retain "all necessary rights" to enable them to publish and share publications in any format at any time, by applying, prior to publication, OA licensing (CC-BY) to the Author Accepted Manuscript (AAM) (or Version of Record (VOR), if possible).¹

¹ The draft uses this form of words for the author-applied OA licence: "This research was funded in whole or part by the NHMRC [Grant No.]. For the purposes of Open Access, the author has applied a CC-BY public copyright licence to any Author Accepted Manuscript (AAM) version arising from this submission".

We endorse the NHMRC approach to removal of the embargo period. In addition, we appreciate the move towards a stronger assertion of the availability of Australian research funded by the NHMRC. However, our research and legal experience suggests that implementation of sector policy requires more attention in order to support desirable public policy goals. The approach proposed places the onus for the move on academics as individuals inappropriately.

Our position is based on the fact that:

- There are unresolved legal quandaries arising from diverse and inconsistent approaches to IP policy and copyright assignment across the sector;
- The evidence to date is that the implementation of OA has been complicated precisely because there is insufficient institutional or systemic leadership;²
- Individual researchers need institutional support and consistency to help realise the public good goals that the research funder is seeking.

The approach proposed raises a number of legal and practical obstacles, that will be considered in turn.

Copyright ownership in research publications

The NHMRC proposal assumes that:

1. The academic author owns copyright in their AAM, and is therefore in a position to apply a CC-BY licence prior to publication;
2. That licence prevails over any licence or assignment to a publisher signed by an academic.

Assumption 1 is not necessarily correct as a matter of law. The default ownership position under the *Copyright Act 1968* (Cth) is that copyright in works produced in the course of employment belong to the employer (s 35(6)), subject to any contrary agreement (s 35(3)). Most researchers who receive NHMRC grants are likely to be an employee of a university and their research publications are likely to come within the scope of their employment duties or they are of a status where they are subject to university research policies.

University IP policies may be a contrary agreement to the default rule, assuming that they are incorporated into the employment contract. In the course of our research, we have reviewed the IP policies of a number of leading Australian universities and have found that the position regarding ownership and licensing of scholarly works varies across institutions. QUT, for example, asserts ownership of copyright in scholarly works, but then assigns the 'right to publish' to academic authors subject to a perpetual, irrevocable licence to QUT for educational

² See, for example, Vincent Lariviere & Cassidy R. Sugimoto, 'Do authors comply when funders enforce open access to research?' *Nature* 562, 483-486 (2018) <https://www.nature.com/articles/d41586-018-07101-w> ("Universities, industry and funding agencies should think collectively about robust and scalable models. Cooperation and foresight are the only ways to ensure that everyone has open access to research...")

and research use and commercialisation, as well as a licence to allow QUT to include the work in its open access institutional repository. Other institutions' IP policies purport to assign ownership in scholarly works to the academic author, subject to retaining a perpetual, non-exclusive licence to use material 'for teaching and research purposes'. The position at some institutions is unclear due to inconsistencies between different policies or gaps in policies. Further, institutional failure to effectively implement and enforce policy has created additional uncertainty as to the academic's right to assign or licence publications. In summary, it should not be assumed that academic authors across Australia own copyright in scholarly works sufficient to enable them to apply a CC-BY Licence.

Assumption 2, that a prior-applied licence prevails over later assignments or licences is not clear in the instance of a prior OA licence, and is complicated by the realities of the journal submission and publication process. The general principle that a prior-applied licence prevails over later assignments or licence has some support in copyright law. Section 196(4) of the *Copyright Act 1968* (Cth) provides that 'A licence granted in respect of a copyright by the owner of the copyright binds every successor in title to the interest in the copyright of the grantor of the licence to the same extent as the licence was binding on the grantor';³ licences can be applied prospectively (s 197(3)). As far as we are aware, however, the applicability of this principle to prior-applied *bare* licences (licences unsupported by consideration, including at least some OA licences) is untested. Even if bare OA licences do fall within the general principle, the applicability of the principle requires that the licence is granted *prior* to any assignment. Its operation therefore could depend on how a (often automated) journal submission process is set up, and whether it asserts that submission constitutes agreement to the journal's IP licensing terms., It also depends on when an academic author remembers to apply an OA licence or use the required form of words. What if the journal's submission process is an online submission system that has no place to insert the pro forma text? What if the journal's submission process is an online submission system and the author has to check a box confirming that they have all the rights necessary to assign full copyright to the publisher (and the system doesn't allow submission until you check that box)? Further, even assuming it is right, as a matter of law, that the licence takes precedence over any assignment of copyright by the author to the publisher, most publishing contracts will *also* include a term whereby the author warrants that they own copyright and have all the rights necessary to sign the transfer. The impact of such a provision requires more detailed legal analysis than there is space for here: suffice it to note that the legal position is uncertain.

Assumption 3 is that it is straightforward to reconcile researcher obligations under the proposed policy and *Ethical conduct in research with Aboriginal and Torres Strait Islander Peoples and communities: Guidelines for researchers and stakeholders (2018)* and *Keeping research on track II (2018)*. OA policy has traditionally exempted confidential and culturally sensitive material. We assume the failure to acknowledge this in the Consultation paper is an oversight. Today, best practice is also to discuss whether the contributions of Aboriginal and Torres Strait Islander Peoples constitute co-authorship at all stages of the research — prior to applying for a grant, during the conduct of the research, in drafting publications and approving final copy. The emphasis on individual academic authors and an a priori OA mandate ignores the researcher and institutional responsibilities in managing the ethical relationship in funded research and forecloses the scope of ethical

³ See also *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577

consultation about any issues that should affect the public accessibility of the research. Aboriginal and Torres Strait Islander research collaboration in funded research and Closing the Gap requires building trust and an openness to full and frank discussion where the terms of participation are not foreclosed by advance commitments to OA. Greater attention is needed to the implementation of an OA mandate in this area to maximise the potential of NHMRC policy to improve OA and ethical research by and with Aboriginal and Torres Strait Islander Peoples. Best practice OA policy needs to work alongside and in support of institutional ethics regulation of Aboriginal and Torres Strait Islander Research and meet community expectations in this area.

Responsibility should not be placed on individual academic authors

In our view, there are significant problems with imposing responsibility on individual academic authors.

Academic researchers are:

- Subject to many other demands on their time, and could easily forget to use the pro forma words when submitting manuscripts;
- Not copyright experts; and
- Subject to conflicting policies and pressures and incentives: such as obligations to publish in the most high-quality venues possible, for the sake of their institution's ranking and their own promotion and grant prospects, even where those venues do not support OA.

One likely outcome of imposing this burden entirely on researchers is that it won't be implemented, or will be implemented sporadically, and only by the most conscientious/engaged researchers.

We also suspect that if individual academic authors are required to manage compliance with the NHMRC policy, journals are likely to offer authors under OA obligations via the NHMRC the means to comply with that obligation by paying an article processing charge (APC). If universities do not act collectively to assert their right to include articles in institutional repositories, it will be difficult to avoid the exponential growth of APCs.

We note that the NHMRC does not, it appears, propose to:

- Change current policies that do not allow for the inclusion of OA publication costs in project budgets; or
- Provide separate block funding to universities to pay for OA.

This will place further strain on already scarce research resources.

In any event, it is not clear that assuming ownership by individual academic authors, and imposing the obligation and responsibility on academic authors to retain rights and apply an OA licence, is consistent with best practice developing overseas, or offers the best protection for any of the parties involved, whether academic author, university, scholarly publishers or the NHMRC.

The research infrastructure through which OA publications are made available also needs to be considered. While the OA publication may be freely available to individuals via an institutional repository, research dissemination and impact of research is supported by inclusion of the publication in a commercial database. Access to the database involves a separate licence agreement negotiated by university libraries with a very small number of commercial actors. The ripple effect on the cost of access to the database licence agreements needs to be considered when taking into account the implications of improving access to publicly funded research publications.

Plan S allows for institutional retention of rights

We assume that a possible goal of the NHMRC revision is to enable the NHMRC to sign up to **Plan S**,⁴ which requires that all publications funded by cOAlition S members must be published under an open licence, preferably the Creative Commons Attribution licence (CC BY). To achieve this goal, however, Plan S specifically allows for rights retention *either* by individual academic authors, *or their institutions*. In our view, the NHMRC should at least avoid foreclosing the option of institutional retention of rights to fulfil OA mandates. One reason is to accommodate existing variation in the ownership of scholarly works noted earlier in this submission.

In our view, implementation of Plan S via *institutional* retention of rights has advantages over implementation via *individual* retention of rights:

1. It situates responsibility and capacity to fulfil Plan S at the level where copyright expertise is held. *Universities* have access to copyright expertise to give effect to Plan S. Individual academics are not copyright experts, nor should they be required to become experts.
2. Institutional retention of rights would enable institutions to act collectively to manage negotiations with publishers.
3. Institutional retention of rights will assist the sector in negotiating university library database licences, where regardless of the OA status of an individual publication, a separate licence agreement is needed for the research to reach and be used by intended audiences.

Matching Policy to Institutional implementation

The consultation provides impetus to help improve sector OA policy. We do not wish to detract from the important progress that has been made to support freely available publicly funded research. As noted on page 1, none of the issues raised above pose insurmountable obstacles. We would like to offer our copyright expertise that is grounded in sector experience and knowledge of practical impediments to policy implementation to assist in progressing this agenda. We would welcome the opportunity to discuss this further with you.

⁴ <https://www.coalition-s.org/>