

**2007 Discussion Paper  
on the Extension of  
Legal Deposit**

# Discussion Paper on the Extension of Legal Deposit

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# 1 Setting the scene

1. The purpose of this discussion paper is to invite comment on the feasibility of extending the current legal deposit scheme to include audiovisual and electronic material. This paper is intended to inform and assist with public consultations on this issue.
2. Technological change has greatly increased the scope of published material and the increasing importance of film and television in Australian culture, among other issues, provide impetus to consider broadening the current arrangements. Legal deposit may not effectively serve its purpose of building a broad national collection of culturally significant material because materials such as films, sound recordings and web material do not come within the scheme.
3. However, the extension of the scheme would not necessarily be without public cost depending on the type of scheme adopted. Costs of an extension of legal deposit could include the cost of extra storage, collection depreciation, management and administration. There could also be costs to publishers of depositing additional copyright material depending on the type of scheme adopted. These potential additional costs will be considered in examining the feasibility of expanding legal deposit.
4. An extended scheme may result in the collection of some material which is not necessarily culturally significant, and/or which does not have lasting value. For this reason there is merit in considering alternatives to a comprehensive extension of the legal deposit scheme. Those alternatives would involve selective deposit of the extended range of material.
5. A review of the legal deposit scheme raises issues for arts policy, national collections policy, information technology policy and copyright law policy. For this reason the examination of the legal deposit scheme is being undertaken jointly by the Department of Communications, Information Technology and the Arts and the Attorney-General's Department.
6. Submissions are invited from interested stakeholders on the issues set out in the paper. Submissions should be made by 11 January 2008. For further information on how to make a submission see Parts 8-10 of this paper.

## Existing legal deposit provisions

7. The present legal deposit scheme is implemented under s 201 of the [Copyright Act 1968](#), as set out below. The scheme requires Australian publishers of 'library material' to deposit copies of that material with the National Library of Australia (NLA). The scheme only applies to material that is published in Australia. 'Library material' is defined broadly and includes all paper-based publications,

books, pamphlets, sheet music, and periodicals (s201(5)). Publishers are not entitled to payment or compensation for depositing items as required by the scheme. The scheme does not currently apply to films, sound recordings or other materials in an electronic form such as web material or books published electronically.

8. Non-compliance with the requirement to deposit set out in s 201(1) constitutes an offence attracting a \$100 penalty.

### ***Copyright Act 1968***

#### **201 Delivery of library material to the National Library**

- (1) The publisher of any library material that is published in Australia and in which copyright subsists under this Act shall, within one month after the publication, cause a copy of the material to be delivered at his or her own expense to the National Library.

Penalty: \$100.

- (2) The copy of any library material delivered to the National Library in accordance with this section shall be a copy of the whole material (including any illustrations), be finished and coloured, and bound, sewed, stitched or otherwise fastened together, in the same manner as the best copies of that material are published and be on the best paper on which that material is printed.
- (3) When any library material is delivered to the National Library in accordance with this section, the National Librarian shall cause a written receipt for the material to be given to the publisher of the material.
- (4) This section is not intended to exclude or limit the operation of any law of a State or Territory (whether made before or after the commencement of this Act) that makes provision for or in relation to the delivery to a specified public or other library in or of the State or Territory of copies of library material published in the State or Territory.
- (5) In this section:

***illustrations*** includes drawings, engravings and photographs.

***library material*** means a book, periodical, newspaper, pamphlet, sheet of letter press, sheet of music, map, plan, chart or table, being a literary, dramatic, musical or artistic work or an edition of such a work, but does not include a second or later edition of any material unless that edition contains additions or alterations in the letter press or in the illustrations.

9. There are also various legal deposit schemes in most states in Australia. For more information see the following link to the NLA website ([www.nla.gov.au/services/ldeposit.html](http://www.nla.gov.au/services/ldeposit.html)) which provides links to a number of state government legal deposit schemes.

## Purpose of the current legal deposit scheme

10. While there are different legal deposit models in place around the world they share a common purpose: to develop a national collection of published material in order to preserve national heritage, and to provide the public with access to that material for research or study.
11. The legal deposit scheme was considered by the then Copyright Law Review Committee (CLRC) in 1959. In its report advising the Government on the nature and scope of copyright reforms which led to the Copyright Act<sup>1</sup> the CLRC noted:  
  
“...that the main purpose of such a provision should be to build up a complete collection of Australian literature.”  
  
That report made no mention of the use to which such a collection should be put.
12. The CLRC again considered the legal deposit scheme in 1999 in its report [\*Simplification of the Copyright Act 1968\*](#). There the Committee said:  
  
“The Committee regards the primary purpose of the legal deposit provisions as ensuring the preservation of aspects of Australia’s cultural heritage. At the same time the deposited materials must be accessible to the public whether by being displayed, or being available on site for research or study purposes.”  
  
This purpose is also reflected in the [\*Guidelines for Legal Deposit Legislation\*](#), published by the United Nations Educational Scientific and Cultural Organisation (UNESCO) in 2000.
13. A national record of Australia’s economic, social, scientific and educational activities helps foster the creation of new intellectual output. The relationship between access to information and the development of new knowledge is acknowledged in international fora such as the UNESCO/ International Federation of Library Associations and Institutions forum. An extension of the existing legal deposit scheme to include audiovisual material and electronic publications could be expected to facilitate further innovation and creative output.
14. An extended legal deposit scheme could have the aim of building up a comprehensive collection of published Australian audiovisual and electronic material to more effectively preserve Australia’s cultural heritage.
15. However, broader heritage protection regimes worldwide do not generally attempt to comprehensively preserve all historic material, but instead focus on that which has been identified as significant.

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<sup>1</sup> *Report of the Committee appointed by the Attorney-General of the Commonwealth to consider what alterations are desirable, to the Copyright Law of the Commonwealth.*

## History of legal deposit and copyright

16. Legal deposit was linked to copyright during the 18th century when deposit was a requirement for the grant of copyright under UK law. However, the link between deposit and the grant of copyright was abolished in 1911 when the UK brought its copyright law into line with the requirements of the Berne Convention. The Berne Convention requires member countries to provide that the enjoyment of the right to protection of literary and artistic works should not be subject to any formality. Australia adopted the provisions of the UK legislation in the *Copyright Act 1912*.
17. In recent times a number of countries have enacted new laws governing legal deposit arrangements that are separate to their copyright laws; for example the United Kingdom, Denmark and New Zealand.
18. In Australia the Copyright Act still governs legal deposit. The Copyright Act also allows the copying of those deposited materials by and for library users where that material is required for research and study (fair dealing provisions (ss 40-43 for works) and libraries and archives provisions (Division 5 of Part III for works, and s 112AA for the preservation of culturally significant published editions in the collections of key cultural institutions).

Issue 1: Should the legal deposit scheme be extended to audiovisual and electronic materials and, if so, how should such materials be defined (including the quality of legal deposit materials, such as the 'best copy')?

Issue 2: Should an extended legal deposit scheme be in the *Copyright Act 1968* or is a separate piece of legislation more appropriate?

## Legal deposit and compensation for publishers

19. In most countries, including Australia, legal deposit is an unremunerated scheme. Materials are deposited at the publisher's own expense. Those countries which provide some form of remuneration do so on the basis of an application from the copyright owner, i.e. the requirement to deposit is not tied to a right to compensation. In Japan a copyright owner may apply for full reimbursement of the cost of the item and the cost of postage. Some other countries, including Denmark and Sweden, refund the cost of postage.
20. The *Guidelines for Legal Deposit Legislation* published by UNESCO suggest that:

“as a matter of principle, legal deposit should be free since its objectives are to serve the public interest, mainly to ensure the preservation and the availability for future generations of the intellectual record of the nation's economic, social, scientific and educational activities. Over the history of legal deposit, compulsory deposit of multiple copies has been a concern to publishers especially when the number of copies has been increased. Even if legal opinion on this issue is not unanimous, when the number of copies to

be deposited is limited, the principle is generally accepted.”

Those countries that have extended legal deposit to include audiovisual and electronic materials have not changed their policies in relation to compensation.

Issue 3: How many copies of published material should a publisher be required to deposit under an extended legal deposit scheme?

Issue 4: Should the existing requirement that material be deposited at the publisher’s expense continue to apply under an extended legal deposit scheme?

## **Past and current inquiries**

21. The CLRC’s 1999 report recommended that the current legal deposit scheme be extended to include audiovisual and electronic material.
22. In 2003 the Senate Standing Committee on the Environment, Communications, Information Technology and Arts also briefly considered the issue of legal deposit in its report [\*Libraries in the online environment\*](#). The Committee declined to recommend that the legal deposit scheme be extended to digital material but recommended that the Government consider the issue as part of its three-year review of the [\*Copyright Amendment \(Digital Agenda\) Act 2000\*](#) (the DAA).
23. The review of the DAA, did not examine this issue. Instead the issue of legal deposit was identified for separate consideration which has led to the development of this discussion paper.
24. Most recently, the Joint Committee on Publications, in its May 2006 report on the *Distribution of the Parliamentary Papers*, recommended that the legal deposit provisions of the Copyright Act be extended to include electronic copies of documents.

## **2 Current collection arrangements for audiovisual and electronic material**

25. In the absence of a statutory deposit requirement for audiovisual material and material in an electronic form, the National Library of Australia (NLA) and the National Film and Sound Archive (NFSA) and the National Archives of Australia (NAA) collect certain audiovisual and electronic materials through voluntary deposit arrangements. The NAA also collects audiovisual and electronic materials as provided for under the *Archives Act 1983* and the Copyright Act<sup>2</sup>. These materials are not limited to published materials but include large amounts of unpublished material.

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<sup>2</sup> See s 47 (6)

## National Library of Australia

26. The NLA hosts PANDORA (Preserving and Accessing Networked Documentary Resources of Australia). PANDORA is a web archive of online publications and websites that are about Australia, by an Australian on a subject of relevance to Australia, or by an Australian of recognised authority on a subject of international importance. The PANDORA website is at <http://pandora.nla.gov.au>.
27. PANDORA is built up through regular scans of the web, with material selected on the basis of its relevance and functionality. This selection process also allows materials to be catalogued as part of the national bibliography.
28. PANDORA was established by the NLA in 1996 and has since grown into a collaborative project involving nine other participants. They are:
  - Australian Institute of Aboriginal and Torres Strait Islander Studies
  - Australian War Memorial
  - NFSA
  - Northern Territory Library
  - State Library of New South Wales
  - State Library of Queensland
  - State Library of South Australia
  - State Library of Victoria
  - State Library of Western Australia
29. Of the organisations collecting material for PANDORA, South Australia and the Northern Territory can rely on state and territory legal deposit legislation which specifically includes electronic publications. In the absence of legal deposit provisions for online publications and web material, all other participants are obliged to seek the permission of publishers before copying material into the web archive.
30. Material held in PANDORA is generally publicly accessible via the internet and is available free of charge. There is a small proportion of titles which are restricted for commercial reasons, or because their content is sensitive. Where material is restricted for commercial reasons, collecting institutions negotiate with publishers to determine an appropriate period for restriction, usually the period during which the item is commercially viable. During the period of restriction, most publishers permit use of the material on-site on a single computer located at the NLA in Canberra.
31. The cost associated with collecting material and making that material publicly accessible through the web archive is largely borne by the collecting institutions. Where the material is not freely available on the web, publishers may provide access to the material, or copies of it, at their own expense.

## National Film and Sound Archive

32. The NFSA<sup>3</sup> develops, preserves, presents and makes available Australia's national audiovisual collection. The collection comprises film, recorded television and radio broadcasts, sound recordings, electronic materials (including web pages and media rich content) and still images (including documentation, transparencies and posters). The NFSA currently obtains material for the archive through partnerships, agreements or ad-hoc arrangements with commercial organisations, independent interests and other government agencies. Filmmakers who receive Australian Film Commission (AFC) or Film Finance Corporation funding are generally contractually obliged to deposit materials with the NFSA and they bear the cost of deposit.
33. Access to the NFSA collection is provided through the online search facility *Search the Collection*, the *Centre for Scholarly and Archival Research* and its Collection Access Services area. Services available include research and information, copying, previewing, as well as internal and external screenings. Fees are charged for services facilities and licences. The primary users of the Collection Access Services are broadcasters, program producers, individual industry researchers, scholars, and Indigenous peoples and communities.
34. Access provided by the Collection Access Services area facilitates on-site preview for individual users under controlled circumstances. For the delivery of material offsite (whether preview, loan or copy), the user requesting the material must seek the appropriate clearances from the copyright owner(s), and/or Indigenous cultural custodians (where applicable) and present these to Collection Access Services before any material is released.
35. In certain circumstances the NFSA has negotiated agreements with copyright owners to communicate material to users for offsite preview, and to sublicense use (for example broadcast) upon payment of a scheduled fee.
36. The NFSA provides general public access to the collection through exhibitions, screenings and cultural outreach programs.
37. The NFSA website is at <http://www.nfsa.afc.gov.au>.

## National Archives of Australia

38. Australian Government agencies, including the Australian Broadcasting Corporation, Special Broadcasting Service and Film Australia, are required by law to transfer prescribed records into the custody of the NAA so that it may preserve and provide public access to them. The majority of the collection held by the NAA is comprised of unpublished paper files. However, there are also significant

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<sup>3</sup> On 1 July 2003 ScreenSound Australia was merged with the Australian Film Commission (AFC). Under the auspices of the AFC, ScreenSound has returned to its former title of the National Film and Sound Archive.

holdings of other material, such as films, sound recordings, photographs, posters, maps, architectural drawings, play scripts, musical scores and digital records from a wide range of agencies.

39. The Archives Act gives the public a statutory right to access Commonwealth records over 30 years old. For access to records before 30 years, including Australian Broadcasting Corporation and Special Broadcasting Service program materials, the requesting user is referred to the relevant controlling agency. The NAA is based in Canberra and has offices in each state and in Darwin, and, provides public access across Australia and internationally through its website. Facilities for viewing material and copying services are provided on a cost-recovery basis.
40. The Australian Government owns copyright in most but not all records held by the NAA. Where the Commonwealth does not hold copyright, the NAA makes copies available to researchers in the form of digital images or photocopies under provisions of the Copyright Act and the Archives Act. The NAA may also provide copies in order to facilitate the process of seeking permission from the copyright owner to publish the material.
41. The costs associated with transferring the custody of records to the NAA are normally borne by the transferring agency. In special circumstances there have been instances where the NAA has shared the costs relating to ABC and SBS program materials by providing blank tapes. The public broadcasters cover other costs, including dubbing and freight. The public broadcasters control and administer copyright in their program material. Researchers wishing to communicate, reproduce, or purchase copies of program material are referred to the broadcasters.
42. The NAA website is at <http://www.naa.gov.au>.

## **Collection under an extended legal deposit scheme**

43. Different media lend themselves to particular methods of collection. For example, some materials can be independently obtained by a deposit institution using automated processes such as robotic harvesting by a computer program of material on the internet or recordings of broadcasts. Other media such as film, CDs and DVDs may require that the publisher or producer submit copies to the deposit institution in the highest quality physical format. Currently, recorded broadcasts are subject to collecting society payments.
44. In its 1999 report the CLRC recommended that the NLA and NFSA be named as repository institutions for the purposes of the extended scheme.

### **CLRC Recommendation**

7.125. The Committee recommends that:

- Both the National Library of Australia and the National Film and Sound

Archive be named as repository institutions;

- The complementary roles of the National Library and the National Film and Sound Archive be recognised in the legislation;
- The definition of library material be broadened to include audio visual materials, and materials in electronic form;
- The revised deposit scheme operate prospectively in respect of the new materials it covers; and
- The deposit of all materials remain compulsory.

Issue 5: Should there be a role for other organisations, in addition to the NLA and NFSA, to act as repositories for material under an extended legal deposit scheme?

Issue 6: How might duplication of material collected by legal deposit agencies be avoided? For example, should publishers be required to deposit relevant material with more than one institution?

### **3 What should be the scope of an extended legal deposit scheme?**

45. The examination of the feasibility of extending the scheme to audiovisual and electronic material recognises that significant material is not captured by the existing scheme. Technological advances mean that some written materials are only available in an electronic form. The omission of audiovisual and electronic materials from the scheme also means that significant films and sound recordings published in Australia are not subject to the legal deposit requirement.

Issue 7: Should an extended legal deposit scheme apply to electronic versions of printed material?

Issue 8: What other material should an extended legal deposit scheme apply to?

### **Broadcast and internet material**

46. The current legal deposit scheme only applies to published material. Under the Copyright Act, material is published when copies have been supplied to the public. In most cases recordings of broadcasts would not be supplied to the public. Some recording is undertaken of audiovisual and electronic materials for the purpose of meeting legal obligations, such as to retain a copy of a broadcast for a specified period. Such recordings however, may not be of a sufficient standard for archiving.

47. A question also arises in relation to the status of material which appears solely on the internet (such as on a website). While many websites do contain material published in other formats, there is no Australian case-law that determines

whether placing unpublished material on a website constitutes publication under the Copyright Act.

Issue 9: Should an extended legal deposit scheme apply to broadcasts? If so should this be limited to any particular types of material? Should the scheme apply to internet material hosted in Australia?

## **Internet material hosted outside Australia**

48. A legal deposit scheme that extended to material on the internet would need to address issues such as determining when the material was relevant to Australia. For example, where material is hosted outside Australia but directed at Australians or where the author is an Australian.

Issue 10: Should an extended legal deposit scheme apply to internet material hosted outside Australia and in what situations?
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## **4 Comprehensive or selective deposit under an extended legal deposit scheme?**

49. Under a comprehensive approach all copyright material that is published in Australia would be subject to statutory legal deposit requirements. As has already been noted, this would raise significant issues for both repository institutions and publishers.

50. A selective approach would mean that only some material would be subject to legal deposit (once the material is selected it would be mandatory to deposit it). Some ways in which a selective model might operate include:

- mandatory notification of new publications to the collecting institution by the Australian publisher and then selection by the institution of material for deposit;
- mandatory deposit by Australian publishers of publications based on prescribed criteria developed by the collecting institution and applied by the publisher; or
- a hybrid approach which could provide that certain prescribed materials must be automatically deposited following publication, (for example, films financed by Government agencies) whilst retaining mandatory notification and selection by the collecting institution for all other published material.

51. In its 1999 report, the CLRC considered the issue of whether a comprehensive or selective approach should be adopted. The CLRC recommended a selective approach, requiring copyright owners to notify collecting institutions within one month of publication of material. The CLRC also recognised that a wide range of factors would need to be considered in developing criteria for selecting material for deposit and recommended that any such guidelines should be developed by repository institutions in consultation with relevant copyright owner groups.

### **CLRC Recommendations**

7.135 The Committee recommends that under the revised scheme the repository institutions have the discretion to select materials for inclusion in their collections.

7.139 The Committee recommends that the development of any guidelines be left to the repository institutions in consultation with relevant copyright owner groups.

52. In considering which approach Australia might take in establishing the scope of any extended legal deposit model, it may be useful to consider the schemes that apply in other countries with relevant legal deposit legislation.
53. The United Kingdom (UK) has adopted a selective approach to expanding legal deposit and plans to implement the system progressively through regulations to cover ‘non-print’ publications. As at August 2007, regulations relating to deposit of non-print publications were yet to be introduced. However, the UK Act states that regulations may set out provisions relating to:
- deposit libraries;
  - the request of copies of computer programs and any information necessary to access those programs;
  - timeframes for delivery of deposit materials;
  - permitting or requiring publishers to deliver materials electronically;
  - specifying the quantity and format of copies (where the material is available in different formats);
  - deciding the circumstances in which works published online are or are not to be treated as published in the UK; and
  - specifying the medium in which a copy of a work published online is delivered.
54. In comparison, New Zealand has adopted a comprehensive approach to extending its legal deposit requirements to include electronic public documents (offline and online). Following a public consultation process in 2004 and 2005, the New Zealand Government implemented these reforms under s 31 of the [National Library of New Zealand Act 2003](#). The changes came into effect on 12 August 2006.
55. Where a document is published in both print and electronic form, the New Zealand scheme requires one copy in each format to be deposited.
56. The approach exempts two classes of document from the requirement to deposit:
- documents created as a source of information, the only purpose of which is to enable the transaction of government business; and

- documents deposited in an archive established for the purpose of long term preservation of public documents or a class of public document.
57. In Denmark, for example, legal deposit legislation which commenced on 1 July 2005 covers ‘materials made public’, which is defined as:
- works published in physical format (regardless of the medium);
  - materials made public via electronic communication network (which provides for harvesting of Danish internet domains and also material which is published from international domains which is directed at the public in Denmark);
  - radio and television programs (which provides for recording of Danish radio and television programs broadcast by a Danish broadcasters or programs aimed at Danish audiences broadcast from other countries); and
  - Danish films produced with a view to public showing (with the producer to bear the cost of delivering two copies plus relevant promotional material to the collecting institution).
58. In comparison, Japan’s legal deposit legislation refers to audiovisual and electronic materials in the following physical formats:
- motion picture films;
  - photographic records; and
  - texts, images, sounds or programs recorded by electronic, magnetic or other methods which can not be directly perceived by human senses.
59. A distinction between the Danish legal deposit model and the Japanese and UK models is that the Danish model defines the content which is subject to legal deposit, whereas the Japanese and UK models define formats which are subject to legal deposit.
60. A possible basis of any Australian extension of legal deposit is that of cultural significance.

Issue 11: What approach, comprehensive, selective or hybrid, should be used for collection of materials under an extended legal deposit scheme? Should ‘significance’, say to Australian audiences, be the basis of any extension of legal deposit? Should online and offline material be treated differently and if so, on what basis?

## 5 Collection and storage

61. Once deposited, materials must be stored and preserved against loss. The storage and preservation of materials will, in most cases require the making of copies. There are a number of general preservation provisions under the Copyright Act that apply to materials held by libraries and archives as well as more specific provisions that can be used by key cultural institutions such as the NLA. These

provisions apply to materials deposited under the legal deposit scheme and are discussed below.

### **General preservation provisions in the Copyright Act - Sections 51A, 110B and 112**

62. Section 51A provides that an officer in charge of the library or archives can copy material for preservation and other purposes. Specifically it provides that the officer may make:

- A copy of a manuscript or an original artistic work for preservation purposes or for the purpose of research;
- A copy of a work in the collection in a published form that has been damaged or has deteriorated – for the purpose of replacing the work;
- A copy of a work in the collection in a published form that has been lost or stolen – for the purpose of replacing the work; or
- A copy of a work in the collection for administrative purposes (administrative purposes means purposes directly related to the care or control of the collection and would include copying for the purposes of preservation).

63. Where a work that forms part of the collection has deteriorated or been lost or stolen, a library is permitted to make a replacement copy of the work. This does not mean that the damaged or stolen copy must be copied. Another copy of the work, eg one held by another library or archive could be copied to make the replacement copy.

64. Section 51A applies to any library or archive. The more limited definition of 'library' used in ss 49 and 50 of the Act does not appear in s 51A. Archives under this section also include collections in museums and galleries. Archives are defined in s 10 of the Act as archival material in the custody of Australian Archives (the NAA), The Archives Office of NSW, the Public Record Office, the Archives Office of Tasmania and a collection of documents or other material to which the definition applies by virtue of s 10(4) (e.g. not-for-profit museums and galleries that maintain a collection of documents or material of historical significance or public interest for the purpose of preservation).

65. In summary, s 51A allows a library or archive to make at least three copies of a manuscript or an original artistic work in their collection. Copies can be made for the purpose of preservation, research or for 'administrative purposes'. The section also allows a library or archive to make a least two copies of a work in its collection on the basis that it has either 1) been damaged or deteriorated or lost or stolen or 2) for 'administrative purposes'.

#### *Films and sound recordings*

66. Similarly, s 110B provides that an officer in charge of the library and archives can make:

- a copy of a sound recording or film held in the collection in the form of a first record or copy for preservation purposes or for the purpose of research;
- a copy of a sound recording or film held in the collection in a published form that has been damaged or has deteriorated; or
- a copy of a sound recording or a film held in the collection in a published form but has been lost or stolen.

67. Section 110B also applies to any library or archive because the limited definition of ‘library’ included in ss 49 and 50 of the Act does not appear in s 110B.

Archives under this section would also include collections in museums and galleries. Archives are defined in s 10 of the Act as archival material in the custody of the NAA, the Archives Office of NSW, the Public Record Office, the Archives Office of Tasmania and a collection of documents or other material to which the definition applies by virtue of s 10(4) (e.g. not-for-profit museums and galleries that maintain a collection of documents or material of historical significance or public interest for the purpose of preservation).

68. In summary, s 110B allows a library or archive to make at least two copies of a sound recording or film held in the collection in the form of a first record or copy. These copies would need to be made for the purposes of preservation or research. This section also allows a library or archive to make one copy of a sound recording or film held in its collection on the basis that it has been damaged or has deteriorated or it has been lost or stolen.

### **Preservation copying by key cultural institutions - Sections 51B, 110BA and 112AA**

69. Recent amendments to the Copyright Act saw the addition of new provisions to ensure that key cultural institutions are able to preserve items of historical or cultural significance to Australia in their collections. The provisions are consistent with international best-practice guidelines for preservation<sup>4</sup>.

70. New ss 51B, 110BA and 112AA enable up to three copies of any material (e.g. works, sound recordings, films and published editions of works) to be made by key cultural institutions. However, such copying can only be done for preservation purposes.

71. For the purposes of these provisions, key cultural institutions are deemed to be those libraries or archives that have a statutory function of developing and maintaining a collection (e.g. NLA, State Library of Victoria). Under these provisions the Attorney-General can also prescribe particular bodies administering libraries and archives to be key cultural institutions.

72. An officer of a key cultural institution is not required to wait for material to deteriorate or to have been lost or stolen before making a preservation copy or

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<sup>4</sup> UNESCO Guidelines for the preservation of digital heritage available at <http://unesdoc.unesco.org/images/0013/001300/130071e.pdf>.

copies. An authorised officer of the institution may make an assessment of the need for a preservation copy at any time. However, the cumulative total of preservation copies that can be made in reliance on these sections is three.

73. A commercial availability test is included in the provisions. Free copying of materials for preservation is only permitted where a copy can no longer be purchased. The commercial availability test does not apply to manuscripts, first records or unpublished records embodying sound recording or first copies or unpublished copies of films.
74. The CLRC also considered the issue of copying for storage purposes in its 1999 report. The Committee recommended that cultural institutions should not be required to seek authorisation from copyright owners for the storage of such material.

#### **CLRC Recommendation**

7.142. The Committee is of the view that the National Library of Australia and the National Film and Sound Archive should not need to seek the authorisation of the copyright owner with respect to the storage of deposited materials. The Committee does not recommend any special exceptions to moral rights of authors under the revised scheme.

Issue 12: In light of the existing provisions in the Copyright Act, is there a need for any additional provisions to ensure the safe storage and preservation of legal deposit materials?

#### **Timeframe**

75. Timeframes for the deposit of materials range widely from country to country. In Australia the timeframe is currently one month from publication (see s 201(1)). In other countries where publishers are also required to deposit physical copies of material with collecting institutions the period varies, e.g. in South Africa deposit is required 14 days from publication, in New Zealand it is 20 days from publication, and in the UK is one month from publication.
76. The timeframe for delivering physical copies of material under a legal deposit scheme was also considered by the CLRC in the context of a selective legal deposit scheme. The CLRC recommended that deposit be required within one month of a publisher receiving a request from a collecting institution.

#### **CLRC Recommendation**

7.136. The Committee ... recommends that the Act require notification to be given to the repository institutions within one month of the date of publication or making available to the public of the copyright material. The publisher of that material should have a further one month from the date it receives a request for deposit to deliver a copy of the material to the repository institution or provide reasons why delivery is not possible within the one month period.

Issue 13: What timeframe should apply for deposit under an extended legal deposit scheme?

Is the timeframe for deposit suggested by the CLRC appropriate in the context of a selective approach to extending legal deposit?

Should different timeframes apply to the deposit of different published materials if legal deposit is extended?

## **Technological Protection Measures**

77. Technological protection measures (TPMs) are technical locks copyright owners use to stop their material being copied or accessed (e.g. passwords, encryption software and access codes) without their permission. There is civil and criminal liability under copyright law for the circumvention ('breaking') of access control TPMs and dealings in circumvention devices and services. 'Access control TPM' is defined in s 10(1) of the Copyright Act. There is no liability for circumvention of measures that do not come within that definition.
78. Under an extended legal deposit scheme it is likely that many published audiovisual and electronic materials that are deposited will be protected by TPMs. Materials such as eBooks, electronic articles, CDs, DVDs, databases and video and audio files often have TPMs applied to them. To ensure it is able to provide access to the public to deposited material the holding institution must have a copy which is accessible.
79. The New Zealand legal deposit model provides for the National Library of New Zealand to copy and store online material for legal deposit purposes and allows circumvention of technological protection measures where such measures prevent or hinder copying, storage and use of the material.
80. Other countries such as Denmark require that the publisher provide the collecting institution with passwords and other information necessary for gaining access to the material, producing copies of the material and making the material available to the general public.
81. In Australia, under the Copyright Act there are already exceptions to liability for circumvention of access control TPMs by libraries and archives in s 116AN(8), in relation to acquisition decisions, s 132APC(8), in relation to anything lawfully done by libraries or archives in performing their functions and under Schedule 10A of the *Copyright Regulations 1969*, in relation to some existing exceptions for libraries and archives to copyright infringement. There are also defences to criminal liability, but not civil liability, for dealings in circumvention devices and services (ss 132APD(7) and 132APE(7)).

Issue 14: In light of the recent amendments to the technological protection measure

provisions in the Copyright Act, are any additional provisions required to ensure access to materials deposited under an extended legal deposit scheme?

Should publishers be required to ensure that the copy of published material provided under an extended legal deposit scheme will be accessible?

## **6 Appropriate access to deposited audiovisual and electronic materials**

82. Material currently collected through legal deposit becomes part of the NLA's general collection and is generally made available to the public in the same way as material which is purchased.

83. The CLRC's 1999 report included a recommendation on the issue of access to deposited audiovisual and electronic materials.

### **CLRC Recommendation**

7.145. The Committee recommends that under the revised scheme deposited materials be made available on the basis of restricted access.

84. The Committee's report discussed 'restricted access' in terms of limiting access so that hard copies and electronic materials could only be viewed on-site at the repository institution.

Issue 15: On what basis, if any, should access be restricted to material deposited under an extended legal deposit scheme?

## **7 Use of legal deposit materials**

85. The NLA relies on the library and archive provisions in Part III, Division 5 of the Copyright Act to copy legal deposit materials for users and other libraries. The operation of those provisions is discussed below:

### **Part III, Division 5 of the Copyright Act**

86. Under s 49 of the Copyright Act, a user may make a request to the library or archive to be supplied with a reproduction of an article, or part of an article, contained in a periodical publication, or the whole or part of a published work held in the collection of the library or archive. This must be accompanied by a declaration that the reproduction is for the sole purpose of research or study, and that such a reproduction has not previously been provided. Where the library or archives officer is satisfied as to the truth of such a declaration then they may make and supply the requested reproduction to the user.

87. There are limits on what can be reproduced. For example, reproduction may not be of two or more articles in the same periodical (unless it is for the same research or course of study), and further, may not amount to more than a 'reasonable portion' of the whole of a work unless the work is unable to be obtained elsewhere within a reasonable time, and at a reasonable commercial price. If the work is in electronic form, then the library may make such work available online to the user within the premises of the library or archives provided it is in a format that cannot be copied.
88. Under s 50 of the Copyright Act, a library may request another library to supply a reproduction of the whole or part of an article contained in a periodical publication, or the whole or part of a published work held in the other library's collection. The other library may provide this reproduction without infringing copyright provided the request is for :
- (i) the purpose of including in the library's collection;
  - (ii) provision of library services to a member of Parliament; or
  - (iii) supplying a user request.
89. Additional restrictions apply to this exception where the reproduction amounts to the whole, or more than a reasonable portion, of the work. This exception is also available to works which are in electronic form. However, a librarian must first determine whether or not the electronic work can be obtained within a reasonable time at an ordinary commercial price before supplying the work and must destroy the copy made for the purpose of supply.

#### **Part IV, Division 6 of the Copyright Act**

90. If the legal deposit scheme were extended the following provisions would also apply to the use and preservation of deposited published sound recordings and films.
91. Sections 110A and 110B provide for the copying and communication of unpublished and published sound recordings and films in libraries or archives. If the legal deposit provisions are extended to include audiovisual and electronic material, there is an issue as to whether or not these provisions should apply to legal deposit material or whether they should be excluded and provisions drafted specifically in relation to material collected through the extension of legal deposit.
92. Section 110A provides that a library or archive may make a copy of an unpublished sound recording or film that is more than 50 years old for the purpose of research or study or with a view to publication. Section 110B provides that a library or archive may make a sound recording or a film that is part of its collection available online on a computer terminal installed within its premises. Section 110B also allows a library or archive to make a sound recording or a film available online to be accessed through use of a computer terminal installed in another library or archive, if the purpose of the copy is for research being carried out by that other library or archive.

## **Section 200AB of the Copyright Act**

93. The *Copyright Amendment Act 2006* introduced an exception for the use of works and other subject matter for certain ‘special purposes’. One of the special purposes is use by a library or archives – for maintaining or operating the library or archives or providing library services.
94. A particular use is allowed pursuant to s 200AB without the copyright owner’s permission if:
- (i) the use is not made partly to obtain a commercial advantage or profit;
  - (ii) the use:
    - amounts to a ‘special case’,
    - does not conflict with a normal exploitation of the material, or
    - does not unreasonably prejudice the legitimate interests of the copyright owner.
95. The prohibition on obtaining a commercial advantage or profit does not prevent charging a fee, on a cost-recovery basis, for providing a service to users. The term ‘special case’ has the same meaning as in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights. It means that, as well as being for one of the precise purposes set out in the exception, the use must also be narrow in scope.

Issue 16: Under any extended legal deposit scheme should legal deposit materials be subject to separate provisions concerning their use by the repository institution and the public?

What kind of provisions are desirable to ensure that repository institutions can provide the public with adequate access to legal deposit materials under any extended scheme?

## **8 Addressing the issues**

96. In preparing your submission you may wish to comment on the questions related to the issues raised in the Discussion Paper, as listed below. The questions are provided as a guide for submitters and are not intended to be exhaustive or to restrict feedback on any other relevant issues.

Issue 17: Are there any other issues that you consider relevant to the extension of the legal deposit scheme?

## **9 List of issues**

97. Issues identified in the text of this document are set out below for ease of reference.

Issue 1: Should the legal deposit scheme be extended to audiovisual and electronic materials and, if so, how should such materials be defined (including the quality of legal deposit materials, such as the ‘best copy’)?

Issue 2: Should an extended legal deposit scheme be in the *Copyright Act 1968* or is a separate piece of legislation more appropriate?

Issue 3: How many copies of published material should a publisher be required to deposit under an extended legal deposit scheme?

Issue 4: Should the existing requirement that material be deposited at the publisher’s expense continue to apply under an extended legal deposit scheme?

Issue 5: Should there be a role for other organisations, in addition to the NLA and NFSA, to act as repositories for material under an extended legal deposit scheme?

Issue 6: How might duplication of material collected by legal deposit agencies be avoided? For example, should publishers be required to deposit relevant material with more than one institution?

Issue 7: Should an extended legal deposit scheme apply to electronic versions of printed material?

Issue 8: What other material should an extended legal deposit scheme apply to?

Issue 9: Should an extended legal deposit scheme apply to broadcasts? If so should this be limited to any particular types of material? Should the scheme apply to internet material hosted in Australia?

Issue 10: Should an extended legal deposit scheme apply to internet material hosted outside Australia and in what situations?

Issue 11: What approach, comprehensive, selective or hybrid, should be used for collection of materials under an extended legal deposit scheme? Should ‘significance’, say to Australian audiences, be the basis of any extension of legal deposit? Should online and offline material be treated differently and if so, on what basis?

Issue 12: In light of the existing provisions in the Copyright Act, is there a need for any additional provisions to ensure the safe storage and preservation of legal deposit materials?

Issue 13: What timeframe should apply for deposit under an extended legal deposit scheme?

- Is the timeframe for deposit suggested by the CLRC appropriate in the context of a selective approach to extending legal deposit?
- Should different time frames apply to the deposit of different published materials if legal deposit is extended?

Issue 14: In light of the recent amendments to the technological protection measure provisions in the Copyright Act, are any additional provisions required to ensure access to materials deposited under an extended legal deposit scheme?

- Should publishers be required to ensure that the copy of published material provided under an extended legal deposit scheme will be accessible?

Issue 15: On what basis, if any, should access be restricted to material deposited under an extended legal deposit scheme?

Issue 16: Under any extended legal deposit scheme should legal deposit materials be subject to separate provisions concerning their use by the repository institution and the public?

- What kind of provisions are desirable to ensure that repository institutions can provide the public with adequate access to legal deposit materials under any extended scheme?

Issue 17: Are there any other issues that you consider relevant to the extension of the legal deposit scheme?

## 10 Submissions

98. Submissions are invited from interested parties on the matters covered in this paper. Submissions should be made by 11 January 2008 and should be addressed to:

Mr Simon Cordina  
Assistant Secretary  
Content, Programs and Regulation Branch  
Department of Communications, Information Technology and the Arts  
GPO Box 2154  
Canberra ACT 2601

99. It would be appreciated if submissions could be provided electronically. Submissions should be emailed to [legaldeposit@dcita.gov.au](mailto:legaldeposit@dcita.gov.au). Questions concerning this review may also be directed by email at the above address, or by telephone 02 6271 1219, or by facsimile 02 6271 1717.

100. It is proposed that all written submissions will be publicly available to foster an informed and robust consultative process. Submissions will be treated as public documents unless otherwise specified and will be published on the Department of Communications, Information Technology and the Arts' website, [www.dcita.gov.au](http://www.dcita.gov.au). The Government reserves the right not to publish documents or other information on this website or any other that it receives from industry or the public, where it considers it is not appropriate to do so. All submissions will be available to relevant officers of Australian Government Departments involved in this review.