



**Submission to the Attorney's General Department and
the Department of Broadband, Communications and
the Digital Economy**

on

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

from

The National Library of Australia

17 January 2008

National Library of Australia Submission to 2007 Discussion Paper on the Extension of Legal Deposit

Overview of key points made in the submission

- The purpose of legal deposit is to ensure a country's documentary heritage in the form of publications is collected and managed for ongoing public access. This purpose is relevant regardless of the format of publication.
- The Library seeks an extension of the scheme that is format and technology neutral to allow it to collect, manage and provide access to all forms of Australian publications. Of immediate concern are publications in electronic form.
- The Library is committed to collaborating with creators, publishers and other collecting institutions in developing a national collection of publicly available electronic resources. It also gives a high priority to keeping abreast of developments in technologies that will improve the efficiency and cost-effectiveness of collecting and managing electronic resources. In these ways, and by taking a selective and judicious approach to what is collected, the Library would aim to better manage the costs involved in extending legal deposit to electronic publications and to minimise the impost on publishers.
- Extended legal deposit provisions should be removed from the *Copyright Act* and placed in separate new legislation that covers the needs of the National Library and the National Film and Sound Archive.
- Current arrangements work very well for print based materials and could be applied to physical format electronic materials, like CD-ROMS and DVDs, and to audio-visual materials, but it is important that the existing arrangements continue to apply to print-based materials.
- Under an extended scheme, the Library requires an extension of its rights so that it can collect electronic publications for the national collection without the need to negotiate the right to do so with publishers on a case by case basis.
- The Library requires the right to collect electronic publications selectively and to apply flexibility in its methods of collecting, including capture of copies by the Library, notification and/or deposit by the publisher, and other methods.
- In seeking an extension of legal deposit, the Library does not seek to undermine the rights and commercial interests of creators and publishers. The Library has a long and successful record of working with Australian publishers of both print and electronic materials, and of compliance with the provisions of the *Copyright Act*.
- With regard to providing public access to materials collected, the Library's requirements for print, microform, physical format electronic and commercial online publications, are covered by relevant provisions of the *Copyright Act*.
- However, for content that was freely available online at the time it was collected, the Library seeks an extension of its access rights under the *Copyright Act* in order to allow it to provide free, remote public access to this content.

- The Library also requires the right to take all actions needed to ensure collected materials can be preserved and remain available for ongoing future access and use.

Introduction - the need to extend legal deposit

The National Library of Australia welcomes the Review of the Extension of Legal Deposit and is pleased to have the opportunity to make a submission.

The National Library has a critical interest in the outcome of this Review. The Library's ability to fulfil its statutory responsibilities in an electronic publishing environment will depend in part on the extension of legal deposit to electronic publications, and on the approach applied.

The National Library of Australia Act 1960 requires the Library:

- (a) to maintain and develop a national collection of library material, including a comprehensive collection of library material relating to Australia and the Australian people;
- (b) to make library material in the national collection available to such persons and institutions, and in such manner and subject to such conditions, as the Council determines with a view to the most advantageous use of that collection in the national interest.

The purpose of legal deposit is to ensure a country's documentary heritage in the form of publications is collected and managed for ongoing public access. The existing legal deposit provisions have enabled the Library to develop a comprehensive collection of Australian print-based publications which is a national asset, available for use by all Australians.

The purpose of legal deposit is relevant for all publications regardless of format. However, the current scheme is limited to particular categories of print-based publications and is unable to be applied to the widening range of technologies and formats now being used for publication. The Library seeks an extension of the existing scheme that is format and technology neutral to provide it with the legal mandate to collect, preserve and provide appropriate access for all forms of Australian publications. Of critical concern now is the need to collect and manage electronic published materials.

As publishing in Australia and by Australians moves increasingly to electronic means of production, distribution and access, the existing legal deposit scheme and the National Library's ability to fulfil its statutory responsibilities are both being left behind. Electronic publishing has become the preferred means of making information resources available to the public; Australians now have an expectation that the information they seek will be available in electronic form. The range and scope of information and intellectual content that is now being offered to the public online, and only online, continues to grow. Government publishing, information generated by community organisations, election material and analysis, research, journals virtually all forms of publishing are now distributed in electronic form, even while print-based publishing continues. Analysis of the Australian web domain over the last three years indicates that an average of approximately 65% new content is added annually, while less than 20% remains unchanged.

The purpose of legal deposit is just as critical with regard to electronic materials as it is to print. The ability to access and use information in electronic form is fragile as it relies on constantly changing technology. Electronic resources reflecting our times can disappear overnight from the World Wide Web, become trapped on obsolete carriers, or become unusable due to superseded software or equipment. There is a very real danger of the record of published Australian creative expression and information entering a digital Dark Age if it is not gathered into a national collection and kept accessible to the public.

Background

Since the early 1980s the National Library has attempted to include Australian electronic publications in its national collection. These publications include physical format electronic materials originally distributed on physical carriers such as magnetic disks, tapes and CD-ROMs. They also include online materials such as websites and online journals gathered very selectively to be managed and accessed through PANDORA: Australia's web archive (as described in paras. 27–32 of the Discussion Paper).

If not for the action already taken by the National Library, the 2000 Sydney Olympics website, the Centenary of Federation website, the website of the previous Prime Minister John Howard, and many other historically important electronic information resources would no longer be accessible to the public; indeed, it would be as if they had never existed.

While the approach used to build the PANDORA collection over the past 12 years has produced an important sample of Australian online publications, this has required labour intensive negotiation with each publisher for the rights to collect, preserve and provide access. The Library's experience over this period proves that it is not possible to scale the current negotiation-based approach to the level of collecting required for an adequate national collection. As a result, the vast majority of Australian online information will not be represented in the national collection of publications, and will not be preserved for future research and study, under the existing legal deposit arrangements.

The Library has also gathered a number of more comprehensive harvests of the Australian web domain, as experimental snapshots taken to better understand the range of content that Australians are publishing online as well as the technical and management issues associated with this approach to collecting. This content has not been made available to the public because this is not allowed under current legal deposit and Copyright provisions.

An extended legal deposit scheme would provide the National Library with a legal mandate to collect and ensure ongoing public access to such materials, avoiding many expensive overheads in doing so and allowing the exploitation of technologies for efficient and intelligent web archiving.

The Library's collection also includes numerous physical format electronic materials some of which have been acquired through voluntary deposit well after the technology for accessing them has become obsolete. The information content of many of these items is no longer retrievable and is effectively lost, despite its importance to the national heritage. An extended legal deposit scheme would ensure such materials entered the Library's collection in time for preservation access to be taken to maintain access.

The Library is committed to collaborating with creators, publishers and other collecting institutions in developing a national collection of publicly available electronic resources. The Library already cooperates with the state and territory libraries and other national collecting institutions in building the PANDORA web archive, and with selected Commonwealth government agencies through the MAGDIR program (<http://www.nla.gov.au/MAGDIR/>) to manage government electronic resources for ongoing access. The Library also gives a high priority to keeping abreast of developments in technologies that will improve the efficiency and cost-effectiveness of collecting and managing electronic resources. In these ways, and by taking a selective and judicious approach to what is collected, the Library would aim to better manage the costs involved in extending legal deposit to electronic publications and to minimise the impost on publishers.

In seeking an extension of legal deposit, the Library does not seek to undermine the rights and commercial interests of creators and publishers. The Library has a long and successful record of working with Australian publishers of both print and electronic materials, and of compliance with the provisions of the Copyright Act.

The National Library's proposed model for an extended legal deposit scheme

The existing legal deposit arrangements work very well for print-based publications - they have enabled the Library to develop an outstanding collection on behalf of the nation and to ensure that it remains available for appropriate access and use. It is important that the existing arrangements continue to apply to print-based materials, while extending the scheme to other forms of publishing.

Under an extended scheme, the Library requires an extension of its rights so that it can add electronic publications to the national collection without the need to negotiate the right to do so on a case by case basis. The Library also seeks an extension of its access rights to be able to provide free remote public access to materials originally published freely online. Where access to content is restricted by publishers, for instance by charging a fee, the Library would continue to provide access under the conditions of the Copyright Act, or seek to establish suitable, mutually acceptable access agreements with publishers.

In summary, the Library considers that an extended scheme should:

- Be as technology and format neutral as possible, based on the fundamental legal deposit principle of ensuring persistent access to published information.

- Maintain the current approach to collecting print-based publications and extend it to physical format electronic publications, microform publications, and published audiovisual materials.
- Provide the Library the legal right to collect publicly available online electronic publications, including the ability to collect selectively and to apply flexibility in its methods of collecting, including capture of copies by the Library, notification by the publisher, and other methods.
- Maintain the current approach to access and use under the Copyright Act for print, physical format electronic and microform publications, and for online electronic materials originally published with access restrictions, but permit remote public access to content that was freely available online at the time it was collected.
- Permit all actions needed to ensure the collected content is preserved and remains available for ongoing future access and use.
- Support efficient, cost-effective procedures and deliver the intended outcomes for publishers, the Library and the public.

Comments on individual issues

Comments on the individual issues identified for comment in the *Discussion Paper* follow.

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’)?

The National Library believes that the legal deposit scheme should definitely be extended to cover published electronic materials and audio visual materials, for the reasons outlined above and in the submission of the National Film and Sound Archive. The Library is interested in particular in Australian electronic materials that are made available to the public in online form (e.g., websites) or in physical format (e.g., CD-ROMs).

The Library also believes microform publications should be included in an extended scheme.

All information and intellectual content that is intentionally made available to the public by the creator or publisher in a form that can be copied should be considered to be published and subject to legal deposit provisions.

The Library believes that information placed on public websites meets this requirement, and would also satisfy a reasonable interpretation of the Copyright Act definition of publication. If the Copyright Act definition is interpreted in ways which would exclude such materials, an extended legal deposit scheme will need to be based on a different definition.

Generally speaking, any publication issued in Australia should be in scope for extended legal deposit requirements. In determining what is an Australian publication, there are long established principles that have worked effectively for print materials, which can be readily applied to electronic materials published in physical formats and to microform publications.

The Library recognises that the globally connected publishing environment for online materials is potentially more complicated. However, exposing content on a publicly accessible website generally involves decisions about what will be included or excluded. The Library considers that where these basic publishing decisions are made provides a workable basis for deciding whether online information has been published in Australia or not.

The term *best copy* presents some problems in an electronic publishing environment. Electronic materials to be included in the national collection under an extended legal deposit scheme must be able to be managed and used. The Library would require that publishers make available a copy that can be cost-effectively captured, preserved, made available, and rendered accurately to its original published form.

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

On balance, the National Library believes that extended legal deposit provisions should be removed from the *Copyright Act* and placed in a separate piece of new legislation that covers the needs of the National Library and the National Film and Sound Archive. As noted in the Discussion Paper, there is no intrinsic link between copyright protection and legal deposit.

While the *Copyright Act* includes critically important provisions relating to libraries and library users, it is not clear that the descriptions of works to be covered by legal deposit will be well served by the definitions associated with the *Copyright Act*. Therefore, the Library believes it may be easier to prepare unambiguous legal deposit provisions outside, but with some reference to, the *Copyright Act*.

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

The Library is seeking a flexible model for the extension of legal deposit. A preferred model at Commonwealth level would require publishers to deposit with the Library one copy of each print publication (as under the existing scheme), and of each physical format electronic publication and each microform publication, while also allowing the Library to capture one copy of online publications.

The Library has established an effective model for collaboration in collecting online publications with a number of collecting organisations at Commonwealth, State and Territory levels through the operation of PANDORA: Australia's web archive. This model would be further developed in an extended legal deposit scheme, to minimise the need for duplication of deposit.

Given the frequently changing nature of online materials, it is likely that some would be gathered more than once over time as part of regular web archiving schedules. These would be stored and controlled as different time-defined versions.

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

The Library believes the principle of deposit at the publisher's expense should be retained in an extended scheme.

However, it should be noted that the flexible model proposed by the Library is aimed at minimising costs to publishers as well as reducing unit costs of collecting electronic publications for the Library. Many of the costs of capturing electronic materials would remain with the Library, but would be significantly reduced by the Library being able to capture content without needing to negotiate rights to capture, preserve and provide access with each publisher.

For some categories of electronic materials, the Library would provide a notification facility so publishers can advise the Library of the availability of their publications, where such an approach offers a mutually cost-effective arrangement. The Library would then decide whether to select the publications.

Under 'best copy' provisions, publishers would be required to either provide a copy without technical protection mechanisms, or to provide additional information that would allow any technical barriers to preservation to be overridden.

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?

The Library supports the extension of legal deposit to facilitate the work of the National Film and Sound Archive in building a national collection of published Australian audiovisual materials. However, it believes that extending legal deposit rights to other national collecting organisations would complicate the situation for publishers and for the institutions without any significant benefit.

Legal deposit for print materials has been successfully managed through the single Commonwealth agency of the National Library. The collaborative approach used to build PANDORA: Australia's web archive has also been used to take advantage of and reflect the expertise and special interests of other collecting institutions. This model would be further developed to ensure appropriate curatorial attention to the range of electronic materials that an extended scheme would cover.

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?

The Library believes that at the Commonwealth level publishers should only be required to deposit material with, or have their material collected by, one institution under an extended legal deposit scheme.

The proposed legal deposit repositories already collaborate closely in establishing and reviewing their Collection Development Policies which set out the scope of each agency's collecting responsibilities. To assist publishers to understand their deposit obligations, the repositories would expose their Collection Development Policies and provide clear guidelines indicating which categories of material should be deposited with or collected by which agency. In cases of uncertainty the agencies would consult to determine the more appropriate home for the material.

The existing collaborative arrangements between the Library and a number of heritage collecting agencies including the NFSA that underpin development of the PANDORA web archive, provide a good model for avoiding duplication of deposit for publishers.

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

The Library believes that an extended legal deposit scheme should apply both to printed material and to any electronic versions of printed materials.

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

As well as materials in print and electronic form, the Library collects publications in microform (fiche and microfilm) and believes these should also be subject to an extended legal deposit scheme in order to ensure their ongoing availability for public use.

The provisions of an extended scheme should include a requirement to deposit any packaging or other information normally associated with physical format electronic publications and microform publications.

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

The Library believes that an extended scheme should apply to broadcasts and supports the NFSA's position as outlined in their submission.

The Library also strongly believes that an extended scheme should apply to Internet material hosted in Australia because the act of placing previously unpublished

material on a public network, and making it available with the express purpose of disseminating information to the public, is analogous with other forms of publishing, and in many cases is replacing other forms of publishing.

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

The Library is interested in collecting some online material hosted outside Australia if it has particular relevance to Australia - for instance, if it is created by a notable Australian or about some aspect of Australia.

The Library recognises that there are likely to be constraints on the application of Australian law to other jurisdictions, limiting how far any local legal deposit scheme can be expected to have effect. However, it believes that legislation should at least be able to extend to online material hosted overseas that is owned by an Australian publisher (as discussed in comments relating to Issue 1 above), so that the Library can collect material of particular interest.

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

The Library believes that a principle of technology and format neutrality should be pursued as far as is practical in defining an extended legal deposit scheme. The underlying purpose of legal deposit is intrinsically technology and format neutral, in that, regardless of the format used, content that has been intentionally made available to the public should be included in a national collection where it can be preserved and made available for ongoing public access and use for the potential benefit of all Australians, under conditions which protect the reasonable rights and interests of producers.

However, the Library believes a hybrid approach is needed at the level of implementing an extended legal deposit scheme.

The Library seeks to build a comprehensive collection of Australian published materials, but also accepts that comprehensiveness not suitable for electronic materials given the vast quantities involved. Some flexibility in methods and scope of collecting is required.

With regard to methods, it would not be feasible to use the same approach for all forms of publicly available information over time and across changing technology environments. Considering current publishing formats, it would be relatively straightforward to apply current deposit practice for print-based materials to physical format electronic publications and microform publications, requiring them to be physically deposited with the Library by the publisher. Most online materials will need to be treated differently. By giving the Library the legal right to initiate and undertake collecting of such materials, the extended scheme would avoid

unsustainable workflows for the Library or publishers, and take advantage of technologies designed for large-scale web archiving.

At the same time, there may be benefits in the Library being able to require publishers to provide notification about some categories of online information. The Library would provide an online notification facility to support this approach.

Significance to Australian audiences is one criterion the Library would continue to use in deciding what online materials should be collected under a selective approach. However, different kinds of significance may be recognised for the same material; for example, it may be appropriate to collect annual snapshots of the whole range of the Australian web domain to reflect the significant trends in how the domain is being used, even though a large part of it may not be judged to have ongoing historical or cultural significance at an individual level.

If an extended scheme were to refer to significance, the Library believes it should be along similar lines to Section 51B of the Copyright Act, (“... an authorised officer of the library or archives is satisfied that the work is of historical or cultural significance to Australia ...”) in order to allow the Library to determine what should be collected. Such determinations would be in line with the Library’s publicly available Collection Development Policy.

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?

The Library believes some additional provisions are needed.

Provisions under Sections 51A and 51B of the Copyright Act do not address the preservation requirements of electronic materials. The commercial availability test requires the purchase of a replacement copy if one is available. However the critical challenge is to maintain accessibility when access technologies change; the commercial availability of additional copies in the same format does not address this challenge for most electronic materials, and instead introduces a delay in taking action. This has the potential to increase both the costs and unreliability of action to maintain access.

Likewise, the limit of three copies that can be made for preservation purposes may be inadequate for electronic materials, which are likely to require the creation of more copies in different formats held concurrently as a guarantee against failure, and as access options for different technology environments.

Issue 13: What timeframe should apply for deposit under an extended scheme? Should different timeframes apply to the deposit of different published materials if legal deposit is extended?

The Library believes the current timeframe of one month has worked well for print materials, and can be readily applied to physical format electronic material and microform publications as well.

For online materials, the Library requires the right to initiate capture. In some cases, bulk deposit arrangements may be negotiated with publishers. In both circumstances, a “best copy” (i.e., able to be captured, ingested, preserved and accessed), should be made available within one month of publication.

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

Given the relatively short timeframe for initiating preservation action for electronic materials, and the nature of the preservation action required, the deposit of ‘locked’ electronic materials would defeat the purposes of legal deposit by making it impossible to preserve the material and to provide meaningful access to it.

While amendments to the Copyright Act relating to TPMs do allow the Library to use circumvention devices, having to rely on such devices is undesirable. It places an additional burden on the Library of having to maintain, migrate, and possibly develop new devices so that access can be provided in changed technical environments.

The Library would require publishers to ensure their publications are deposited or made available for capture free of TPMs which would prevent or complicate copying and preservation action. The Library would work with publishers to determine the most cost-effective ways to achieve this.

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

The Library does not support the CLRC Recommendation 7.145 concerning restricted access to legal deposit material.

Print and electronic published materials deposited or captured under an extended scheme should be subject to normal copyright provisions, including provisions regarding fair use and the rights of libraries and other institutions to provide access, including remote access as currently allowed. However, where Internet material has been freely available to the public at the time of publication, the Library believes it would be anomalous to place greater restrictions on access than were in place when such material was collected. Therefore, the Library seeks the right to provide remote public online access to such material once it has been captured for the national collection.

Much of the population of Australia, for whose benefit the legal deposit scheme exists, live more than a day's travel from Canberra and would be disadvantaged if access were to be restricted to onsite viewing at the Library's premises.

The Library recognises that remote public access may potentially impact on the commercial interests of some publishers of electronic materials. Where a publisher has imposed a restriction such as a fee for access, the Library would continue to provide restricted onsite access under the provisions of the Copyright Act, or negotiate a licence authorising provision of wider access.

The Library would also continue to restrict access where necessary, such as for culturally sensitive material, as is the case with material collected for PANDORA.

Issue 16: Under any extended scheme should legal deposit materials be subject to separate provisions concerning their use by the repository institution and the public? What kind of provisions is desirable to ensure that repository institutions can provide the public with adequate access?

The Library would expect use of legal deposit materials under an extended scheme to continue to conform to the requirements of the Copyright Act, including provisions regarding fair use and the rights of libraries and other institutions to take preservation action, to make copies, and to provide access. However, for an extended scheme to be effective, the Library would additionally require:

- A mandate to copy online electronic materials in order to bring them into the national collection;
- A mandate to provide free remote public online access to any legal deposit material that was freely available to the public at the time it was collected; and
- An extension of preservation provisions to allow effective planning and action for ongoing accessibility.

With regard to whether provisions for access and use of legal deposit materials by repositories and users should be separated from those provisions for copyright materials generally, the Library can see arguments on both sides. Given that the provisions for copyright materials in general would continue to provide the fundamental framework there is an argument for not separating the provisions for legal deposit materials.

On the other hand, the extended provisions that the Library seeks all relate specifically to legal deposit materials, and are sought only in the context of a national collection, rather than as general exceptions for all libraries and archives. Given that it appears to be desirable to move legal deposit provisions generally out of the Copyright Act and into a separate piece of legislation, it would probably be preferable to separate the use and access provisions for legal deposit materials as well.

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

The Library believes the penalty for failure to comply with the legal deposit provisions should reflect the importance of preserving the national documentary heritage and serve as an incentive to compliance. The current penalty level would appear to be inadequate on both counts.

Conclusion

The Library is unable to carry out its statutory functions in an environment of ubiquitous electronic publishing without the extension of legal deposit to electronic materials. The Library notes that a number of countries have enacted or are in the process of enacting legislation aimed at addressing this challenge. It is important that a suitable approach is adopted in Australia to achieve the objectives of legal deposit in a sustainable way. The Library believes the model it has proposed, which incorporates flexibility and selectivity, with a small extension of rights for the Library to collect, preserve and provide ongoing public access whilst not threatening the reasonable commercial interests or other rights of creators and publishers, is appropriately balanced and achievable, and in the best interests of the Australian public.

The Library looks forward to any opportunity to clarify or expand on its proposal and any of its comments in this submission. In the first instance, please contact Ms Pam Gatenby, Assistant Director General, Collections Management (ph. 6262 1672; email pgatenby@nla.gov.au).

Signature