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Dear Mr Cordina

RE: 2007 Discussion Paper on the Extension of Legal Deposit

This is a submission from the Australian Broadcasting Corporation in relation to this Discussion Paper. Please accept the Corporation's apologies for the delay in making it.

Overview:

As noted on page 6 of the Discussion Paper, the primary purpose of a legal deposit provision is to ensure the preservation of aspects of Australia's cultural heritage, making such materials accessible to the public by display or being available on site for research or study purposes.

There is a serious question as to how far the current Australian legal deposit schemes feasibly could be extended to include audiovisual and electronic material, particularly given the transient nature of broadcasts, and the extent to which material posted on the internet changes all the time. The sheer weight and volume of broadcast and internet material published in Australia suggests that a comprehensive legal deposit scheme which is required to capture more than a selective sampling of such material would be onerous, expensive and unworkable. We will refer to this as the feasibility question, which is relevant to all the specific issues identified in the Paper.

There is also the issue of duplication of existing archiving requirements. The ABC, as a Commonwealth agency, may well meet the proposed extension to legal deposit, or at least a system of selective deposit, by working within the requirements of the Administrative Functions Disposal Authority (AFDA) and the ABC's Records Disposal Authority (RDA), as agreed with the National Archives of Australia (NAA). Other Commonwealth and State based agencies work within similar frameworks. It is therefore important that there be no duplication of effort, time or the costs involved, and that these current arrangements for public preservation and access by Commonwealth and State based agencies are included as part of a nationally coordinated process.

As well as the feasibility question, the following comments in relation to the specific issues identified in the Discussion Paper should be read against the ABC's basic submission, which is that at least in relation to agencies (such as the ABC) that have statute-based archiving arrangements, the legal

deposit scheme should not be extended to cover audiovisual and electronic material. We will refer to this as the archiving agencies exception.

1. 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')?

Subject to the archiving agencies exception, the feasibility question and specific comments below in relation to other issues raised in the Paper, the ABC understands why it may be desirable to extend the legal deposit scheme in some way to audiovisual and electronic materials. The ABC has not had the opportunity to consider how such materials should be defined, but would welcome further discussion on this issue. When looking to the technical quality of the material to be deposited, consideration must be given to the differing production scales of material, for example, mass produced audiovisual material (on VHS or DVDs for the retail market etc) on the one hand, and only a limited number of masters or prints (such as film prints, broadcast masters etc) existing on the other. It would not be reasonable to require an audiovisual master (or 'best copy' print) in this latter instance. If 'best copy' is required, the deposit may need to be voluntary, otherwise compensation for the costs of such high quality deposit would need to be provided.

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

In the ABC's view, given that the issues extend beyond copyright, it would be preferable to have separate legislation as in the United Kingdom, Denmark and New Zealand. As pointed out in the Paper, it was only for historical reasons that the provisions were included in the former *Copyright Act 1912*.

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

This raises the issue of which organisations should be responsible for depositing the proposed extended range of materials. In the ABC's view, apart from broadcasting and web materials, responsibility for making deposits should rest with the publisher in relation to "publications," ie that which results from the publishing function as defined in the *Administrative Functions Disposable Authority* of the National Archives of Australia (NAA). The definition is as follows:

"Publication – The function of having works, irrespective of format, issued for sale or distribution internally or to the public. Includes drafting, manual or electronic production (design, layout, typesetting printing etc), marketing and supply of publications by the organisation. Includes external publications (such as technical papers, issues papers, articles for professional journals and reports) and leaflets which aim to promote the services and public image of the organisation; and internal publications (such as newsletters, circulars, procedure manuals etc) which are not produced for public relations reasons. Also includes multimedia publications, CD Rom and Online information services".

This definition, with appropriate adaptation, could serve as the basis for formulating a distinction between those materials that have to be deposited by the publishing organisation,

and those materials (generally those published on the web and broadcast) that should be captured/ harvested by an appropriate designated authority, such as the National Library of Australia (NLA). In particular, (and subject to the overall feasibility question) it is suggested that an organisation such as the NLA should be responsible for capturing web material, as already happens to some extent under the PANDORA web archive hosted by the NLA. With current technology this could also be applied to broadcast material, allowing the NLA to capture material as broadcast. Consistent with the archiving agencies exception referred to above, the role of the National Film and Sound Archive (NFSA) should also be considered, to avoid duplication of functions.

Current technology allows for relatively easy capture, storage of, and access to, material broadcast or published online, although it is difficult to see how any scheme could comprehensively capture all point-in-time web publications. Bearing in mind the feasibility question, to have this function carried out by a single institution would help to ensure appropriate selection of material, more streamlined operations (including consistent formats) and would also minimise duplication. As already noted, from the ABC's perspective, the extension of a legal deposit requirement to include broadcasts and web publication would be extremely onerous and expensive for organisations such as the ABC. The archiving duplication issue has also been referred to above.

If it is accepted that any extension of the legal deposit scheme should involve a designated capturing/harvesting authority (or authorities), the number of copies can be discussed with that authority or those authorities). The manner of storage (digital or otherwise) will be a critical consideration.

It must be emphasised, however, that the feasibility question will be paramount in any extension of the legal deposit scheme, whether the responsibility falls to publishers or designated authorities.

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

In accordance with the ABC's suggestion that there be an archiving agencies exception and the above response to Issue 3, the publisher should bear the expense, as it now does, for "library material". There is a question as to whether this requirement should be extended to certain other materials which fall under "publication" (depending on the final definition of that term). The ABC suggests that one approach would be for the publisher to be responsible for the expense of depositing hard copies of DVDs and CDs that are mass produced for distribution to the public.

It would be a matter for the designated capturing authority to arrange for deposit of captured electronic publications, including broadcasts and web materials, and that authority should be funded accordingly.

- **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 NAA and possibly State libraries and archives would need to be included in this arrangement to ensure there is a comprehensive scheme and to reduce duplication. The ABC

suggests that the NLA, NFSA and the NAA, as applicable, should be responsible for coordinating repository requirements and access arrangements, even if other organisations also are involved as repositories. For broadcast and web materials, a single capturing and repository authority may be preferable.

- **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 process should be coordinated, as outlined above. Publishers should not be required to deposit with more than one institution, and the ABC suggests, as outlined above, that capture of broadcasts and web content should be undertaken by a single designated authority, not the publisher. Many international legal deposit schemes require several copies of a publication to be deposited with various national institutions. The publisher costs involved with this requirement would be avoided if a single designated institution was responsible for the capture and preservation of web content and broadcasts.

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

In accordance with the above suggestions, this would be covered by the requirement for a designated institution to capture such material. In some cases this may mean that there is a hard copy deposited by the publishing organisation and the electronic version, captured by the designated institution. However, the feasibility question again is critical – how much broadcast and web material should be captured? If choices have to be made, it may be that the first thing to avoid is duplication of material captured in another format. The same principle would apply to broadcast material that is simultaneously or subsequently published on the web.

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

The ABC has no comments on this issue at this stage other than web and broadcast material as discussed below in relation to Issues 9 & 10

- **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?**

Subject to the feasibility question and the archiving agencies exception the ABC does not object, in principle, to this suggestion concerning broadcasts and web published material if capture is undertaken by a designated institution such as the NLA. A requirement for broadcasters to make deposits of all content, either comprehensively or selectively based, would be extremely onerous and costly to implement. As noted above the ABC already has preservation requirements and processes in place under its records management responsibilities under the Archives Act, specifically spelt out in the AFDA and the RDA.

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

The ABC's initial view is that this would be difficult to manage as jurisdiction would fall outside Australia. In any event it may not be feasible for practical reasons, in particular the amount of material involved, and the decision making time if a selective process was adopted.

- **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?**

This could be a matter for further discussion involving the NLA and NFSA, if as suggested they become designated repositories, with particular reference to criteria to classify National Archive material already established by the NAA. However, given the feasibility question "significance" may be one factor that could help in managing the weight and volume of material broadcast and published on ever changing web sites. It must also be recognised that much web material is derivative of material that has been published in another format.

- **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?**

With reference to the ABC's position in Issue 2 above, it may also be necessary to amend the Copyright Act to deal specifically with legal deposit and access requirements, and provisions relating to preservation copying by key cultural institutions, in order that the agency providing access is properly licensed to do so.

- **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?**

The ABC considers that the current scheme is appropriate for the range of materials currently deposited. If legal deposit is extended, as envisaged, to audiovisual and electronic materials, and is undertaken via a designated capturing institution as suggested above, presumably deposit will be more or less contemporaneous with the broadcast or web 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 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?**

The ABC suggests that, as in New Zealand, legal deposit should allow for circumvention of technological protection measures where such measures prevent copying, storage and use of the material. This may involve extensions to the relevant provisions of the Copyright Act referred to in paragraph 82 of the Paper. As for accessibility, electronic material (particularly broadcasts and web material) will need to be captured in a way that ensures continued access. There will be technological issues in relation to downloading web material for ongoing access, which will require considerable further discussion.

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

The ABC agrees with the CLRC recommendation that under a revised scheme deposited material should be made available on a restricted basis, namely on site viewing only at the repository institution.

- **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 ensue that repository institutions can provide the public with adequate access to legal deposit materials under any extended scheme?**

It is difficult to say what provisions are desirable in relation to public access under an extended scheme. They will need to be carefully considered, but broadly uses should be compatible with restrictions now applying to archival material – essentially, for research and study purposes.

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

As already noted there is likely to be considerable overlap with the suggested extension of the legal deposit scheme, and material retained under NAA requirements if legal deposit is to apply to broadcast materials.

However, subject to the feasibility issue the ABC would not be concerned with the overlap, and possible retention of duplicate copies, (one for the purposes of the Archives Act, the other for legal deposit,) provided there is one institution charged with capturing/ harvesting broadcast and web materials for the purposes of legal deposit.

There may be issues relevant to broadcast and web material, particularly in the news domain, where material, although initially broadcast, cannot be made accessible to the public for a time – this may be due to complaints, legal action or restrictions (e.g. suppression orders), privacy restrictions, mistakes, differences between State and Commonwealth laws, etc. Managing access effectively could be difficult in a framework where material is captured from broadcasts and web publication.

The ABC is also conscious of the effect any extension would have on its relationships and agreements with the owners of copyright in material broadcast and hosted by the ABC

(whether this material is produced by the ABC, or licensed from third parties). In many cases, the copyright owner may be external to Australia and therefore not familiar with the provisions of the Australian Copyright Act or any new legal deposit legislation.

Also to consider, in any extension of the scheme, are the implications for the ABC's agreements with collecting societies (such as APRA and ARIA/ PPCA etc); unions and other contracted parties. As with Part V of the Copyright Act, legislation implementing an extended scheme may need to consider possible contractual limitations. Similar considerations will apply for other broadcasters.

Thank you for considering this submission. Any questions may be directed to Mary Jane Stannus, the ABC's Head of Content Services, on (02) 8333 2653.

Yours sincerely

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