



Australian Government
Attorney-General's Department

Extending the Legal Deposit Scheme to Digital Material

Regulation Impact Statement

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1. BACKGROUND

1.1 What is legal deposit?

Legal deposit is a requirement under section 201 of the *Copyright Act 1968* that publishers deposit a copy of library material to the National Library of Australia (NLA). This requirement applies to material that is in print form, published in Australia, and in which copyright subsists.

'Library material' is defined as:

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.

1.2 Historical origins of legal deposit

Legal deposit has a long history in common law and has been a part of Australia's copyright law since its colonial origins. Its genealogy may be traced back to the genesis of statutory copyright, the Statute of Anne in 1709, and even further to deposit licensing arrangements established in 1610 by the University of Oxford and the Stationer's Company, a London-based guild of printers, booksellers and publishers.

A legal deposit requirement was included at the inception of Commonwealth copyright legislation. The *Copyright Act 1905* provided that applicants for copyright registration must deposit two copies of books and one copy of works of art with the Registrar of copyrights. The Registrar was then to forward one copy of the book to the Librarian of the Parliament. The Registrar could refuse an application to register a copyright if these conditions were not met.

These legal deposit arrangements were maintained and refined when Australia enacted the *Copyright Act 1912*, which adopted the corresponding United Kingdom *Copyright Act 1911* (Imp). Section 40 of the *Copyright Act 1912* provided that the publisher of every book:

which is first published in the Commonwealth, and in which copyright subsists under this Act, shall within one month after the publication deliver, at his own expense, a copy of the book to the Librarian of the Parliament.

The *Copyright Act 1912* both expanded and limited the scope of the scheme. The previous requirement for works of art was removed, and 'book' was expansively defined as including:

every part or division of a book, pamphlet, sheet of letterpress, map, plan, chart or table, but shall not include any second or subsequent edition of a book unless that edition contains additions or

alterations either in the letterpress or in the maps, prints, or other engravings belonging thereto or any book published by any State or any authority of a State.

These Commonwealth deposit obligations did not derogate from any existing schemes set up for the delivery of material to any State libraries.

Since that time, the scope of the scheme has been expanded to include periodicals and newspapers.

1.3 Rationale of legal deposit

Following the enactment of the United Kingdom *Copyright Act 1956*, the then Government appointed the Copyright Law Review Committee (the Spicer Committee) to prepare for a new Australian copyright Act. The Committee noted that the main purpose of the legal deposit provision should be 'to build up a complete collection of Australian literature' (Report of the Spicer Committee, 1959, at paragraph 468).

The Copyright Law Review Committee (CLRC) was re-established in 1983 by the Attorney-General as a specialist advisory body to report to the Government on specific copyright law issues referred to it for consideration.

In 1997, the CLRC refined this purpose as:

... collection and preservation of a country's cultural heritage as represented by its published works. A vital part of any nation's cultural heritage exists in the publications which document accumulated knowledge, activities and achievements of its citizens in all fields of human endeavour.

In 1999, the CLRC repeated this view, noting 'the committee regards the primary purpose of the legal deposit provisions as ensuring the preservation of aspects of Australia's cultural heritage.' (CLRC Report on Simplification of the Copyright Act 1968, Part 2, 1999, at paragraph 7.144)

2. WHAT IS THE POLICY PROBLEM YOU ARE TRYING TO SOLVE?

2.1 The scope of the problem

There is no existing regulatory scheme or practical measure which effectively preserves Australia's digital published heritage. The growing proliferation of digital media has generated a large body of published material in electronic form. Soft-copy book publication, in the form of e-books and online delivery, has largely been enabled by the proliferation of internet access (*Economic Analysis of Literary Publishing*, Australia Council for the Arts, 2008). The percentage of Australian households with access to the internet at home has continued to increase, from 64% in 2006-07 to 79% in 2010-11 (*Household Use of Information Technology, Australia, 2010-11*, Australian Bureau of Statistics). Online publishing is conducive to the publication of certain types of material that are not favoured by conventional publishing. The Australia Council for the Arts research noted that online publication attracts smaller publishers and the publication of poetry and niche material, due to lower costs.

The growing trend towards digital publishing and the range of material that it produces confirms the importance of establishing an effective scheme to preserve digital material.

2.2 Limitations of section 201

The current scheme in section 201 provides for the deposit of print-based, Australian-published material to the NLA. This scheme does not cover digital material.

2.3 Limitations of State and Territory legal deposit schemes

All States and the Northern Territory have legal deposit schemes which require deposit to their respective State and Territory libraries as well as the NLA.

There is no consistent approach across each of the State and Territory schemes. Each scheme has a different definition of material that is required to be deposited. The majority of these schemes currently do not encompass digital material.

As such, State and Territory legal deposit schemes only assist in the building of a national digital collection to a limited extent. State and Territory schemes do not give the NLA discretion in the material that it can collect through their schemes, which is essential in allowing the NLA to fulfil its role as the cultural institution responsible for maintaining a comprehensive national collection of library material.

2.4 Limitations of voluntary methods of collecting digital material

In the absence of a legal deposit provision for electronic materials, the NLA has attempted to acquire digital materials under a voluntary regime for some years. It has collected a small fraction of the digital output in that time, largely due to the requirement to seek permission from the publisher before acquiring a copy – that is, seeking a licence under the Copyright Act.

2.4.1 Freely available material published on the internet

With respect to the delivery of freely available material published on the internet, in the 12 months to the end of March 2013, NLA web archiving staff undertaking selective, permissions based, web archiving procedures for the PANDORA Archive, the NLA's web archive which was established in 1996, collected around 28 million web pages amounting to 1.28 terabytes (TBs) of data. A trial bulk harvest of the .au web domain run over approximately five weeks in April 2012 collected around 1 billion unique pages amounting to around 42 TBs of data. This means that current processes collect less than 3% of the freely available web materials that could be collected through bulk harvesting processes.

This lack of success in collecting digital content under a voluntary regime is caused by several factors.

1. Administrative and procedural overheads

The requirement for individual permissions to be obtained from each publisher requires a number of operational procedures for the NLA:

- negotiating with publishers one by one to seek their explicit permission;
- careful scoping of harvesting so that only that material for which explicit permission has been received is collected, and
- post-harvest checking to ensure that the scoped content has been collected.

Thus the permissions based approach limits the method of collecting and does not allow for automated bulk harvesting on a scale to match the extent of the content being published online. It imposes considerable administrative and procedural overheads on the NLA.

2. No efficiencies of scale

The NLA has no capacity to increase the resources allocated to its existing web collecting program, and at the same time there is limited scope within a voluntary regime to effect efficiencies of scale when collecting websites in a piecemeal fashion. Automated web harvesting processes which allow for collection on a large scale are not currently possible given the requirement to seek permission from each rights holder.

3. Impracticality of dealing with multiple rights holders

Digitally created works are frequently complex with respect to copyright. Some sites have multiple rights owners, as content used may have been created by third parties or contributors. Seeking to obtain permissions from all the rights holders represented in a website is impractical. In certain cases it may not even be possible to identify rights holders.

4. No requirement for rights holders to respond

Procedures that require the negotiation of specific individual permissions with publishers further limit the NLA's function to collect and preserve published materials because there is no requirement for publishers to even respond to permission requests. They may also refuse to agree to the collecting of material. In the 2012 calendar year 24% of permission requests received no response from publishers and 1.5% of the requests were refused by publishers. Therefore there is considerable uncertainty of a successful outcome even after administrative effort and resource has been expended.

5. Lack of timeliness

The need to be able to respond and collect web materials in a timely manner, since the content may have significance at a particular point in time or it may disappear or change at any moment, means that the NLA requires the ability to apply efficient, timely collecting methods to this content.

2.4.2 Material published on the web requiring mediation by the publisher to provide access

The NLA has had virtually no success in negotiating voluntary deposit of materials requiring mediation by the publisher. These materials include publications which are behind a pay wall, or which are subject to some other means of restricting access which prevents delivery to the NLA by automated web harvesting processes. This material is the most difficult to obtain by voluntary agreement with the publisher and only a negligible amount is being collected by the Library.

2.4.3 Offline material

The NLA has negotiated agreement with publishers for the voluntary deposit of approximately 700 offline publications on physical data carriers. Without a regulatory regime, collecting coverage has been patchy and new material only produced in the digital form is consistently not being captured. Although this format comprises a small part of Australian publishing output it is highly vulnerable to loss without timely technical intervention. It is also likely that publication of e-books will expand further in future as internet access and reading devices continues to improve, and may therefore represent a higher proportion of Australian publishing output.

Information on physical format media such as CDs and DVDs will quickly become inaccessible when the media become obsolete, malfunctions or the file formats can no longer be opened in modern-day operating systems (as is now the case with media such as 5 ¼ inch floppy disks).

2.5 Limitations of purchasing material that is not freely available

Purchasing all future commercial e-publications would place an unsustainable burden on the NLA's resources, comprising not only the cost of publications but the staff resources required to manage procurement.

The NLA reports on the quantity of published Australian print materials received through the legal deposit scheme in its annual financial statements. It also reports an average value for accounting purposes. In 2011-12 the figure reported for the combined value of the year's intake of new print books, serial publication issues, sheet music and printed maps was \$1.740m.

The NLA has recorded a trend decline of between 10% and 15% in the number of print books and serial issues received. It is likely that this decrease is being matched with a corresponding increase in electronic publishing. Although Australia's digital publishing output would not equal this value in the short term, it is likely that the cost of purchasing e-titles will grow to this level in the medium to long term.

3. WHY IS GOVERNMENT ACTION NEEDED?

The objective of government action is to enhance the preservation of Australia's documented cultural heritage, forming a national record of Australia's intellectual and creative endeavours, history and way of life.

One of the functions of the NLA under the *National Library Act 1960* is to 'maintain and develop a national collection of library material, including a comprehensive collection of library material relating to Australia and the Australian people'. Legal deposit provides a reliable mechanism for the NLA to collect material from Australian publishers in both hardcopy and electronic formats

Therefore, the Australian Government is aiming to modernise the scheme for legal deposit to the NLA so that the scheme encompasses a comprehensive range of published material, including material only produced in digital form.

One of the primary motivations for extending legal deposit to electronic materials is so that collecting can be more efficiently and comprehensively accomplished, thus retaining the cultural significance of all content by collecting as much of the associated (linked) context as is feasible and practical given resource and technical constraints.

The relevance of cultural significance is explained at **Appendix A**.

4. WHAT POLICY OPTIONS ARE YOU CONSIDERING?

This RIS focuses on options for improving the capacity of the NLA to acquire and maintain a comprehensive, representative national collection.

The following four policy options were considered:

1. take no action
2. industry-government agreement
3. amend the Copyright Act: post-consultation model.
4. amend the Copyright Act: pre-consultation model

4.1 Option 1: Take no action

If no action is taken, the NLA would continue to rely on existing means of procuring material, including the print legal deposit scheme, State and Territory legal deposit schemes, voluntary deposit and purchasing.

4.2 Option 2: Industry-Government agreement

An option is for the NLA, together with the Attorney-General's Department (AGD) and Ministry for the Arts (MFTA), to facilitate discussions with the Australian Publishers Association (APA) to voluntarily reach an agreement on arrangements for deposit of digital material.

4.3 Option 3: Amend the Copyright Act: post-consultation model

This option would involve inserting new provisions into the Copyright Act providing an obligation to deliver electronic library material. The existing scheme in s201 would be incorporated into a consolidated scheme for deposit of both print and electronic library material, with some minor amendments for consistency. Some aspects of the scheme would be set out in the *Copyright Regulations 1969*. In addition, it is intended that the NLA will develop guidelines in consultation with affected parties, including publishers. These guidelines will have no legislative force. Their purpose will be to provide information to publishers on how to comply with the scheme in practice, and the treatment of material collected through the extended legal deposit scheme by the NLA, including measures that will be taken to ensure security and copyright protection.

The new provisions would provide a broad and technologically neutral definition of electronic library material. Electronic library material would encompass published material, being a literary, dramatic, musical or artistic work in electronic format, in which copyright subsists, excluding work that is primarily audio-visual, or prescribed in the Regulations. It is intended that the definition would not capture material that is copyright infringing, confidential, shared by means of a private network, comprised partly of personal data and only made available to a restricted group of persons.

Electronic library material can be published either online or in physical format ('offline').

Distinct delivery obligations would apply depending on the mode of publication, in recognition of technological differences and the large quantity of electronic library material that is published online. Electronic library material published online would be delivered only at the request of the NLA, however the NLA intends to publish guidelines that allow publishers to contact the NLA to negotiate electronic deposit. The NLA intends to request electronic material by an automated web harvesting processes to the fullest extent possible. For unrestricted online publications, the NLA would use a web crawl robot to make a request for selected content from a web server using the URL of the selected content, and in response the web server would deliver the selected content to the crawl robot and so to the NLA archive.

Publishers would automatically be required to deliver any offline electronic library material to the NLA, within one month of publication. The NLA would work with publishers to develop the most cost-effective way to deliver offline electronic library material. It is expected that in future the majority of publishers will take advantage of the more flexible and less expensive electronic deposit of library material, including via email. This is reflected in our cost calculations. Physical delivery, as for print library material, would satisfy this requirement. Material delivered would need to be a 'best copy' in any format in which the work is published.

Publishers would be required to provide material that is technologically accessible by the NLA. Where a publisher delivers required electronic library material that is protected by a technological protection measure (TPM), the publisher must deliver a second copy of that material which is not protected by a TPM.

Non-compliance would be subject to a strict liability penalty. The penalty provision in section 201 would be revised to be consistent with the new scheme and best practice drafting. At present, the penalty for non-compliance is \$100. In future, the NLA will administer an infringement notice scheme and provide for a penalty of up to 10 penalty units.

Where a work is published in different formats and therefore captured by more than one legal deposit provision in the Copyright Act, including the print legal deposit obligation in section 201 and the proposed obligations to deliver online electronic library material and offline electronic library material, the publisher will not be required to deliver the same work under more than one provision.

Minor amendments to the scheme in section 201 would include the removal of the requirement for the NLA to provide a receipt for a deposited copy, and revision of the penalty provision.

4.4 Option 4: Amend the Copyright Act: pre-consultation model

The above option was developed after extensive consultation, detailed in section 6 below. Option 3 was a significantly revised version of the previous draft model, which was outlined in a consultation paper released on 7 March 2012. Option 3 reflects changes that were made in order to address concerns raised in the consultation process.

The previous model proposed amendments to the Copyright Act to create an extended legal deposit scheme which would:

- retain the existing definition of 'library material' and adapt it to the digital environment
- require publishers to remove technological protection measures before deposit
- require publishers to bear administration and compliance costs
- allow public access to material through the existing copyright framework for libraries and archives, and
- allow the NLA to use deposited material in accordance with existing copyright exceptions.

This pre-consultation model proposed mandatory delivery of offline electronic library material and mandatory delivery of online electronic library material on demand.

The key differences between this earlier model (pre-consultation) and the proposed scheme in Option 3, detailed above are:

- new technology-neutral and format-neutral definitions for online and offline electronic library material
- a requirement that a work that is delivered pursuant to the extended legal deposit obligation must be a 'best copy' of the work in any format in which the work is published

- a requirement that any work that is deposited with a TPM be accompanied by a TPM-free version, to allow the TPM-protected copy to be used for public access purposes and the TPM-free copy to be stored securely by the NLA and used only for preservation purposes
- an exemption from liability in contract or copyright for publishers delivering material in accordance with the extended legal deposit obligation; and
- specific exclusions and an exemption from delivering the same work under more than one legal deposit provision.

5. WHAT IS THE LIKELY NET BENEFIT OF EACH OPTION?

This section will consider the benefits and limitations of the policy options and highlight a net benefit analysis.

5.1 Option 1: Take no action

The NLA would continue to administer the scheme as it is. Print publishers are required to continue submitting their hardcopy works by post. Electronic only publishers would not have to submit their material to the library, which would save them money. Dual publishers will not have the option to submit their works electronically. There is no expected change for consumers, except they will not be able to access Australia's digital published history at the NLA.

Net benefit analysis

Existing regulatory and voluntary schemes do not effectively enable collection of a comprehensive range of digital material and it would not be practicable for the NLA to rely on purchasing items that are not freely available, given the large volume of digital material in existence and the constraints of the NLA's current budget. If its budget were to be adjusted to allow for more items to be purchased, this would shift the burden of costs to the Australian Government. This would be inconsistent with the current legal deposit scheme which requires publishers to bear compliance costs. Whilst there are modest costs for depositors under the current, print-based legal deposit arrangements, the depositors do get an incidental benefit in their works being preserved for free and included in the national collection.

5.2 Option 2: Industry-government agreement

Who would be affected

1. Government

The NLA administers the current legal deposit scheme and under this option it would administer the terms of an agreement. The NLA's function of collecting and maintaining library material would be expanded to encompass a substantially larger and more diverse body of digital material.

AGD and MFTA would share the responsibility of facilitating discussions with publishers, together with the NLA.

2. Business

Publishers who are members of the APA would be required to comply with the terms of the agreement. Proprietors of software embedded in works would also be affected.

3. Consumers

Affected consumers would be the users of the NLA. As the NLA is a public access institution this means that this category includes the general public.

Benefits

1. Government

This option would have the potential to lead to an agreed scheme which facilitates deposit of digital material without imposing an unacceptable compliance burden on publishers.

To the extent that the NLA wishes to collect material from members of the APA, it would be able to do so by relying on the agreement without the administrative burden of seeking individual permissions from those members. If an industry agreement with the APA was reached, it would have the effect of being broadly equivalent to the current library material that is captured under the existing scheme. This agreement would not cover the extensive range of digital publishers who are not members of the APA.

Therefore, the NLA would only be able to fulfil its mandate under the National Library Act marginally rather than being able to build a comprehensive collection to a greater extent than it is able to do at present.

2. Business

Publishers would have the opportunity to negotiate an agreement which does not impose an unacceptable compliance burden on them.

3. Consumers

A more comprehensive record of mainstream Australian publishing would be preserved and made available for use into the future, compared with the present situation in which only print material is collected.

Costs

1. Government

AGD, MFTA and the NLA would need to allocate significant staff resources to participate in negotiations for the agreement. If the agreement were to have a fixed term, it is possible that further negotiations

would need to be conducted at the end of this term. If an industry agreement with the APA was reached, it would have the effect of being broadly equivalent to the current library material that is captured under the existing scheme. While this would address moves by traditional publishers towards substituting online publishing in place of print, it would not capture the new online micropublishers. As a result the scheme would not meet the objective of comprehensiveness.

2. Business

Publishers would need to participate in negotiations either directly or through representation by a peak body and would need to comply with the terms of the agreement. Costs of fulfilling obligations under the agreement would depend on the terms of the agreement. These could include, for example, the costs of delivering digital material to the NLA. The costs for publishers would be similar to those under option 3. That is, ranging from no cost for delivery when web harvesting methods can be employed to those costs involved in delivering content on physical media and establishing compliance mechanisms. This Option would direct administrative resources to those publishers covered by the extended scheme which may be at the expense of dealing with ostensibly larger cohort of non-industry affiliated publishers. In short, as this option would not cover publications by non-APA affiliated micropublishers, there would be no costs for them.

5.2.1 Consumers

No costs to consumers are anticipated.

Net benefit analysis

This option would not achieve the desired objectives of an extended legal deposit scheme as it would not cover non-APA 'micropublishers', involve an inefficient use of Australian Government resources and place an unreasonable burden on business.

The APA represents roughly 200 publishers, comprised mostly of larger publishing groups which publish in traditional media. There is no industry body which represents the majority of digital publishers. In particular, the membership of APA does not capture the diverse and extensive body of micropublishers in the online community. The objective of enabling the development of a comprehensive national collection would be only partially achieved by reaching an agreement which only captures major publishers. However, attempting to reach agreement with all publishers would not be an efficient arrangement for business or the NLA. Negotiating individually would place a burden on business, not all of which may be geared to take on this task. Individual negotiations would also be an inefficient use of Australian Government resources in an area where technology is encouraging a dynamic growth in participants. Therefore, this option would be more feasible if limited to negotiations with the APA.

5.3 Option 3: Amend the Copyright Act: Post Consultation Model

Who would be affected

5.3.1 Regulated industries

The main sector regulated would be the publishing industry, which will have an obligation to deliver digital material, and other content owners such as authors. Proprietors of software would also be affected. Publishers can include large and small businesses, individuals and community organisations.

Electronic publication, particularly online publication, is substantially democratic given that financial and print publishing barriers are largely removed. Potentially every Australian may be a publisher of electronic material.

It is not possible to establish a definitive figure for the number of number of actual publishers of electronic materials. At best, indicative and potential numbers may be posited. For example, the Australian web domain administration (auDA) reported 2,441,240 domain registrations as at June 2012. However, many of these registrations may be inactive and many registrants (potential digital publishers) may have registered multiple domains. Test indexing of the .au web domain in 2013 crawled 1,690,326 domain hosts. Many of these hosts will belong to a common domain, so it is evident that the actual number of active domains within the .au top level domain would be substantially less than the number of registrants reported by auDA. Even establishing the number of active domains does not equate to the number of actual publishers but it does provide an indicative figure of a potential scale of publishers involved.

The Australian Bureau of Statistics has not published statistics on publishers, specifically book publishers, since 2004 at which time there were 244 recorded. The APA claims to represent 91% of the industry (based on turnover) and reports that it has 'over 216 members'. Not all of these publishers publish digital material. However self-publishing platforms mean that not all electronic publishing will be through industry association members and, at least in theory, may include all Australians (a Copyright Agency survey of digital publishing trends in May 2011 found 54% of publishers surveyed published ebooks or digital products. Only 19.6% of those surveyed were members of the APA).

The principal active electronic publication collecting program in Australia, the NLA's PANDORA Archive, has around 15,000 publishers (including individuals, organisations, government and commercial publishers) registered as contacts as the result of seeking permission to collect and archive web based publications.

Benefits

1. Benefits for publishers

A consistent legal regime for both print and digital materials provides certainty for the publishing community.

The NLA would archive and preserve all electronic library materials selected under an extended legal deposit scheme with no charge to the publisher of those materials. Those publishers without the necessary infrastructure, expertise or business need to manage their electronic publications for the long

term, could rely on the NLA to do this for them, at least for eligible resources. In this way, their contribution to the history of publishing in Australia would be preserved for posterity. However, this benefit is likely to be only a small avoided cost.

Many of the publishers of electronic materials are relative newcomers to publishing and are not represented by the traditional publishing sector. The NLA has gained an understanding of their concerns and requirements over the years by working with them to build the Pandora web archive and these relationships will stand both publishers and the NLA in good stead in commencing work on an extended legal deposit regime. There would be the opportunity to make available and preserve works that would not otherwise have been commercially viable or would have been lost over time. The extended legal deposit scheme would publicise the works of lesser known publishers.

2. Benefits for society

A genuinely comprehensive record of Australian publishing would be preserved and made available for use into the future.

The disappearance of published heritage constitutes a loss of value to a nation in terms of knowledge, culture, historical record and the primary material to support and drive education, research and innovation. The benefits of ensuring the collection and preservation of published digital materials are largely social benefits and include fostering and understanding national identity and providing access to a shared (even at times contested) social heritage.

The collection of Australia's published digital heritage is primarily of benefit as an historical research resource documenting the nation's growth and advancement culturally, socially, intellectually and commercially. The true and substantial benefit of this resource will be realised over time by the future generations who may access this material to understand and build upon their heritage and inform future research and innovation.

With the enabling legislation a more systematic collection of heritage materials could be achieved and the NLA would be able to fulfil its mandate under the National Library Act to build a comprehensive collection which will meet the diverse needs of all Australians.

Efficiencies in collecting material could be achieved by increasing the scale of automated harvesting. More timely harvesting would be possible, since delays arising from negotiating individual permissions would be removed. Scoping of harvesting and quality checking could be more efficiently managed and automated since collecting would not be restricted by the more limiting licence agreements arranged with publishers. A comprehensive warrant to collect online material would provide the NLA with the opportunity to develop more efficient workflows because the complexity of individual rights negotiations would be removed for the greater amount of material. The time currently spent by staff negotiating terms with individual publishers would be redirected into identifying eligible content to be collected through automated harvests.

5.2.3 Costs

At present, publishers bear any costs of the legal deposit scheme. Impacts on publishing groups should be considered in three categories: (a) publishers of online content (b) publishers of electronic books and journals, delivered other than on the web (e.g. email) (c) publishers of physical format electronic publications. To extend the scheme to cover electronic deposit, publishers will make significant savings of time and cost as they no longer have to pay for printing and postage of their physical material when depositing it to the NLA.

(a) Website and online publishers

Based on an estimate derived from the NLA's 2013 whole domain harvest crawl, the volume of websites to be collected annually is estimated to be 560,000. Of these websites, 557,200 were freely harvestable with no restrictions, whereas 2800 were not immediately harvestable. An explanation of these categories and their cost implications is set out below.

(i) Freely harvestable websites

For material published on the Internet that is freely accessible, the most efficient method of delivery to the NLA, and the method that is proposed, is through the process of web harvesting. This is an automated process by which a web harvesting robot requests content from a publishing web server in much the same manner as an indexing robot or web browser request. The cost of this delivery process – that is the data download cost and infrastructure to manage it – would be borne by the NLA since this form of delivery is initiated and managed by the collecting institution rather than the publisher. There is no substantive or administrative compliance cost to the publisher in responding to a 'request to deliver' when the process is automated since this forms part of the request-response protocol between the web harvesting robot and publishing web server.

(ii) Websites not immediately harvestable

When content cannot be collected by automated means, publishers will be required to respond to a request for delivery (sent in either email or hard copy form). In such cases, compliance may be simple, such as providing necessary protocols so that content may be harvested; or, in some cases, compliance may require the publisher to deliver content by other means such as FTP or on a physical carrier, in which case the cost of preparing the material for delivery by electronic or physical means and transporting it (if appropriate) would be borne by the publisher.

The standard cost of compliance when the publisher is required to deliver content is estimated to be within the same range of costs for delivering physical format electronic material published on a physical carrier (discussed below), that is between A\$3 and A\$19. The lower figure in the range would be applicable to relatively trivial compliance such as the supply of a login protocol while the upper end of the range would be applicable when files may need to be copied to a physical carrier and posted to the National Library. It is expected that electronic deposit will become more popular for publishers as hard

copy material continues to be replaced by electronic publishing. It should be noted that in some circumstances, when there is a substantial amount of content to be supplied, the compliance costs may be higher and may involve 'setup' costs by publishers to facilitate the delivery of large amounts of data. A survey conducted by the Publishers Association in the UK for the 'Impact Assessment for Regulation for the Legal Deposit of UK On Line Publications' (2012) estimated setup costs as between £1,300 and £2,000 (between A\$2,000 and A\$3,000) with the average administrative burden per deposit of between £3 and £6.50 (between A\$5 and \$10). The costs in such cases where compliance is more complex may be able to be mitigated by negotiating the timing and frequency of deposit. For example it may be acceptable and appropriate in some cases to deposit at an 'end of life' point only. Those publications that are likely to be more complex in respect to delivery compliance and incur more cost are those with a large amount of content published in a restricted manner from a content management system. So, the content involved, in terms of collection material, may be substantial. However, the number of websites (and publishers) involved as a percentage of published online material is estimated to be small. In a test crawl of the entire .au web domain conducted on behalf of the National Library in April 2013, less than 0.5 of the web pages crawled returned 'unauthorized'(401), 'payment' required (402) and 'forbidden' (403) HTTP client error status codes indicating the presence of access restrictions.

(a) Potential loss of earnings

Some publishers of freely accessible online content on websites generate earnings by including advertising or 'click through' functionality on their sites. The archived copies of these sites, being static versions, will not provide this revenue stream when accessed. This potential limitation upon a content owner's potential for earnings will be mitigated by keeping access to the archived version at a remove from live search engines so that the archived version would not compete with the live version in a commercial context. Moreover, since the archived version will also provide links to the live version and other resource discovery metadata may be added – for example the creation of catalogue records or search indexes for archived content – there is a potential in fact to enhance discovery and direct additional traffic to the live site from the archived version and associated metadata.

In 2005 the NLA conducted a survey of publishers of electronic materials already archived to assess the impact of archiving as perceived by the publishers. In response to the question as to whether PANDORA archiving had affected the number of hits on online publications 65% responded that it had not. Of those that said it had an effect, 92% said that it had been a positive effect. In response to the question of any impact on sites that generate revenue 88% said there was no impact, 11% said the impact was positive and only 1% said the impact was negative (see, Crook, 2006, 'For the Record: Assessing the Impact of Archiving on the Archived', RLG DigiNews, vol. 10, no 4.

<http://worldcat.org/arcviewer/1/OCC/2007/08/08/0000070511/viewer/file3438.html#article0>

Where content is not freely available, but is available by payment or subscription, the content would not be made freely available by the NLA while the publisher's commercial interest remains active. Access would be limited to that permitted under the Copyright Act so as not to conflict with the publisher's exploitation of the work.

(b) Delivery of a TPM-free copy

There are many types of TPMs which are used for different purposes. These include, but are not limited to, passwords, encryption, copy limiting, time limiting, reading limiting and watermarking. Since TPMs differ in their form and how they are applied, it is not possible to propose a standard cost that may be incurred in retaining or preparing TPM free versions for delivery to the NLA.

However, because publishers will be alerted to the requirement to deliver a TPM-free version of electronic material, where practical, efficiencies may be found by incorporating the preparation (and retention for compliance) of a TPM-free copy within their workflows. For example, in certain cases it may be possible to retain and deliver a copy before the TPM is applied to the content.

3. Consumers: No costs to consumers are anticipated.

4. Balance of cost offsets for Option 3

The proposed amendment provides for the continuing evolution of publishing from print material to electronic. It is deregulatory and would benefit business, community organisations and individuals who are required to comply with it.

Table A calculates the balance of cost offsets (savings) for Option 3. \$394,975.03 is the ongoing cost to dual publishers (print and electronic) of delivering print material under Option 1 (take no action) that might have otherwise been delivered electronically under Option 2. The delivery of electronic material under Option 2, including new digital-only material that was not previously collected under the scheme, is \$269,828.87. Therefore, although digital-only publishers will be subject new costs under the revised scheme, an overall cost saving of .125 million is gained. There is a cost reduction for stakeholders. The savings to dual publishers who now only need to provide electronic copies of their publications to the library is estimated to outweigh the cost to electronic-only publishers.

Please see over for cost offset table.

Table A: Option 3 balance of cost offsets

Average Annual Compliance Costs (from Business as usual)				
Costs (\$m)	Business	Community Organisations	Individuals	Total Cost
Total by Sector	140,876.27	\$87,437.04	\$41,515.56	\$269,828.87
Cost offset (\$m)	Business	Community Organisations	Individuals	Total by Source
Agency	\$0	\$0	\$0	\$0
Within portfolio	\$204,675.61	\$118,546.89	\$71,752.53	\$394,975.03
Outside portfolio	\$0	\$0	\$0	\$0
Total by Sector	\$204,675.61	\$118,546.89	\$71,752.53	\$394,975.03
Proposal is cost neutral? Yes				
Proposal is deregulatory Yes				
Balance of cost offsets \$125,146.16 (savings)				

Note: Costs for print-only publishers are not costed as they will remain the same.

Key cost assumptions and stakeholder views:

The NLA provided the data to inform the above calculations. These figures are well informed estimates gathered through international best practice, consultation and through a thorough understanding of the publishing industry in Australia. The electronic deposit figures are based upon estimates of methodology and processing costs as established by the British Library, combined with Australian production figures for hardback books and local postage and courier averages. Electronic deposit will be available via simple web-form, the preferred method of deposit for smaller publishers. Cost estimates for middle and small publishers are based upon the assumption of using this form with a readily available format. For larger publishers, it is assumed that investing in systems compliant with the NLA systems will achieve sharp per-deposit savings. The estimated cost of ebooks is between \$3 and \$19. Wages are based on Australian Bureau of Statistics Clerical and Administrative workers - \$30.40 per hour. According to the National Library of Australia, these estimates are in accordance with their view that the extended legal deposit scheme will represent a cost saving to publishers depositing digitally.

Net benefit analysis

Dual publishers will now have the advantage of submitting an electronic format, rather than more expensive hardcopy format work to the NLA. In the past, they were required to publish an extra copy and post it to the National Library which imposes a burden of time and cost. This will be significantly reduced with the option to submit, for example, an e-book instead.

Under the existing legal deposit scheme, publishers of electronic only works are not required to deposit copies of their material to the NLA. Their works would need to be submitted under the new scheme;

however it would be request driven which will reduce the burden and volume of works they are required to send and the NLA receive. Therefore the new scheme imposes costs for electronic only publishers.

For online electronic works, publishers will only need to submit what is requested by the NLA. For offline electronic works, the scheme will remain the same. However, as indicated above in table A, the net benefit of the scheme is deregulatory and produces savings for the sector. Although electronic publishers would now be impacted under the new scheme, overall savings are gained for the sector.

Option 4: Amend the Copyright Act: pre-consultation model

The impact analysis of option 3 is relevant to this option, except for the differences which are set out in this section.

Benefits

Benefits to government and to consumers for this option would be less significant than for option 3 for the reason that the proposed definition of 'electronic library material' is not technology neutral and thus would become outdated in the future. Costs

Costs, including perceived costs, to business would be more significant than for option 3 in the following ways:

- this option would require deposit of a work in all formats, whereas option 3 would require deposit of a work in only one format, provided that copy is a 'best copy'
- this option does not exempt publishers from delivering the same work under more than one legal deposit provision
- this option leads to an increased loss of profits as it does not give publishers the option of delivering a copy of a work which is protected by a TPM (together with an unprotected copy) so that the protected copy may be used for public access
- this option does not include guidelines, which are intended to provide transparency and reassurance to publishers of adequate security measures for deposited material to eliminate risks of loss of profits by publishers and a further commitment by the NLA to minimise costs for publishers to the extent possible
- this option does not include a specific exemption from liability in contract or copyright for publishers delivering material in accordance with the extended legal deposit obligation, a risk which was perceived by publishers to be significant, as demonstrated in the consultation process; and
- this option does not contain specific exclusions from the definition of 'electronic library material', which means that confidential material may potentially be included, leading to the risk of losses to business.

Net benefit analysis

When compared with option 3, this option is a less developed policy framework, without stakeholder input and engagement and contains some considerable shortcomings. The benefits to government and to consumers for this option would be less significant than for option 3 for the reason that the proposed definition of 'electronic library material' is not technology neutral and thus would become outdated in the future.

Costs to publishers would be more significant under this option when compared to option 3. As noted above, potential increased costs include: unreasonable burdens on business to deposit work in all formats; not exempting publishers from delivering the same work under more than one legal deposit provision; a potential loss of profits by requiring publishers to provide works without TPM protection; no guidelines or specific exemption from liability; and does not specifically exclude confidential material.

6. WHO WILL YOU CONSULT ABOUT THESE OPTIONS AND HOW WILL YOU CONSULT THEM?

6.1 Previous public consultation: 2007 – 2011

In October 2007, the previous Government initiated a consultation process stimulated by a discussion paper inviting comment on the possible extension of the legal deposit scheme. This discussion paper considered extension of the scheme to digital and audio-visual material. Legal deposit of audio-visual material is outside the scope of this current process. In 2011 the Government continued this process. A working group with representatives from the then Department of the Environment, Water, Heritage and the Arts (DEWHA), the Department of Broadband, Communications and the Digital Economy (DBCDE) and AGD assessed submissions. Twenty-seven submissions were received, 19 supported extension, four opposed it and four supported the current voluntary arrangements. Cultural institutions expressed support for the extension, while the publishing, film and broadcasting industries expressed concerns related to potential costs and administrative burden.

6.2 Recent public consultation: 2012

A further public consultation was held from 7 March 2012 to 15 April 2012 in response to a discussion paper on a proposed extended legal deposit model.

The draft model proposed to:

- retain the existing definition of 'library material' and adapt it to the digital environment
- require publishers to remove technological protection measures before deposit
- require publishers to bear administration and compliance costs
- allow public access to material through the existing copyright framework for libraries and archives, and

- allow the NLA to use deposited material in accordance with existing copyright exceptions.

Twenty-three submissions were received from content owner groups including publishers, authors and collecting societies, government agencies, cultural institutions including the NLA and state libraries, intermediaries, academics and other interested individuals.

6.2.1 Main findings of the 2012 public consultation

The main suggestions from stakeholders in relation to the definition of 'library material' were:

- a new technology-neutral and format-neutral definition of library material
- incorporating 'cultural significance' as a basis for legal deposit
- requirement to deliver a 'best copy' in any format
- specific exclusions, such as audio-visual material, infringing material, confidential material, and
- clarification of an approach for dealing with underlying software, websites and databases.

In relation to TPMs:

- cultural institutions supported a requirement on publishers to remove TPMs prior to delivery, at the expense of the publisher
- content owners submitted that removal of TPMs should not be required, due to the risk of exposing unprotected copyright material to public access
- content owners and cultural institutions suggested alternative means of granting the NLA access to TPM-protected material for preservation purposes only, such as:
 - requiring publishers to provide a TPM-free copy together with a TPM-protected copy
 - requiring publishers to provide digital keys to the NLA for safekeeping
 - granting the NLA an exception to circumvent TPMs
 - voluntary removal of TPMs by publishers, and
- some content owners proposed an obligation on the NLA to secure unprotected material.

In relation to administration and compliance costs:

- cultural institutions submitted that there should be greater penalties for non-compliance, equal to or exceeding the cost of compliance

- content owners either submitted that content owners should be reimbursed for compliance costs or noted that compliance costs could be significant, for example, due to the need to develop systems to facilitate compliance, or to provide operating systems to allow meaningful access to deposited material, and
- content owners submitted other means of reducing compliance costs e.g. requiring the NLA to purchase library material that is costly to manufacture, restricting deposit demands to an annual basis, not requiring publishers to modify works prior to delivery.

In relation to public access to deposited material:

- cultural institutions supported granting access in accordance with existing copyright exceptions, and
- content owners submitted that there should be restrictions on public access, such as restriction to on-site access, use of designated terminals with no printing or communication facilities and granting access to an electronic copy to one user at a time.

In relation to use of deposited material by the NLA:

- stakeholders agreed that the NLA should be able to use deposited material in accordance with existing copyright exceptions for preservation copying.

6.3 Targeted consultations

Targeted consultations were held from 26 November 2012 to 21 December 2012 to address the main concerns raised in the 2012 public consultation. During this time, this Department chaired consultations involving Office for the Arts and the National Library and met with the Australian Copyright Council, the Australian Publishers Association, the Australian Broadcasting Corporation and the Australian Digital Alliance. The views of Copyright Agency and the Australian Society of Authors were also represented. The National Film and Sound Archive of Australia attended as an observer.

The main issues discussed in the targeted consultations were public access to deposited material, security concerns and costs associated with removal of technological protection measures, compliance costs and the definition of 'library material', particularly in relation to dynamic content and software. Significant progress was made on substantive issues.

Out of these public consultations the following decisions were made and were included in the proposed option 2 scheme:

- new technology-neutral and format-neutral definitions for online and offline electronic library material
- a requirement that a work that is delivered pursuant to the extended legal deposit obligation must be a 'best copy' of the work in any format in which the work is published

- a requirement that any work that is deposited with a TPM be accompanied by a TPM-free version, to allow the TPM-protected copy to be used for public access purposes and the TPM-free copy to be stored securely by the NLA and used only for preservation purposes
- an exemption from liability in contract or copyright for publishers delivering material in accordance with the extended legal deposit obligation
- specific exclusions, and
- exemption from delivering the same work under more than one legal deposit provision.

7. WHAT IS THE BEST OPTION FROM THOSE YOU HAVE CONSIDERED?

Option 3: Amend the Copyright Act: Post Consultation Model

It is recommended that option 3 is adopted as this option provides the most efficient way to identify and collect electronic published material whilst minimising the impact and cost for business. This is the recommended option as it achieves the stated objectives of comprehensiveness, has stakeholder buy-in and is the most well developed policy framework for an extended legal deposit scheme.

This option was developed following thorough consultation with cultural institutions, publishers and other content owners and the general public. The current proposal includes some significant modifications suggested by stakeholders and addresses concerns raised by affected parties during the consultations to the reasonable satisfaction of those parties.

This option assumes that the NLA will take reasonable steps to ensure that content owners' concerns are adequately addressed in guidelines detailing the day-to-day operation of the scheme.

Option 1, 2 and 4 could not be reasonably implemented by the Attorney-General's Department. They do not equally fulfil the criteria required to efficiently collect electronic material. For further analysis, please refer back to the net benefit analysis statements for each option 1, 2 and 4 in Section 5.

8. HOW WILL YOU IMPLEMENT AND EVALUATE YOUR CHOSEN OPTION?

The NLA will administer the proposed extended legal deposit scheme. The NLA would manage costs. The NLA intends to evaluate the operation of the scheme and report to the National Library Council. Any evaluation reports would be shared with the Attorney-General's Department.

The legislative amendments would commence six months after Royal Assent to allow the NLA to publish guidelines prior to the amendments coming into force.

NLA records of the numbers of delivery requests made, and the proportion of refusals or non-compliant responses, will provide a means of monitoring content owner responses to the extended scheme.

Regulated parties would be required to deliver electronic library material to the NLA, as described at 5.1.

It is intended that the proposed legislative scheme will be technologically neutral to avoid becoming outdated within a short period of time, and therefore will only be reviewed if the need arises.

Regulations may be amended to prescribe material to be excluded from the definition of electronic library material as required and would be reviewed periodically.

The guidelines on the day-to-day operation of the scheme will be flexible, and the NLA would develop and periodically review these guidelines in consultation with interested parties

9. STATEMENT OF POLICY PROCESS

This statement was provided to OBPR for consideration under the previous assessment system in 2013. The RIS required some changes as directed by OBPR. Subsequently, and before final approval under the previous assessment system, the assessment process changed. This statement was resubmitted to OBPR for first pass assessment on 15 May 2014 following discussions with OBPR regarding the requirements to satisfy the new assessment system. The most significant change relates to the inclusion of the regulatory burden cost offset estimate table and further analysis of the net benefits of all options put forward. This statement now more clearly identifies that the measure will be deregulatory and that to modernise the legal deposit system from physical deposit to physical and optional electronic deposit will reduce the burden of the existing system.

APPENDIX A

Cultural significance

In the context of the NLA's statutory function to comprehensively collect material relating to Australia and Australians, the concept of 'cultural significance' should be understood as a broad guiding principle for inclusion rather than as a limiting and privileging selection tool.

Cultural significance as defined in the Burra Charter means aesthetic, scientific, social or spiritual value for past, present or future generations (http://australia.icomos.org/wp-content/uploads/BURRA-CHARTER-1999_charter-only.pdf). While the Burra Charter is intended specifically for heritage places, the principle of cultural significance is also applicable to documentary heritage. While the principle is broadly inclusive it does permit a distinction from material that has only commercial or utilitarian value which would not be understood as having cultural significance and would not come within the remit of the collecting for cultural heritage purposes.

Digital publications are by their nature dynamic, innovative, multimedia, hypertextual, interactive, democratic and protean in form and cannot be simply equated to print publication typologies and discrete categories of publications for the purpose of understanding and defining cultural significance. An online ejournal or ebook that bears some resemblance to a print journal or book does not by its form alone carry more cultural significance than a blog or website.

Moreover, as the Burra Charter Guidelines state in respect to historical built heritage (2.3) (http://australia.icomos.org/wp-content/uploads/Guidelines-to-the-Burra-Charter_-Cultural-Significance.pdf), but being equally applicable to documentary heritage: 'significance will be greater where evidence of the association or event survives in situ, or where the settings are substantially intact, than where it has been changed or evidence does not survive'.

While cultural significance of itself may not define a narrow remit for what should be subject to collection, other conditions (or threshold tests) may be used to prioritise material for the practical purpose of a collecting regime. Such conditions include: provenance, representativeness, rarity, integrity and substance. Such conditions may be incorporated into the NLA's collection policies.

Cultural significance as understood in heritage materials may grow or diminish over time. The dynamic nature of digital material – its susceptibility to rapid publishing, change and disappearance – necessitates the collection of such material in an inclusive and comprehensive manner, as digital artefacts, so as to enable the assessment by all Australians of their cultural significance over time.