

Submission in response to an exposure draft of the Copyright Amendment (Access Reform) Bill 2021 and the review of technological protection measures (TPMs) exceptions

Submission by the Australian Digital Alliance and
the Australian Libraries and Archives Copyright Coalition

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<https://digital.org.au/resources/access-reforms-exposure-draft-joint-submission>

<https://alacc.org.au/access-reforms-exposure-draft-joint-submission>

Contents

Executive summary	1
List of recommendations	3
Introduction	5
About the Australian Digital Alliance	8
About the Australian Libraries and Archives Copyright Coalition	9
Limitation on remedies for use of orphan material (Schedule 1—Orphan works)	10
Balancing the interests of users and copyright owners	11
The scope of the orphan materials scheme	12
The ‘reasonably diligent search’ test	15
Factors to determine whether a ‘reasonably diligent search’ has occurred	16
The nature of the copyright material	17
The purpose and character of the use	17
How the search was conducted	18
Who conducted the search	20
The search technologies, databases and registers available at the time	21
Relevant industry codes of practice	22
Where a copyright owner is later identified	22
Using orphan material in practice	23
Requiring attribution when using orphan material	25
Orphan materials and the statutory licences	26
Applications to the Copyright Tribunal – Response to Question 1.1	26
Quoting copyright material (Schedule 2—Fair dealing for quotation)	27
The scope of the fair dealing for quotation exception	27
Quotation only by identified users	28
Quotation only of material that has been ‘made public’ – Response to Question 2.1	29

Quotation only for noncommercial purposes or commercial uses of immaterial value	31
Factors determining if the use is fair	32
The purpose and character of the dealing	32
The nature of the copyright material	33
The effect on the market for the material	34
The amount and substantiality of the part dealt with	35
Requiring attribution when quoting material	35
Quotation and other fair dealing exceptions	36
Expanding the library and archives exceptions (Schedule 3—Libraries and archives etc.)	37
Library and archives exceptions not significantly changing	37
Document delivery and interlibrary loans	38
Requirements for making a request for supply	39
Retention copies	39
Using unpublished copyright material and theses	40
Making material available online	41
Reasonable steps to ensure copyright is not infringed – Response to Question 3.1	41
‘Private and domestic’ uses	42
Application of the ‘commercial availability test’	42
The ‘commercial availability test’	43
The ‘reasonable portion’ test	44
Clarifying s 47H’s impact on ‘contracting out’	44
Modernising the exceptions for education providers (Schedule 4—Education)	46
Education exceptions that will not significantly change	46
Use of material in the course of educational instruction	46
‘A person taking part in the giving or receiving of the educational instruction’	47
Temporary access to recordings	48
Limiting online access to recordings and ‘reasonable steps to ensure copyright is not infringed’ – Response to Question 4.1	49

**JOINT SUBMISSION IN RESPONSE TO AN EXPOSURE DRAFT
OF THE COPYRIGHT AMENDMENT (ACCESS REFORM) BILL 2021**

Restoring a wider scope to s 106	49
Updating the exceptions for federal and state governments (Schedule 5—Use of copyright material by the Commonwealth or a State)	50
Expanding the scope of the government statutory licensing scheme	50
Government use of incoming material	51
Safeguards for government use of incoming material – Response to Question 5.1	51
Review of the exceptions to the Technological Protection Measures (TPMs) provisions	52
Ensure current exemptions are carried over	52
Include the new provisions	52
Include flexible dealings (s 200AB)	53
Other matters	54
Schedule 6—Registrar of the Copyright Tribunal	54
Schedule 7—Regulations relating to technological protection measures	54
Schedule 8—Archives	54
Schedule 9—Referrals	55
Schedule 10—Notifiable instruments	55
Legislative drafting	55

Executive summary

The need for the reforms proposed in the Copyright Amendment (Access Reform) Bill 2021¹ (the Bill) has never been more apparent than now, during the ongoing COVID-19 pandemic. The Australian public expects flexibility in online engagement with public bodies such as libraries and archives, primary, secondary and tertiary education providers, government agencies and research organisations. This is by necessity not desire. Australia needs a copyright system that is digital-first.

While there has been considerable copyright reform in recent years, more work is needed to modernise the *Copyright Act 1968* (the Act). If enacted, the Bill will continue Australia's path to a flexible and contemporary copyright system that actively supports and safeguards copyright users and copyright owners equally.

This submission – made jointly by the [Australian Digital Alliance](#) (ADA) and the [Australian Libraries and Archives Copyright Coalition](#) (ALACC) – advocates for the introduction of these amendments on public interest grounds. Specifically, this submission argues in support of reforms related to:

- **Limiting remedies available when orphan material is used** – Opening up access to the volumes of orphaned material in Australia is overdue. Deploying a scheme to limit remedies available to a copyright owner of formerly orphaned materials when that material is used by another party is a crucial next step in freeing up productive and creative new uses of orphan materials. A solution to the orphan material problem is strongly supported.
- **Quoting copyright material** – Introducing a mechanism by which users can quote from copyright material is to be applauded. However, we have concerns that the value of the proposed provision will be unjustifiably limited if the scope remains as narrow as is suggested in the drafting. Limiting who can quote material, the material they can quote and the types of uses those users can engage in when quoting material will erode the utility of the proposed fair dealing for quotation. This will be exacerbated by also applying a set of fairness factors to quotations. A new fair dealing for quotation is supported, but that exception should apply more broadly than the current scope.
- **Expanding the library and archives exceptions** – Updating the library and archives exceptions to reduce 'red tape', encourage making more material available online and allow new uses by the public will address important issues with our currently outdated copyright system. More so, the changes will support our cultural collections to provide equitable access to their collections. These updates are supported.

¹ Department of Infrastructure, Transport, Regional Development and Communications (2021) *Copyright Amendment (Access Reform) Bill 2021 Exposure Draft*. Available at <https://www.infrastructure.gov.au/department/media/publications/copyright-amendment-access-reforms-bill-2021>.

**JOINT SUBMISSION IN RESPONSE TO AN EXPOSURE DRAFT
OF THE COPYRIGHT AMENDMENT (ACCESS REFORM) BILL 2021**

- **Modernising the education exceptions** – The need for flexibility in educational delivery, and the limitations of Australia’s copyright regime to support it, are the background to the proposed changes to the education exceptions. These reforms must be supported if Australia wants to fully embrace contemporary online teaching and learning practices.
- **Updating the government exceptions** – A future where Australian government bodies can be smart, flexible and digital-focused requires a copyright scheme behind it that champions these ambitions. Addressing the shortcomings of the government statutory licensing scheme and clarifying how governments can use material provided to them are supported as these reforms will contribute to that future.
- **Reviewing the Technological Protection Measures (TPM) exceptions** – We recommend continuing all current exemptions to the TPM exceptions outlined in reg 40 of the *Copyright Regulations 2017* (the Regulations), and extending the exemptions to the new access provisions proposed in the Bill and to library and archives uses of s 200AB.
- **Other matters** – Additional minor measures to support simplification and consistency in the Act are supported.

There is a real need for these reforms. Regional and remote library users, academic, family and community researchers, government staff, parents, students and teachers across the country are increasingly frustrated by the copyright red tape that gets in the way of them engaging with collections material, accessing important collections items such as family history records, delivering government services online or being able to participate fully in online classes. While COVID-19 is the backdrop against which these reforms are framed, the issues addressed are long-standing. These changes are needed for libraries, for archives, for schools, for universities, for researchers of all kinds, for governments and for the Australian public. Australia’s post-COVID recovery depends on a more modern copyright system that can deliver the flexibility and agility needed in this time of pandemic and going forward. This Bill provides the opportunity for Australia to embrace an effective online future.

List of recommendations

Below is a summary of our main recommendations in response to the reform package:

- It is recommended that the new **limitation on remedies for the use of orphan materials** should be enacted as drafted. Its scope should remain broad enough to accommodate any copyright material, any user and any use, including commercial uses. The risk of inappropriate reuse of copyright material is minimised by requiring a 'reasonably diligent search' to identify the copyright owner be undertaken within a reasonable time before using the material.
- The related **limitation on remedies for the use of formerly orphaned materials** should also be enacted as drafted. Without the assurance that compensation or other relief cannot be sought for past uses of formerly orphaned material the risk of using orphan materials would be too great. Compelling the parties to negotiate for the ongoing use of formerly orphaned materials provides a mechanism through which copyright owners can assert their rights and be remunerated should they be identified after the initial use of the material. Both provisions are needed. It is through the interaction of the two provisions that the full potential of an orphan works scheme is more likely to be realised.
- We endorse introducing a mechanism that permits quotation of copyright material but we recommend that the new **fair dealing for quotation** should be expanded to apply to any copyright material, not just material that has been 'made public'. The exception should also include all users, not just a subset of users. The narrowness of the provision as drafted is unjustified, and will seriously undermine its practical utility if passed as is.
- The suite of proposed **exceptions for libraries and archives** are supported and we recommend they are all enacted. We highly recommend widening of the scope of the 'supply provisions' (document delivery and interlibrary loans), enabling libraries and archives to retain supply copies for use in response to future requests, introducing 'private and domestic use' into a number of the library and archives provisions, and expanding the ability of libraries and archives to make material in their collections available online in reasonable and limited ways.
- We recommend passing all the proposed **exceptions for education**. Specifically, we strongly endorse widening the breadth of the exception for the use of material in the course of educational instruction. This will add much needed flexibility for teachers and students, as well as teaching support and parents.
- We support the proposed changes to the **government exceptions**. In particular, broadening the scope of the government statutory licensing scheme and the proposed provision for use of material provided to a government are supported.

**JOINT SUBMISSION IN RESPONSE TO AN EXPOSURE DRAFT
OF THE COPYRIGHT AMENDMENT (ACCESS REFORM) BILL 2021**

- In response to the **review of the technical protection measures (TPMs) exceptions** we recommend that the current list of acts outlined in reg 40 of the Regulations that are non-actionable circumventions of access control TPMs continue to apply and that list be updated to take into account any current provision that is slated to be replaced by a provision included in the Bill (e.g. the updated library and archives provisions). Additionally, we call for the new access provisions introduced with the Bill to be exempt, as well as flexible dealings (under s 200AB) by libraries and archives that circumvent access TPMs.
- We also support the additional minor measures which are outlined in **Schedules 6–10** of the Bill.
- Finally, we recommend that, to the extent possible, the Department prioritises easy-to-read drafting and layout.

Introduction

The ADA and the ALACC are pleased to jointly provide comments on the exposure draft of the Bill and in response to the review of the access control technological protection measures (TPM) exceptions in the Regulations. We thank the Department of Infrastructure, Transport, Regional Development and Communications (the Department) for the opportunity to make a submission.

We welcome the objectives of the reforms, namely to simplify and update provisions of the Act to better support the needs of Australians when accessing content digitally. More and more services and programs are delivered online by libraries and archives, schools, universities, research organisations and governments, yet our copyright system has been slow to adapt.

The reforms are part of an ongoing process to modernise Australia's copyright system, building off the consultation activities that led to the enactment of the *Copyright Amendment (Disability Access and Other Measures) Act 2017*, the *Copyright Amendment (Service Providers) Act 2018* and the Regulations. Of course, those amendments were in turn informed by significant public consultation undertaken by a number of government bodies over a number of years.

The issues raised in the discussion paper are longstanding and increasingly urgent. Our copyright law is outdated, and the need to address this has been made more apparent by the ongoing impact of the COVID-19 pandemic – not to mention the disruptive and devastating force of bushfires, floods and other extreme weather events. Cultural institutions have experienced acute increases in the demand for ways to remotely access their collections and services during periods of lockdown, and the public's appetite for more flexible access options does not dissipate after a lockdown has been lifted.

Australia has an enviable track record for generating new research knowledge. Yet for years we have allowed our researchers and research organisations to be burdened with the requirement to secure permissions for quotes in research, even though international experience shows that a quotation exception is beneficial to all.

Likewise, it should not take the arrival of a global health emergency on our shores to fast track a digital focus for the education provisions in the Act. Schools, universities, TAFEs and other education providers have been struggling for years under provisions in the Act that were never set up to accommodate the needs of online learning. This lack of flexibility is to the detriment of our students.

And, with a majority of government initiatives and programs being delivered wholly or partly online it is remarkable that the government statutory licensing scheme does not already extend to communication of material. The provisions for governments in the Act need to be supporting flexible and equitable access to government programs and information.

With a strong public interest agenda, the reforms will introduce much-needed changes that strive to make our copyright system more agile, fit for purpose and digital-focused. The package includes a suite of reasonable and practical measures that reflect contemporary uses of copyright material. Importantly, these

**JOINT SUBMISSION IN RESPONSE TO AN EXPOSURE DRAFT
OF THE COPYRIGHT AMENDMENT (ACCESS REFORM) BILL 2021**

changes iteratively modernise our copyright laws without undermining incentives and protections for the creators of copyright-protected content.

Australia stands to benefit significantly from the reform package. Together, its provisions will create greater certainty for libraries, archives and cultural institutions, for students, teachers, lecturers and education institutions, for researchers and bodies engaged in research, for Commonwealth and State government bodies and, most importantly, for the Australian public at large. Further, we make the following observations with respect to the amendments:

- **Libraries, archives and cultural institutions** will benefit greatly from efficiencies created by the application of the reforms. Reducing complexity, the administrative burdens on collecting institutions, the need for double handling and other constraints on the management and use of their collections, together will free up time as well as human and financial resources that can be reallocated to other pursuits for the benefit of collections and the community, including the delivery of services online. And cultural collections of all sizes will benefit from the greater certainty the reforms provide for the use of orphan materials.
- The guidance around quotation will bring down administrative costs and speed up the time it takes to release research outcomes disseminated by **researchers and research organisations**. Plus, greater access to orphan materials in cultural collections will open up volumes of new material for research purposes. Both outcomes will contribute greatly to the public interest.
- Greater clarity around online teaching, increased certainty when involving parents and other parties in teaching, and the use of orphan materials and quotations from other third-party copyright material in classes and teaching resources will make it easier for **educators and educational providers** to focus on quality teaching outcomes.
- Updating the government statutory licensing scheme to include communication of materials will better support federal and State and Territory **government departments and agencies** as they continue to increase their delivery of services online. And the amendment will clarify government use of material other parties provide to it, making government processes quicker and easier.
- Perhaps the greatest dividends though will come from the benefits for **the Australian public**. Specifically, the public will be able to more confidently use orphan materials, will be able to use cultural collections material for personal and domestic use and will be able to engage with more research outputs made available more quickly. And broadly Australians will enjoy the convenience of more online service delivery from cultural, educational, research and government entities.

Both the ADA and the ALACC have a long history contributing to copyright reform processes. We bring different perspectives to copyright debates, with a focus on the public interest in access to knowledge, culture and education. That experience informs our responses to this current consultation. In this submission we provide observations on the specific drafting in the exposure draft, address the questions raised by the Department for consideration in the discussion paper, and respond to other points outlined in the discussion paper.²

Finally, the ADA and the ALACC broadly supports the submissions made by:

- The Australian Library and Information Association (ALIA);
- The Creative Commons Australia Chapter (CC Australia);
- Open Access Australasia (OA Australasia);
- The National Library of Australia (NLA);
- National and State Libraries Australasia (NSLA); and
- Universities Australia (UA).

Should the Department require additional information, analysis or evidence, the ADA and the ALACC would welcome the opportunity to make further comments. Our principal contact with respect to this submission is our Copyright Officer, Elliott Bledsoe, who can be reached at elliott@digital.org.au or on 02 6262 1118.

² Department of Infrastructure, Transport, Regional Development and Communications (2021) *Discussion paper—Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions*. Available at <https://www.infrastructure.gov.au/department/media/publications/discussion-paper-exposure-draft-copyright-amendment-access-reform-bill-2021-review-technological>.

About the Australian Digital Alliance

The Australian Digital Alliance (ADA) provides a voice for the public interest in access to knowledge, information and culture in copyright reform debates. We are a broad nonprofit coalition of public and private sector groups formed to provide an effective voice for a public interest perspective in copyright policy. The ADA was founded following a meeting of interested parties in Canberra in July 1998, with our first patron being retired Chief Justice Sir Anthony Mason AC KBE QC. More than 20 years later, the ADA continues to be a respected and active participant in the Australian copyright reform debates, regarded for our depth of copyright expertise and advocacy efforts on behalf of a diverse membership.

ADA [members](#) span various sectors, and include universities, schools, disability groups, libraries, archives, galleries, museums, research organisations, technology companies and individuals. The ADA unites those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture.

Committed to copyright reform that enables fair access to content and encourages innovation and growth, the ADA provides policy advice to government and its members, supports research and publications on new copyright law and policy, monitors international trade and IP developments, and facilitates forums to discuss topical copyright issues and progressive reform.

More information about the ADA is available at digital.org.au/about.

About the Australian Libraries and Archives Copyright Coalition

The Australian Libraries and Archives Copyright Coalition (ALACC) (formerly the Australian Libraries Copyright Committee (ALCC)) is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. The ALACC has nine organisational members, each of whom nominates a representative to provide advice and reflect the concerns of their members. The organisational members are:

- [Australian Library and Information Association \(ALIA\)](#)
- [Australian Society of Archivists \(ASA\)](#)
- [National and State Libraries Australasia \(NSLA\)](#)
- [Council of Australasian Archives and Records Authorities \(CAARA\)](#)
- [Council of Australian University Librarians \(CAUL\)](#)
- [National Archives of Australia \(NAA\)](#)
- [Australian School Library Association \(ASLA\)](#)
- [NSW Public Library Association \(NSWPLA\)](#)
- [Australian Government Libraries Information Network \(AGLIN\)](#)

The ALACC offers informed contributions to domestic and international copyright law and policy discussions and organises copyright education, including training and online information resources targeted at the library and archives sectors.

The ALACC and its members support a copyright framework that appropriately protects the interests of right holders while ensuring access to important cultural, educational and historic content for the public's benefit.

More information about the ALACC is available at alacc.org.au/about.

Limitation on remedies for use of orphan material (Schedule 1—Orphan works)

The introduction of a copyright duration for unpublished materials that came into force in 2019³ was a significant positive step towards a robust response in the Australian copyright system to orphan material (i.e. copyright material whose owner is unknown or cannot be contacted). Abandoning the antiquated concept of perpetual copyright for unpublished works, and setting a fixed copyright term for content regardless of whether the material was published or not meant orphan materials now have a pathway to entering the public domain. Without undermining the importance of that change, the introduction of a scheme to limit remedies available to a copyright owner of (formerly) orphaned material when that material is used by another party will address many of the outstanding issues still holding back wider reuse of orphaned content. It has the potential to activate orphaned content through new productive and creative uses before copyright in the material has expired.

The barriers to using orphan materials have been a concern for the ADA and the ALACC for a number of years. By their nature, orphan materials are risky to use.⁴ The low risk appetite of some libraries and archives means much orphaned material held in collections is not made available to the public. This is a particular problem for smaller organisations without dedicated copyright expertise. The potential for a copyright owner to come forward in the future and object to or claim compensation for the use of the material will often deter libraries or archives from using orphaned content themselves. It has also been cited as a reason for libraries or archives not making orphan materials accessible to other parties. We welcome the certainty the proposed provision will bring, and the flow on effects of that: the release of more collections material for viewing online, or for reuse in reasonable circumstances. Further, we note that a major benefit from the provision will be the reassurance it will give smaller cultural institutions in particular to confidently use orphan materials from their collection.

We also welcome the benefits the scheme will provide for researchers and other users. Of the orphan materials that are accessible, not being able to secure permission from the copyright owner causes many potential users to abandon plans to use the material or avoid using it in the first place.⁵ For these potential users the threat of a copyright owner coming forward can discourage the use of orphan materials. It can be

³ Introduced with the *Copyright Amendment (Disability Access and Other Measures) Act 2017*.

⁴ You cannot secure a permission if you do not know who the copyright owner is or you cannot contact them. You may not be able to determine the copyright duration for the material either.

⁵ The topic of avoidance or abandonment of copyright material is discussed by Kylie Pappalardo and others in a research report looking at how creators reuse copyright materials in practice. The authors note that a consequence of complicated or lengthy licensing processes is that some creators try to replace the material with content that is easier to secure permission to use while others abandon the use of material or the entire project: Pappalardo, K et al. (2017) *Imagination foregone: A qualitative study of the reuse practices of Australian creators*, Queensland University of Technology: Brisbane, Queensland, pp 28 and 29. Available at <https://eprints.qut.edu.au/115940/>.

hard to reconcile their investment in repurposing the material with the potential that a copyright owner emerges later seeking an unknown amount as payment for prior or ongoing use of the material, or who wants to stop the user making use of it at all.

Encouraging the use of orphan content can only be achieved by reducing or removing these barriers. Limiting the relief a copyright owner can seek against a user of orphan material is one way to do that. It is for this reason that the limitation on remedies for the use of orphan materials is supported as a solution.

While we support the benefits of the orphan materials scheme, we welcome the measures that have been included in the drafting – coupled with further guidance outlined in the discussion paper – to ensure safeguards for copyright owners are in place. Together, the provisions will open up orphan materials for uses in the public interest while ensuring an appropriate balance with copyright owners' interests. We will take up this matter further below.

There are many elements included in the drafting of Schedule 1—Orphan works in the exposure draft of the Bill. This section will provide comments on those elements, and the related points included in the discussion paper.

Balancing the interests of users and copyright owners

The need to protect both potential users of orphan materials and copyright owners of that material is embedded in the drafting of the provisions, starting with the requirement that users undertake a 'reasonably diligent search' to identify the copyright owner of the orphaned material.⁶ This diligent search requirement and the inclusion of factors that may be considered to determine if that search was 'reasonably diligent' are likely to discourage any misuse of s 116AJA if enacted.

Including situations where the outcome of a 'reasonably diligent search' reveals the identity of the copyright owner, but they cannot be contacted brings 'abandoned materials' within the scope of the scheme. This is strongly supported. Further comments on 'abandoned materials' are made below, including examples of materials that may have been abandoned.

Requiring contextually relevant search effort depending on the purpose and character of the intended use of the copyright material is another important aspect of how balance is achieved.⁷ We acknowledge that there are circumstances where it is reasonable to expect a more onerous search effort before using orphaned content. This topic will be taken up in more detail when discussing the fairness factors below.

⁶ The Bill, subpars 116AJA(1)(d)(i) and (ii).

⁷ Discussion paper, p 12.

It is appropriate that a user under the orphan materials scheme should be required to attribute the author of a work or maker of a film⁸ should an author or maker be identifiable and to the extent it is reasonably practicable to do so. Likewise, where the user of the orphan material wishes to continue using the material after a copyright owner is identified, requiring the parties to negotiate terms for ongoing use of the former orphan work⁹ also strikes the right balance. Where agreed terms cannot be reached, either party can apply to the Copyright Tribunal (the Tribunal) to fix reasonable terms for the ongoing use of the material.¹⁰ Finally, regardless of how terms were set, not limiting remedies where agreed terms or terms fixed by the Tribunal are not complied with by the user¹¹ is appropriate.

The scope of the orphan materials scheme

The utility of the orphan materials scheme will be maximised by its wide application. Applying to any orphaned copyright material, any use of that material, and use by any user¹² is supported. Limiting the material, use or user would make the application of the scheme unnecessarily complex, which is counter to the stated intention of the Bill to simplify provisions of the Act. In particular, we support the point made by CC Australia in their submission that in an era where digital technologies and the internet are in wide and regular use there is less reason to differentiate between types of material, the mediums through which material is expressed and the mechanisms used to distribute material.

As noted above, including 'abandoned' materials within orphan materials is welcome as it will ensure the orphan materials scheme will apply broadly to material where the copyright owner cannot be identified and to situations where the copyright owner is known but cannot be contacted, does not respond to attempts to contact them or is unwilling or unable to make a decision. The breakout box below identifies a few examples of potentially 'abandoned materials' that we believe fall within the scope of the orphan material scheme.

⁸ The Bill, para 116AJA(1)(e).

⁹ The Bill, subpara 116AJA(1)(e)(i).

¹⁰ The Bill, subpara 116AJA(1)(e)(ii).

¹¹ The Bill, para 116AJB(1)(f).

¹² The Bill, paras 116AJA(1)(a) and (b) and discussion paper, p 10.

BOX 1 – Examples of orphaned and ‘abandoned’ materials

There are a number of different scenarios we would like to highlight that may result in copyright material being explicitly or effectively orphaned or ‘abandoned’.

Some materials are orphaned almost immediately when they are created, simply because the creator was never recorded or identified. This commonly includes:

- Ephemera, such as minor publications, pamphlets, leaflets, handbills, invitations, cards, menus, junk mail, theatre programs and retail trade catalogues.¹³
- Non-professional photographs and videos.

Other materials may once have had a known rightsholder, but over time they become lost or impossible to contact, such as:

- Letters, diaries and journals where the name is unreadable, too generic to identify a specific individual (e.g. the letter’s author is ‘J Smith’), or is a nickname or pseudonym.
- Published material produced by an entity which no longer exists, such as books, newspaper or journals where the publisher has gone out of business

Some materials may be orphaned by default, because the rights become too complex to determine who has the legal right to provide permission. This may include:

- Old magazine or newspaper materials produced by freelance journalists, writers, photographers, illustrators and other contributors, or where there are multiple potential rights holders.
- Old audio-visual material, where the rights holders may be layered or unidentified.
- Published material where the original publisher has been taken over by another entity and the title is difficult to trace.

Still other materials may have an identifiable or even contactable publisher, but they are unwilling or unable to respond to requests for permissions for some reason. This is common in relation to:

- Grey literature such as reports, discussion papers, working papers, technical manuals, fact sheets, instructional information, data sets, infographics, conference papers and other information produced by universities, research centres, think tanks, companies, nonprofit organisations, professional, trade and industry bodies, Commonwealth and State or Territory government departments and agencies, local government authorities and other entities.

¹³ These types of content are identified by the NLA as printed ephemera. See NLA (n.d.) ‘Printed ephemera’. Available at <https://www.nla.gov.au/collections/what-we-collect/printed-ephemera>.

**JOINT SUBMISSION IN RESPONSE TO AN EXPOSURE DRAFT
OF THE COPYRIGHT AMENDMENT (ACCESS REFORM) BILL 2021**

- Commercially produced material that is no longer commercially viable, where the publisher may be disinclined to spend time and human resources effort determining the status or providing permission.
- Material produced by large multinational nonprofits such as the United Nations, which produce high volumes of material and may not have the resources to manage their ongoing rights.

It is supported that the scheme will apply to any use, including commercial uses of the material. This has the potential to stimulate economic value for orphaned content as new products and services using them emerge. In such situations we support the expectation that greater search effort may be required where commercial use of orphaned materials in new products or services is envisaged. We will provide more comments on this matter below.

It is the experience of libraries and archives that only very few copyright owners come forward after orphan collection items are released, and without these items being made public those copyright holders would never have been identified. If this is indicative of the future likelihood of a copyright owner being identified, any potential for commercial uses of orphan material to harm copyright owners' commercial markets is likely to be low.

Additionally, not placing any limitations on the types of uses that can be made under the scheme is supported, as is the fact that the scheme will apply to any user, including the public. Permitting use by any one, including for commercial purposes, will ensure the full potential value of these materials is achievable, both culturally and economically. Commercial uses such as authors integrating material into books, or filmmakers drawing inspiration from or using materials in fiction or documentary screen content. Australia's creators and cultural production are enriched by having access to orphan materials, and that enriches the lives of all Australians.

The ‘reasonably diligent search’ test

The orphan material scheme includes an obligation to undertake a ‘reasonably diligent search’ on a person who ‘... does an act comprised in the copyright in copyright material’.¹⁴ A number of factors¹⁵ are included in the drafting in relation to such searches. We will respond to the factors later in this section.

Before we do so, we would like to make some observations with regard to the ‘reasonably diligent search’ test. In particular, the level of flexibility the factors afford in relation to undertaking a ‘reasonably diligent search’ is important. As such, the following measures are supported:

- The factors for consideration include a wide range of relevant matters. These should be interpreted widely so as to encourage an understanding of the context of the use, the user and the search.
- The factors listed in the drafting are considerations only, and are not prescribed requirements. We would not encourage a rigid prescription of the factors in the drafting of the legislation or through regulation.
- Not all factors have to be applied in all situations, allowing for factors relevant to the specific context of the use, the user and the search to be considered.
- The factors are non-exhaustive,¹⁶ allowing for other matters relevant to the specific context of the use, the user and the search to be considered.
- While potential users of orphan material are obligated to conduct a search, the extent of the search required should not be unreasonable.¹⁷
- A ‘reasonably diligent search’ must be conducted in a ‘reasonable time’, not a specified period of time.¹⁸
- Including industry codes of practice as a factor will allow the scheme to remain in step with industry standards and best practice without the need for legislative reform to reflect industry practice.

Before moving on to look at the factors that may be considered in determining whether a ‘reasonably diligent search’ has occurred, the ADA and ALACC would like to point out to the Department that libraries

¹⁴ The Bill, subcl 116AJA(2).

¹⁵ The Bill, subcl 116AJA(2).

¹⁶ The Bill, subcl 116AJA(3).

¹⁷ Discussion paper, p 12.

¹⁸ The Bill, para 116AJA(1)(c).

and archives are good actors in their handling of orphaned materials. They have well established practices that ensure a search for a copyright owner is reasonable and considered. This will extend to using orphan materials under the scheme.

While we understand some stakeholders have questioned the certainty of the provisions we remind the Department that similar concerns were expressed around the introduction of s 200AB. In the 15 years since that provision has been in play we have seen sensible approaches to using it by libraries and archives. GLAM bodies have been conservative in the use of s 200AB, especially when it is used by smaller organisations.

Factors to determine whether a ‘reasonably diligent search’ has occurred

To guide the application of the new orphan material scheme the drafting of the provision includes a non-exhaustive set of factors that may be considered in determining whether a ‘reasonably diligent search’ was conducted. These are:

- The nature of the copyright material;
- The purpose and character of the act comprised in the copyright;
- The manner in which the search was conducted;
- The person who conducted the search;
- The technologies, databases and registers that were available for searches; and
- Any relevant industry codes of practice.

By outlining such factors, potential users of the provision are alerted to the types of matters they should be mindful of when conducting searches for the identity of a copyright owner. We welcome the clarification of the factors outlined in Table 1 in the discussion paper,¹⁹ and would like to see those factors specifically mentioned in the Explanatory Memorandum of the Bill (the Explanatory Memorandum). However, we wish to make a number of points in relation to each factor to determine whether a ‘reasonably diligent search’ has been undertaken.

¹⁹ Discussion paper, pp 12 and 13.

The nature of the copyright material

We make the following points in relation the nature of the copyright material as one of the factors:

- Listing the age of the material and the type of the material as examples of what matters may be considered in relation to the nature of the copyright material is appropriate and consistent with other provisions in the Act.
- Including the amount of identifying information available is also appropriate. However, the mere existence of identifying information that is not readily discoverable through a 'reasonably diligent search' should not negatively limit the scope of the scheme. We suggest qualifying the amount of identifying information by limiting it to information that is 'reasonably available'.
- While we acknowledge that the ADA and the ALACC are not experts with respect to Indigenous Cultural and Intellectual Property (ICIP), we recommend that the examples of what may be considered in relation to the nature of the copyright material include ICIP and other cultural sensitivities. In particular, we note that the lived, continuous nature of First Peoples' connection to their traditional knowledge and traditional cultural expressions from which ICIP is drawn subsists regardless of the duration of copyright or the age of the material. As such, ICIP should be considered in relation to any material – contemporary, orphaned or in the public domain.
- Including the intentions of the creator when considering the type of material is supported. By specifically identifying in the discussion paper material being created for personal consumption or without an expectation of commercial return,²⁰ libraries, archives and cultural institutions will have greater confidence when using this kind of material. There are many situations in which material identified in Box 1 above would likely have been created for personal reasons or without an expectation of commercial return.

The purpose and character of the use

It is reasonable to expect proportional search effort based on the circumstances. For example, we agree that placing greater obligations on users intending to use orphaned items in more exploitative ways – such as uses for commercial purposes or where the user (other than a library or archives) intends to disseminate the material widely – strikes the right balance. Likewise, we support less onerous expectations for some uses, particularly uses in the public interest. To illustrate, the discussion paper flags urgent broadcasts where the safety or welfare of a person is at risk²¹ as an example of a use in the public interest. Other public interest uses may include:

²⁰ Discussion paper, p 12.

²¹ Discussion paper, p 12.

JOINT SUBMISSION IN RESPONSE TO AN EXPOSURE DRAFT OF THE COPYRIGHT AMENDMENT (ACCESS REFORM) BILL 2021

- Wide dissemination of digitised collections material made available online by a library or archives;
- Educational instruction – whether in-person or online – relevant to the subject-matter, type of material or time period of the orphan work;
- Orphan materials related to matters of significant public interest such as commemorative addresses or obituaries;
- Orphan materials that can inform community resilience planning, such as historical material and data relevant to weather, land and water use, utilities, transport and cultural practices.
- Presentations including orphaned materials delivered by members of the public to historical or community groups; and
- Family histories that include relevant orphaned materials with small print runs and limited distribution.

How the search was conducted

The particulars of how a user conducted their search will be relevant to determining if it was a ‘reasonably diligent search’. We agree generally with the examples listed in Table 1 in the discussion paper,²² but wish to make the following points in relation to those examples:

- While we agree that publishers, broadcasters and collecting societies may hold relevant information to help identify and contact a copyright owner, it should not be compulsory to consult these organisations. Anything that will introduce bureaucracy into the search process should be avoided (or at least minimised). This is crucial to avoid the unintended dampening effect on the use of orphan materials that has come to bear in other jurisdictions.
 - Take the situation that has resulted since the 2012 EU Orphan Works Directive²³ came into force as an example, where there has been low numbers of orphan works declared and registered²⁴ in the [EUIPO Orphan Works Database](https://euiipo.eu/orphan-works-database). Criticisms of the scheme range from the unjustifiable amount of time and resources that need to be dedicated to

²² Discussion paper, pp 12 and 13.

²³ *Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA relevance*. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0028>.

²⁴ Matas, A (2020) *Evaluating the Orphan Works Directive*, Europeana Pro, Europeana: Den Haag. Available at <https://pro.europeana.eu/post/evaluating-the-orphan-works-directive>.

conducting a 'diligent search' to obligations to consult sources that are 'often irrelevant and difficult to access'.²⁵

- Similarly, we caution against arguments that collecting societies are the bodies best positioned to carry out searches for orphaned materials. Orphan work statutory licensing schemes in the United Kingdom (UK) and Canada have both been criticised for their high costs to set up and maintain versus limited positive outcomes.²⁶ Consulting publishers, broadcasters and collecting societies would likely be more warranted where only a small number of copyright owners are likely to be involved.
- The discussion paper states that “[i]n some cases, it may be reasonable to narrow searches to a shorter investigation based on the outcome of a representative sample of the works, for example in the case of mass digitisation of collection items.”²⁷ While we support the notion, we caution that sampling should not be required in all circumstances involving mass digitisation of large volumes of material. Archival collections, for example, can include hundreds of thousands of individual items. Even a very small sample size for such collections would require laborious seeking copyright owners for thousands of copyright owners. This burden is further compounded if the sample must be representative.
- We agree that expecting a user to extend their search to another country where there is evidence that the copyright owner is outside Australia is reasonable.
- And we agree that, where a copyright owner is identified, not receiving a response from the copyright owner may not mean that the material is orphaned. However, we are pleased that the discussion paper identifies that if a response to multiple attempts to contact the copyright owner using different means (e.g. by post, email and telephone) has not been received within a reasonable time ‘... the user may reasonably expect that the copyright owner is not actively exercising their exclusive rights and the work is [abandoned and] orphaned’.²⁸ To ensure this does not become unintentionally burdensome it should be clarified that:

²⁵ See for example, Siso-Calvo, B et al. (2018) ‘Is There a Solution to the Orphan Works Problem? Exploring the International Models’, in Chowdhury, G, McLeod, J, Gillet, V and Willett, P (eds) *Transforming Digital Worlds. iConference 2018. Lecture Notes in Computer Science*, vol 10766, Springer, Cham. Also available at https://eprints.ucm.es/id/eprint/48521/1/ORPHANWORKS_POSTPRINT_SISO_ARQUERO_MARCO_COBO.pdf.

²⁶ See for example, Intellectual Property Office (2015) Orphan works: Review of the first twelve months. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/487209/orphan-works-annual-report.pdf. See also, Katz, A (2012) ‘The Orphans, The Market, and the Copyright Dogma: A Modest Solution to a Grand Problem’, *Berkeley Technology Law Journal*, vol 27, no 3. Available at SSRN: <http://ssrn.com/abstract=2118886>.

²⁷ Discussion paper, p 12.

²⁸ Discussion paper, p 12.

**JOINT SUBMISSION IN RESPONSE TO AN EXPOSURE DRAFT
OF THE COPYRIGHT AMENDMENT (ACCESS REFORM) BILL 2021**

- Requests through multiple channels is appropriate where multiple channels are reasonably identifiable. This should not be taken to imply that, where multiple means of contacting the copyright owner are available, that a request must be issued to every available channel.
- Multiple requests through a single channel may be appropriate where only a single means of contacting the copyright owner is reasonably identifiable.

Who conducted the search

The person who conducted the search is also relevant to determining if a ‘reasonably diligent search’ was undertaken. It is important that this be understood in the context of the situation. To illustrate, in practice staff of libraries, archives and cultural institutions are likely to be a large group of people undertaking such searches in relation to orphaned collections material held by their institutions. Prior experience, industry best practice and the types of information that are available to librarians, archivists and other information professionals is different to that of a member of the public who seeks to use orphan material. It would be unreasonable to place the same expectations on the public as is placed on information professionals working in cultural institutions.

The outcome of prior searches undertaken by another person should be able to reasonably be relied on by a user in appropriate circumstances. For example, the discussion paper states that ‘... [a] librarian may be able to rely upon a previous search by another librarian at the same or another library’.²⁹ The efficiencies this will bring are welcomed. This will reduce administrative costs for cultural institutions as repeat requests for the same material may not require another ‘reasonably diligent search’(especially where the circumstances have not changed or a long period of time has not passed since a prior search was undertaken).

The discussion paper also identifies some secondary uses of material containing an orphan work where a future user of the underlying orphan material may reasonably be able to rely on that prior search.³⁰ These examples are supported, and should be included in the Explanatory Memorandum. Although, in doing so, it should be made clear that these are not the only scenarios where a potential future user may reasonably be able to rely on prior searches undertaken in relation to material containing an orphan work.

The discussion paper clearly anticipates that a member of the public may, in appropriate circumstances, rely on a library, archives or other cultural institution’s prior search efforts. We welcome this outcome, but we recommend that the Explanatory Memorandum should make it clear that the mere existence of a prior search for a copyright owner doesn’t necessarily overcome the need to conduct a separate ‘reasonably diligent search’. For example, where a user intends to use the material for commercial purposes or where

²⁹ Discussion paper, p 12.

³⁰ Discussion paper, pp 12 and 13.

they intend to disseminate the material widely, this may give rise to the need to undertake a 'reasonably diligent search' for themselves, even where the host institution or another party has conducted a search prior.

That said, libraries and archives have a wealth of experience using orphan materials. We do not want to see libraries and archives burdened with the requirement to support searches by other users of orphaned works. But libraries and archives are open to work collaboratively to share their industry codes and to contribute to co-designed educational activities that will support other users who may make use of orphan materials, and encourage them to adopt best practices in doing so.

The search technologies, databases and registers available at the time

We welcome the acknowledgment that what constitutes a 'reasonably diligent search' will change over time. While we agree, we caution against being overly prescriptive as to the current or future sources of information and search technologies, databases and registers that could be consulted when conducting searches. Publishers, broadcasters and collecting societies may be sources of relevant information to help identify and locate a copyright owner, as may be any public registers established by collecting societies or industry associations, but making it compulsory to consult these sources and tools is discouraged. Anything that adds bureaucracy into the search process should be avoided outright (or minimised to the extent possible). Let the EUIPO Orphan Works Database or the UK and Canadian orphan works statutory licensing schemes be a cautionary tale.³¹

We recommend including other potential sources of information to the Explanatory Memorandum, such as provenance information held by libraries, archives and cultural institutions. The scope of this factor should also be flexible enough to incorporate new information sources and search technologies such as information stored in smart ledgers, backed by Blockchain technology.

³¹ For more information on issues arising from international approaches to orphan works see, for example:

- ADA (2020) *Australian Productivity Commission Intellectual Property Arrangements Inquiry Final Report: Response by the Australian Digital Alliance*, p 7. Available at <https://digital.org.au/resources/productivity-commission-ip-arrangements-inquiry-final-report-submission/>.
- ALACC (2018) *Copyright Modernisation Review: Submission from the Australian Libraries Copyright Committee*, p 19. Available at <https://alacc.org.au/copyright-modernisation-consultation-submission/>.
- ADA (2015) *Submission to the Productivity Commission Inquiry into Australia's Intellectual Property Arrangements*, pp 13 and 14. Available at <https://digital.org.au/resources/submission-to-the-productivity-commissions-inquiry-into-australias-intellectual-property-arrangements/>.
- ADA and ALACC (2013) *Copyright and the Digital Economy: Submission by the Australian Digital Alliance and Australian Libraries Copyright Committee in response to the Australian Law Reform Commission's Discussion Paper*, p 35. Available at <https://digital.org.au/resources/submission-in-response-to-the-alrc-discussion-paper-copyright-and-the-digital-economy-inquiry/>.

Relevant industry codes of practice

Including industry codes of practice as a factor to consider when determining if a 'reasonably diligent search' took place is supported. This will allow the provision to remain agile and adapt to changes in the management of orphan material in cultural collections over time. It is positive that this takes in a range of '... written guidelines, protocols or other industry guidance material on conducting diligent searches'.³² We anticipate that existing codes such as the position statement put out by National and State Libraries Australasia (NSLA) on conducting a reasonably diligent search for orphan works³³ and the corresponding guidelines³⁴ will be within the scope of the provision at commencement. Although, we note that those mechanisms may need to be updated to ensure they accommodate the amendments.

Where a copyright owner is later identified

It is crucial that the orphan material scheme makes it clear that no compensation or other relief can be sought for past uses if a copyright owner of the material is identified at a later time. Without this assurance, significant risk would remain for users of orphaned content. We welcome both provisions that make up the scheme, and the way in which they interact with each other. Together, the full potential of the scheme is more likely to be realised.

The inclusion of an option for the parties in the matter to negotiate terms for ongoing use of the material³⁵ is supported, as is allowing either party to apply to the Tribunal to fix reasonable terms for the ongoing use of the copyright material where the parties are unable to agree on terms.³⁶ Notwithstanding this arrangement, it is worthwhile noting that negotiations of copyright licences can be marred by inequalities of bargaining power, lengthy negotiations, complex terms and requests for high licence fees. Each of these can act as a barrier to securing permissions through negotiation.³⁷ A discussion of the creative and financial costs of seeking permissions and licensing is taken up by Kylie Pappalardo and others in the report *Imagination foregone: A qualitative study of the reuse practices of Australian creators* (which was produced for the ADA). The report identifies a number of hurdles creators face when trying to secure permission to use copyright material, including:

³² Discussion paper, p 13.

³³ NSLA (2019) *Position statement: Reasonably diligent search for orphan works*. Available at https://www.nsla.org.au/sites/default/files/documents/nsla.copyright-search-orphan-works-feb19_0.pdf.

³⁴ NSLA (2019) *Procedural guidelines for reasonably diligent search for orphan works*. Available at <https://www.nsla.org.au/sites/default/files/documents/nsla.copyright-orphan-works-guidelines-jun19.pdf>.

³⁵ The Bill, subpara 116AJA(1)(e)(i).

³⁶ The Bill, subpara 116AJA(1)(e)(ii).

³⁷ Pappalardo, K et al. (2017), pp 20 and 21.

- Significant investment of time and human resources in identifying and then negotiating a permission;
- The potential for high fees or costs to be charged in relation to a permission;
- The potential for the scope of a permission that is granted to be very limited;
- The complexity of the process for making requests for permission to some publishers;
- That the process for requesting permissions differs from one copyright owner to another; and
- That regardless of good faith negotiations, the ultimate result may be that the copyright owner opts not to grant a permission to use the material.

We draw the Department's attention to the fact that the ability for either party to apply to the Tribunal may not always be enough to counteract the impact of these issues.

In addition, it would be prudent for the Explanatory Memorandum to provide guidance on what it means for the application of the provision when a copyright owner is identified and contacted, is not concerned by the continued use of the formerly orphaned material, but is unwilling to engage in negotiations related to that continued use. We recommend that implied licences be enough to satisfy the negotiation of terms for the purposes of the new orphan materials scheme.

Finally, in relation to situations where a copyright owner is later identified, we support not limiting remedies where agreed terms or terms fixed by the Tribunal are not complied with.³⁸ This is consistent with copyright licensing practice and with the principles of contract law, namely the performance of contractual rights and obligations and the remedies available to aggrieved parties in contractual disputes.

Using orphan material in practice

There are a number of potential positive outcomes that will result from the introduction of a scheme to allow greater use of orphan materials. Box 2 below lists outcomes likely to come within the scope of the provision. Every effort should be made to ensure that the drafting of the provision, and the Explanatory Memorandum facilitates these kinds of outcomes.

³⁸ The Bill, para 116AJA(1)(f).

BOX 2 – Activities that will benefit from the orphan materials scheme

A sample of activities that will benefit from the scheme include:

- **Mass digitisation** – In practice the limitation on remedies for the use of orphan materials will work in tandem with s 200AB. Libraries and archives will be able to rely on either provision, or both, when undertaking digitisation projects. The interplay between both provisions will simplify decision making for libraries, archives and cultural collections by further reducing risk and the administrative burden experienced by these institutions when undertaking mass digitisation. This is further enhanced by the ability for cultural institutions to rely on the outcome of prior searches, removing the need to conduct a new search (in appropriate circumstances).
- **Historic research** – Historians, including professional historians as well as people working on family and community history projects, need more flexibility when using orphaned materials in their research. Particularly of note is the flexibility afforded by the scheme to allow greater use of orphaned materials in research outputs such as reports and publications. This will give Australians access to broad and diverse interpretations that explore, share and preserve Australia's history.
- **Artistic outcomes** – Artists draw inspiration for a range of sources. The unique properties of specific material that has been orphaned may be vital to the creative, curatorial or other aims of a user. The provision will make orphaned material available to creators in addition to public domain material or material licensed for reuse under a Creative Commons (CC) licence.
- **Documentary filmmakers and screen producers** – The nature of documentaries necessarily requires use of third-party content to tell the stories the documentarian wants to tell. The intended market for a documentary is also usually highly public, such as performance at festivals, public broadcast or online distribution, increasing the complexity of obtaining permissions or using material under other exceptions. The provision will reduce the complexities for documentarians seeking to use orphan materials.
- **Educational outcome** – Students, teachers and lecturers will be better able to incorporate orphan materials into their coursework, lessons and conference presentations.
- **Text and data mining (TDM)** – The scheme will open up orphan materials for text and data mining (TDM), and use in machine learning (ML) and artificial intelligence (AI) applications. Currently input data for ingesting into a ML process legally should be limited to content in the public domain or CC-licensed material.

Additionally, the provision will create more certainty around the use of orphan materials. This may result in greater acceptance of the use of orphan materials in a number of situations, such as when someone is:

- Entering into a commercial arrangement with publishers and distributors in respect of a manuscript or screen production that incorporates orphaned content;
- Entering into a writing or film festival that requires entries to have a licence to use all material included in the entry;
- Securing insurance over a project that incorporates orphan materials;
- Contributing content to a website which prohibits users from uploading content that infringes on another party's copyright in its terms of use;³⁹ and
- Applying to a government or non-government funding program that requires recipients of funding to secure appropriate permissions for any third-party copyright material incorporated into a funded activity.

Requiring attribution when using orphan material

We are pleased to see that the application of the right of attribution of authorship⁴⁰ has been considered in relation to the proposed limitation on remedies for use of orphan materials. Requiring a user to attribute authorship of a literary, dramatic, musical or artistic work or film is reasonable where the author or maker is identifiable.

We also support that attribution is required regardless of the outcome of a 'reasonably diligent search'. Many situations arise where the name of the author may be known despite not being able to identify the copyright owner or being unsuccessful in an attempt to elicit a response from them in relation to a request to reuse the copyright material. This includes situations where the name of the author or maker associated with the material is generic (such as 'J Smith') or pseudonymous, where the author is known but the current copyright owner is not identifiable, and where the copyright owner is identified but the material has been abandoned (see above).

Further, we note that experience suggests that attribution of material where orphan works are made available online can be an effective way of revealing copyright owners. In some cases this can be more effective than a 'reasonably diligent search'.

³⁹ The Terms of Service for the Facebook platform, for example, states that users must not do or share anything '[t]hat infringes or violates someone else's rights, including their intellectual property rights'. See Meta. (2022). 'Terms of Service'. Available at <https://facebook.com/terms>.

⁴⁰ The Act, s 189.

Orphan materials and the statutory licences

We support the exclusion of orphan materials from the scope of the education, free-to-air retransmission, subscription TV retransmission and government statutory licences. We refer the Department to the submission by UA for more on this topic.

Applications to the Copyright Tribunal – Response to Question 1.1

Generally, the types of matters to be included in applications under other provisions of the Act outlined in the Regulations are relevant to applications under the new s 116AJB. Specifically, we are of the opinion that the following matters should be deemed to be part of the circumstances or events giving rise to the application and should be included in an application:

- Identifying the copyright material the application relates to;
- Stating whether the applicant is the owner or the user of the formerly orphaned material (and identifying the copyright owner or user of the material depending which party is applying);
- A description of the circumstances giving rise to the application, including particulars of the negotiation; and
- Requesting the Tribunal fix reasonable terms for the arrangement.

Given the purpose and application of the orphan materials scheme, we join UA in recommending that a non-exhaustive set of matters the Tribunal must have regard to when making an order to fix reasonable terms is introduced either in the drafting or the Regulations. The following should be considered for inclusion those matters:

- The nature of the the use and/or proposed use of the former orphan material, including whether it was created for personal consumption or without expectation of commercial return;
- The purpose and character of the use and/or proposed use, including whether the use is commercial or intended for wide distribution;
- A description of the search process that was undertaken, including who undertook the search;
- A description of how and when the copyright owner was identified; and
- Whether another exception in the Act applies in relation to the use and/or proposed use.

Quoting copyright material (Schedule 2—Fair dealing for quotation)

The introduction of a new exception for fair dealings for the purpose of quotation is welcomed by the ADA and ALACC. We agree that, ‘... quotation generally has no impact on the market for the original copyright material, but its absence can degrade the value of academic work or research.’⁴¹ It is common for academic publications, conference papers, theses and other research outputs to include numerous instances of quoted third-party material. The time and effort required to secure permission to include those quotes in the final outcome can be extremely onerous.⁴²

If enacted, the provision will afford many benefits to the organisations that can rely on it, and it will respond to our ongoing concerns that clearing quotations in research outputs creates significant burdens on researchers and research organisations, as well as other institutions. Notwithstanding the extent to which other fair dealing exceptions permit quotation in appropriate circumstances, creating a stand-alone fair dealing exception will provide greater confidence when quoting copyright material. The provision will also reduce administration requirements, unnecessary redaction or adaptation to remove third-party content and the time it takes to release outputs that include quoted third-party material. All of these outcomes will also increase the public value of content released by libraries and archives, education providers, researchers, research organisations and governments.

The drafting of Schedule 2—Fair dealing for quotation in the exposure draft of the Bill includes a number of matters. This section will provide comments on those matters, and the related points included in the discussion paper.

The scope of the fair dealing for quotation exception

The new fair dealing for quotation will permit quotation of any copyright material for the purpose of, but not limited to, explanation, illustration, authority and homage by certain types of organisations and certain types of individuals, where that quotation is for a noncommercial purpose or is of immaterial commercial value.⁴³ The limitations imposed on the application of the provision are unjustified, and will seriously limit the usefulness of the provision. We know that the drafting seeks to align with the wording in Article 10 of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), however by including the limitations discussed below, what is proposed is much narrower than what is required under

⁴¹ Discussion paper, p 14.

⁴² See Pappalardo, K et al. (2017), p 21.

⁴³ The Bill, cl 113FA.

the Convention. We will address these limitations further below. Before we do so, we would like to make a few general points about the scope of the provision.

Applying the provision equally to works and subject-matter other than works is welcome. This will reduce complexity in the application of the provision. Likewise, the adoption of technology neutral language in the drafting is supported. In this case, it will mean that the new fair dealing for quotation exception will permit the use of quotes in physical or digital formats. It will also give the provision much-needed flexibility.

Importantly, the provision will extend to publishing the material or otherwise making the material public. This is supported, namely because of the wide public benefit that will derive from the ability to include quotes in published material or material that has been made public. The discussion paper goes further and identifies a number of examples of how the provision may be used.⁴⁴ The application of the provision would be greatly enhanced by the inclusion of these examples in the Explanatory Memorandum.

Quotation only by identified users

The first limitation to the scope of the fair dealing for quotation exception we wish to respond to is the limit on who can rely on the provision. We welcome that the benefits of the provision will extend to libraries and archives and authorised officers of libraries and archives, as well as to educational institutions and the Commonwealth government and State or Territory governments, and persons authorised by an educational institution or a government to act on their behalf. We are also pleased that the provision extends to people or organisations where the quotation is for a research purpose.

We are glad that the discussion paper sets out a broad scope of who is considered a researcher and research organisation. Rightly this includes students, teachers and academics but also covers a range of other individuals and organisations such as ‘... organisations that are engaged in scientific, medical or industrial research such as hospitals, medical research institutes and [the] CSIRO’.⁴⁵ To avoid any doubt in the application of the provision these details should be included in the Explanatory Memorandum.

Beyond institutional researchers and research organisations, we are very supportive that the provision is designed to extend to other people engaging in research such as documentary producers and family historians. We would welcome an explicit inclusion of community historians alongside family historians to bolster the use of source materials available to support histories for and by the diversity of Australian communities. To ensure the benefit of this broad scope is realised, these types of users should be specifically mentioned in the Explanatory Memorandum as well.

⁴⁴ Discussion paper, pp 16 and 17.

⁴⁵ Discussion paper, p 14.

There is no doubt that the individuals and entities the fair dealing for quotation exception will apply to will gain significant value from the new provision. However, it is concerning that the provision is only available to a subset of users. This will leave a wide range of quotation activities outside of the scope of the new provision, most notably quotation by members of the public. It has been acknowledged in the discussion paper that quoting copyright material typically has no impact on the market for the original copyright material.⁴⁶ Given this acknowledgement and that uses within the scope of the provision are limited to noncommercial purposes or commercial purposes where the '... quotation is immaterial to the value of the product or service', the rationale applied to justify not making the provision available to all users is unclear. Broadening the scope to include any user would bring copyright law closer to the normative expectations the public has with regards to quotation of material, freedom of speech and public discourse in a democracy.

Quotation only of material that has been 'made public' – Response to Question 2.1

In addition to limiting the users who can rely on the provision, it is concerning to see that the provision will also be limited to copyright material that has lawfully been 'made public'.⁴⁷ This will needlessly introduce complexity to the scheme. Excluding unpublished material from the scope of the fair dealing for quotation exception is not supported.

As NSLA notes in their submission, there is a huge volume of collections items held by libraries, archives and cultural institutions that are unpublished. They make up the majority of materials in many institutions's collections. And they are the majority of digitised material made available online by cultural institutions. There is as much, if not more, interest in unpublished materials in cultural collections from users. The public benefit from this material comes not just from access to the original material, but from the interpretation of the material by researchers, which is more robust when researchers can include quotes in their research outputs. As NSLA says in their submission, leaving the provision as drafted will exclude some of Australia's unique heritage material from the fair dealing for quotation exception.

Limiting the provision to material that was 'made public' by the copyright owner or with their permission will reduce its utility, introduce uncertainty and make it difficult for most users to apply. There are many situations where it will be impossible to determine whether material has been lawfully 'made public'. Material made available online by cultural institutions is frequently legally uploaded without rightsholder permission under s 200AB, in circumstances where the owner is difficult to identify or contact, or where the material is of a small quantity and incidental to a larger collection. Furthermore, the same uncertainty as to

⁴⁶ Discussion paper, p 14.

⁴⁷ The Bill, subcl 113FA(1)(c). s 29A of the Act provides a non-exhaustive list of situations when copyright material is 'made public'.

**JOINT SUBMISSION IN RESPONSE TO AN EXPOSURE DRAFT
OF THE COPYRIGHT AMENDMENT (ACCESS REFORM) BILL 2021**

the provenance of quote materials exists outside the library sector. Many materials are published by third parties in books or articles, for example, under exceptions such as fair dealing for criticism and review, or on a risk management basis where the copyright owner is difficult to identify or contact.

This will put a significant administrative burden on users of the provision, as well as libraries, archives and cultural institutions who will be required to track and answer questions about uses of their collection materials, and potentially even publishers and authors quoting materials in past publications. Researchers and institutions themselves would be left in a position where, because it is unclear that permission was obtained, they will be unable to use the exception and will need to obtain permission themselves. Such scenarios would undermine the stated aim of this provision to reduce the disproportionate administrative burden, cost and uncertainty in getting clearances for quotes.

Additionally, excluding unpublished works will seriously undermine the value and practical application of the provision. It will also put the new fair dealing at odds with the other fair dealing provisions which do not distinguish between the use of unpublished material and material that has been 'made public'. Further, it will seemingly go against the stated aim of recent copyright reforms, including the copyright duration amendments and the amendments to the libraries and archives provisions enacted in the *Copyright Amendment (Disability Access and Other Measures) Act 2017*. According to the Explanatory Memorandum and Minister's second reading speech for that Act, these amendments sought to 'harmonise' the treatment of unpublished material and material that had been 'made public' under the Act so as to give "institutions greater opportunities to deal with unpublished materials... [and] improve access to important Australian historical and cultural materials."⁴⁸ In fact, since these amendments, to our knowledge only one exception in the Act treats published and unpublished material differently, 'Inclusion of works in collections for use by places of education' (s 44). A strong justification should be required to reverse this important step to increase access to historic materials, and we see no argument to support such a restriction in relation to non-commercial quotation. Indeed, quotation is the minimum exception that the public expects to be allowed under copyright law, and by definition does not compete with the market for whole works. Like NSLA, we do not support re-introducing this distinction for this provision.

Extending the provision to also cover unpublished material would greatly increase its utility. We believe that current mechanisms in the provision will ensure an appropriate balance with copyright owners' interests. The provision is already limited to a subset of users, to noncommercial and commercial uses of immaterial value and by the inclusion of fairness factors. As the discussion paper itself notes, '... it is likely that the fairness factors would exclude commercially valuable or confidential material from being quoted'⁴⁹

⁴⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, Wednesday, 22 March 2017, (Paul Fletcher, Minister for Urban Infrastructure). Available at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F7c24ae06-5284-45f0-9c0c-3e66799c0523%2F0045%22>.

⁴⁹ Discussion paper, p 18.

in many circumstances. This begs the question, what reasonable justification is there for excluding unpublished material?

Quotation only for noncommercial purposes or commercial uses of immaterial value

The new fair dealing for quotation exception will be limited even further because it is designed to only apply to quotation for noncommercial purposes, or in situations where the quotation is for a commercial purpose in relation to a product or service, but the quotation is immaterial to the value of that product or service. The discussion paper attempts to provide further guidance on what is meant by commercial uses of immaterial value by including the following as examples of where quotation may be permissible despite the product or service having some commercial value:⁵⁰

- Citing text or images in scholarly works published commercially;
- Excerpts of background music or images captured in a documentary that is broadcast by a commercial broadcaster; and
- Images and diagrams used in a presentation at a conference where people in attendance paid a fee to attend.

In the interests of avoiding doubt in relation to the application of the provision, the list of scenarios where the provision may extend to quotation in a product that has some commercial value should be included in the Explanation Memorandum of the Bill. But this should not be treated as an exhaustive list.

As the discussion paper notes,⁵¹ limiting the purposes available under the provision will add complexity to its application. The main justification for this limitation seems to be to explicitly exclude profit-driven activities or services. The discussion paper offers the following as examples of what is considered to be outside the scope of the provision:⁵²

- Providing snippets in search results to attract advertising income; and
- Making t-shirts that display recognisable quotes from movies or TV shows.

Arguably these kinds of uses likely wouldn't be deemed fair even if the scope of the provision were wider.

⁵⁰ Discussion paper, p 17.

⁵¹ Discussion paper, p 17.

⁵² Discussion paper, pp 15 and 18.

The discussion paper also lists retweeting or quoting small amounts of copyright material on social media as outside the scope of the provision.⁵³ This is an example of the kinds of uses where a common practice occurs and that practice has not been challenged by rights holders.

Factors determining if the use is fair

The drafting of the provision includes a set of fairness factors to be considered in determining whether a dealing with copyright material constitutes a fair dealing with that material.⁵⁴ We believe the proposed fairness factors are reasonable and appropriate for the fair dealing for quotation. The fairness factors proposed are consistent with fair dealings for the purpose of access by persons with a disability⁵⁵ and largely consistent with the factors for fair dealings for the purposes of research or study.⁵⁶

Further, we welcome the clarification given in the discussion paper.⁵⁷ We recommend that guidance be included in the Explanatory Memorandum. That said, we will make some comments on the factors now.

The purpose and character of the dealing

It is appropriate that commercial uses should weigh against dealings being deemed fair.⁵⁸ Although, given the limitation of the provision to noncommercial purposes or commercial uses of immaterial value, the scope for commercial uses is already limited. To illustrate, the discussion paper provides the example of deriving promotional benefits for a commercial enterprise by making research material publicly accessible as a situation where this factor may weigh against fair dealing. It is difficult to fathom how such a situation would not be considered a use of a quotation for a commercial purpose that is material to the value of the related product or service.

⁵³ Discussion paper, p 15.

⁵⁴ The Bill, subcl 113FA(2).

⁵⁵ The Act, s 113E.

⁵⁶ The Act, ss 40 and 103C.

⁵⁷ Discussion paper, pp 18 and 19.

⁵⁸ Discussion paper, p 18.

The nature of the copyright material

The discussion paper provides a discussion of potentially relevant matters in relation to the nature of the copyright material.⁵⁹ While we agree in principle with many of these points, we make the following comments in response to these matters:

- **The age, currency or type of material** – The age of the material, the currency of the material and the type of the material are provided as examples of what may be considered in relation to the nature of copyright material. This is appropriate and consistent with the application of other provisions in the Act.⁶⁰
- **Commercially available material** – While it is generally appropriate that quoting from material that is commercially available is less likely to be considered fair, it is important to make it clear that the mere fact that the material to be quoted is available commercially should not exclude a user from being able to quote from the material. By extension, it is reasonable that it is more likely to be deemed fair to quote from material that is no longer commercially available (i.e. 'out of print').
- **Creative or unique material** – There are many scenarios where a user may want to quote factual content or quote creative or unique content. It is unclear why the discussion paper presumes that using creative or unique copyright material would be less likely to be considered fair than uses of factual content. By their very nature creative or unique content may be more desirable or appropriate to quote from in some circumstances.
- **Culturally sensitive material** – It is important that cultural sensitivities are observed when using content. This is especially the case when material is or incorporates Indigenous Intellectual and Cultural Property (ICIP). It is appropriate that use of material that also requires cultural permissions or cultural sensitivity is less likely to be fair than use of other material.
- **Material with limited distribution** – The discussion paper discusses the fairness factors in relation to material that is not widely distributed or is made available on a confidential basis together. We feel that the two situations need to be considered separately. We encourage the Explanatory Memorandum in the Bill to add further guidance on the notion that quoting from material that has had limited distribution is less likely to be deemed fair than quoting from widely distributed material. Specifically, we would like to draw the Department's attention to the fact that many items held by libraries and archives were intended for limited distribution when they were created. Correspondence sent to a Minister or a member of Parliament that is now

⁵⁹ Discussion paper, p 18.

⁶⁰ For example, ss 40, 103C and 113E of the Act.

held in an archives, for example, may have been intended to be distributed to the Minister or MP and their staff. And photographs taken to document a government program were likely only intended to be distributed to government officials to evidence a program outcome. Historically some material may have been considered too 'specialist' or 'technical' for wide dissemination but may be of broad interest to an increasingly well educated Australian public.

- **Confidential material** – The notion that quotes drawn from material made available on a confidential basis is less likely to be considered fair than material that is not confidential is reasonable. However, in relation to confidential material, we note that it may be difficult in some situations for a user of this new provision to be able to know that the material they intend to quote was confidential commercial or business information or a trade secret. Also, in relation to confidential material, we welcome the Explanatory Memorandum being clear that the context of the material is important. Some material may have been confidential when it was created but the need for confidentiality has passed, such as tender applications to a government tender or matters that were secretive but have since become public knowledge.
- **Highly quoted material** – It is unclear to us why the extent to which copyright material has been quoted in the past should impact how fair it is to use the material. There are as many reasons why users may want to quote extensively quoted content and less quoted content. For example, material that has been quoted extensively may be suitable in relation to current affairs or emerging trends, whereas more obscure material may be relevant for niche topics.

The effect on the market for the material

It is appropriate that the effect of a quotation on the current or potential market for the original copyright material is a consideration in determining if a quotation is fair. In considering this matter though, we suggest that the Explanatory Memorandum make the point that for this matter to weigh against fair dealing, there needs to be evidence that the quotation will impact or has impacted the current or potential market for the original copyright material. The mere fact that a quotation may impact the market for copyright material should not undermine the provision.

The amount and substantiality of the part dealt with

It is reasonable that the greater the amount of the material that is quoted the less likely the use will be considered fair. This is consistent with the application of this matter for fair dealings for the purposes of research or study.⁶¹ As the discussion paper states, this will depend on the type of material and the context of the quotation.⁶² The Explanatory Memorandum needs to ensure this is clear.

Requiring attribution when quoting material

As with the limitation of remedies for use of orphan materials, we are glad to see that the application of the right of attribution of authorship⁶³ has also been considered in relation to the proposed fair dealing for quotation provision. Requiring a user to attribute authorship of a literary, dramatic, musical or artistic work or film is reasonable where the author or maker is identifiable.

We also note that the proposed provision will extend beyond the requirements of the right of attribution of authorship in so far as it also requires the title or name of the material to be identified with the quotation,⁶⁴ where it is reasonably practicable to do so. Requiring a user to identify the title or name of the material, in conjunction with attributing the author, is reasonable. This also aligns with common practice when quoting material and normative expectations the public has with regards to quotation of material. And it supports and facilitates readers ability to locate the source of the quoted material, which in turn may encourage further use and understanding of the quoted content.

A final comment we will make on attribution is to reinforce the points made by the Creative Commons Australia Chapter about the requirement to attribute under the CC licences and those that arise under the moral right of attribution and the new requirement to identify the title or name of the work if the Bill is passed. CC licences and the Act will place users under substantially the same obligations. Harmonising these different requirements to attribute material is supported.

⁶¹ The Act, ss 40 and 103C.

⁶² Discussion paper, p 19.

⁶³ The Bill, subcl 113FA(1)(d).

⁶⁴ The Bill, subcl 113FA(1)(e).

Quotation and other fair dealing exceptions

A final point we wish to make is that, in some circumstances, the quotation of copyright material may be within the scope of other fair dealing exceptions, namely fair dealing for the purpose of criticism or review, parody or satire or the reporting of news. The potential for quotation under these provisions should not be limited by the introduction of the fair dealing for quotation.

Expanding the library and archives exceptions (Schedule 3—Libraries and archives etc.)

The proposed amendments to the exceptions for libraries and archives are welcome. The changes are an appropriate continuation of the modernisation of the library and archives exceptions brought in with the commencement of the *Copyright Amendment (Disability Access and Other Measures) Act 2017*. They will respond to long-standing concerns we have expressed about the impact of an outdated copyright system on the ability for libraries, archives and cultural institutions to do their work. And they will further reduce the administrative burden on institutions, while increasing equitable access, allowing greater use of new technologies to deliver services and ensuring libraries are well placed to quickly respond to disruptions such as the ongoing COVID-19 pandemic.

We support moving all the library and archives exceptions to Subdivision A (Public libraries, parliamentary libraries and archives) in Division 3 (Libraries and archives) of Part IVA of the Act (Uses that do not infringe copyright). Placing them together in the Act will make identifying the relevant provisions in the Act easier. This would be particularly useful for smaller and regional organisations with fewer resources and no staff with specialist skills in interpreting legislation.

There are a number of proposed changes that will come in if Schedule 3—Libraries and archives etc of the Bill is enacted. We have addressed these individually in this section. The application of other parts of the library and archives exceptions that will not change significantly have been dealt with together.

Library and archives exceptions not significantly changing

The drafting of many of the proposed library and archives exceptions provisions is substantially the same as the former provision that they will replace. As such, we have no specific comments on:

- The interpretation provision.⁶⁵
- The provisions related to infringing copies of material made on machines installed at libraries and archives.⁶⁶
- The provisions related to copying by Parliamentary libraries for members of Parliament.⁶⁷

⁶⁵ The Bill, cl 113G and the Act, s 48.

⁶⁶ The Bill, cl 113KA and the Act, ss 39A and 104B.

⁶⁷ The Bill, cl 113KB and the Act, ss 48A and 104A.

**JOINT SUBMISSION IN RESPONSE TO AN EXPOSURE DRAFT
OF THE COPYRIGHT AMENDMENT (ACCESS REFORM) BILL 2021**

- The provision related to publishing of unpublished works held by a library or archives.⁶⁸
- The provision related to reproducing and communicating works in care of the National Archives of Australia.⁶⁹
- The provision related to how the other provisions apply to illustrations accompanying a literary, dramatic or musical work, an article or a thesis.⁷⁰

Further, in relation to this final point, we believe that the drafting of the new provision will adequately cover all of the matters set out in current s 53. As such, we have not specifically addressed Question 3.2 asked in the discussion paper.

Document delivery and interlibrary loans

The ADA and ALACC support the proposed widening of the scope of the ‘supply to a person’ provision⁷¹ (commonly referred to as ‘document delivery’) and the ‘supply to another library or archives’ provision⁷² (commonly referred to as ‘interlibrary loan’) to include any copyright material held in a library or archives collection or another library or archives collection. Libraries, archives and cultural institutions have been supplying material to satisfy document delivery and interlibrary loan requests for a long time. Some audio-visual material has been supplied in effectively the same way under s 200AB. We welcome the simplification that including all copyright material in the provisions will bring to document delivery and interlibrary loans.

We also welcome the expansion of the document delivery provision to include supply for a person’s ‘private and domestic use’ in the new s 113KD. By extension, interlibrary loan requests can provide copies of material to satisfy a document delivery request for a person’s ‘private and domestic use’.⁷³ We provide further comments on ‘private and domestic’ uses below.

⁶⁸ The Bill, cl 113KJ and the Act, s 52.

⁶⁹ The Bill, cl 113KL and the Act, s 51AA.

⁷⁰ The Bill, cl 113KK and the Act, s 53.

⁷¹ The Bill, cl 113KD and the Act, s 49.

⁷² The Bill, cl 113KE and the Act, s 50.

⁷³ The Bill, para 113KE(1)(c).

Requirements for making a request for supply

It is appropriate to continue to require users requesting supply under the ‘document delivery’ provision to make a signed request in writing stating that the user requires the material for the purposes of research or study or for their private and domestic use, and that they will not use the copy for any other purpose. It is also appropriate to continue to require a library or archives to not supply a copy if they know a statement in a request is untrue.

We welcome that the new provision will continue to allow requests to be made orally in appropriate circumstances. Further guidance in the Explanatory Memorandum on the types of situations where an oral request may be appropriate would be welcomed, and will help the application of the provision. It remains appropriate that, in such situations, the request is recorded by the library or archive. We also support allowing another person to make a request on behalf of a user and the clarification that a request can be signed electronically (using an electronic signature). Together, these will bring the provision in line with generally accepted business norms and update the system from the paper-based processes originally designed.

We support the point made in the discussion paper that libraries and archives will continue to have a discretion to refuse supply of a copy if they are not satisfied that it is reasonable to supply the copy.⁷⁴ This could include situations such as where the material is culturally sensitive. We would like to see this stated in the Explanatory Memorandum.

Finally, the comments we have made here about the requirements for a supply request also apply to the new provisions for the use of unpublished copyright material⁷⁵ and the use of unpublished theses or similar literary works.⁷⁶ Both of these provisions include the same requirements when a user is requesting copyright material under them.

Retention copies

Relatedly, we are pleased to see a new provision will be introduced in relation to the retention of copies made by a library or archives in response to a ‘document delivery’ or ‘interlibrary loan’ supply request.⁷⁷ We agree that removing the requirement to destroy electronic copies of material made in response to a ‘document delivery’ or ‘interlibrary loan’ supply request as soon as practicable after communication, and allowing libraries and archives to retain supply copies and use them to respond to future requests, will

⁷⁴ Discussion paper, p 25.

⁷⁵ The Bill, cl 113KG.

⁷⁶ The Bill, cl 113KH.

⁷⁷ The Bill, cl 113KF.

create significant labour and financial efficiencies. In particular, our members have noted that there is potential for significant cost savings to be achieved through retaining supply copies as digitisation is a highly manual process requiring skilled labour and time to undertake. It will also help protect fragile collection materials as they will only need to be digitised once.

We welcome the clarification in the note in new s 113KF that a retention copy may also be used for other library or archives uses such as preservation,⁷⁸ research carried out at the institution or another institution⁷⁹ and making material available online.⁸⁰ We recommend the note also include administration of the collection.⁸¹ If administration of the collection is also included this would mean retention copies may also be used for administrative purposes such as business continuity or disaster recovery, which are standard management practices. A final point worth bringing to the Department's attention is that enabling a broader set of uses for retention copies may also enable a library or archives to consider disposing of duplicate physical copies of materials which would allow the collecting institution to free up limited collection storage facilities.

Using unpublished copyright material and theses

We welcome combining the current provisions relating to reproducing and communicating unpublished works in collection and to copying and communicating unpublished sound recordings and cinematograph films in collections⁸² into the new single new provision.⁸³ The provision will allow an authorised officer of a library or archives to make or communicate a copy of material of a certain age or older for the purposes of research or study, for the purposes of a person's 'private and domestic use' or with a view to publication. In relation to that new section, we support extending its application to allow use of any copyright material. By extension, we welcome the introduction of the new s 113KH which applies in a substantially similar way to unpublished theses and similar literary works.

As noted above, the points raised in relation to the requirements for a supply request are also relevant to requests made under these two new provisions.⁸⁴ The request requirements for each are the same as those for a user requesting copies of copyright material under the supply provisions.

⁷⁸ The Act, ss 113H and 113M.

⁷⁹ The Act, s 113J.

⁸⁰ Exposure draft, cl 113KC.

⁸¹ The Act, s 113K.

⁸² The Act, ss 51(1) and 110A.

⁸³ The Bill, cl 113KG.

⁸⁴ The Bill, cls 113KG and 113KH.

Making material available online

Expanding the provision related to libraries and archives making material in their collections available online is strongly supported. The need for reform in this area is urgent as digitisation is more important than ever for cultural institutions. It opens up collections beyond the privileged researchers who have the time, money and ability to travel to a capital city or a major centre to access materials onsite. We are excited that the provision will allow cultural institutions to provide the same kind of access online as is available onsite at their premises. Although we note that the deployment of the provision will likely be slow as libraries and archives ensure their already robust systems for protecting copyright materials are in place. It will also take time for institutions to reallocate or find new resources to do so.

Any claim that the actions of libraries and archives will undermine commercial business models for services such as online streaming video and ebooks is unfounded. Australian libraries and archives have no desire to provide services that compete with audio-visual streaming services. Many decades of evidence proves that the sector will always apply the exceptions available to it in a cautious manner that emphasises the importance of maintaining support for creators.

Further, we note that some publishers have argued that decisions not to make certain material available in electronic format is a business decision that may be undercut when libraries or archives make that material available online. It may be the case that there are legitimate business reasons for publishers to withhold electronic copies of material from the market, but we are concerned that business decisions may prevent public access to the material, particularly where that denial of access further disadvantages rural and remote users and users with disability. Library copies of material will always only be available on a limited basis, and so will not impact on the market or commercial decisions by publishers.

Reasonable steps to ensure copyright is not infringed – Response to Question 3.1

We welcome including reasonable steps in the new provision for making material held in the collection of a library or archives available online.⁸⁵ The notion that a library or archives must take reasonable steps to ensure that a person who accesses copyright material it makes available to them does not infringe copyright is well-established throughout the Act and is well-understood by the industry. We support the kinds of steps outlined in the discussion paper⁸⁶ but caution that the application of the steps must be flexible to ensure the steps are appropriate in the circumstances, that factors such as the size and available resources of an institution are factored in, and that the steps can adapt over time as industry practice and

⁸⁵ The Bill, cl 113KC.

⁸⁶ Discussion paper, p 23.

technologies change. The flexibility of the provision would be lost if the steps were specified in detail in the drafting of the legislation or through regulation. Such a move is not encouraged or supported.

‘Private and domestic’ uses

Introducing the use of copyright material for the purposes of a person’s ‘private and domestic use’ into the Act is supported. Making or communicating a copy of copyright content for the purposes of a person’s ‘private and domestic use’ will be included in the scope of the new provisions for supplying copies of copyright material to people,⁸⁷ for the use of unpublished copyright material⁸⁸ and for the use of unpublished theses or similar literary works.⁸⁹ It will also indirectly be within the scope of the provision for supply of copies to other libraries or archives⁹⁰ given that provision allows a library or archives to supply material to another library or archives for the purpose of supplying the copy under s 113KD. Extending these provisions to include ‘private and domestic’ uses of copyright material will greatly increase the utility of each provision. This broader scope will also bring copyright law closer to the normative expectations the public has with regards to using material for personal uses.

We welcome the clarification of ‘private and domestic use’ in the discussion paper.⁹¹ In particular, we are pleased to see the notions that a ‘private or domestic use’ can occur ‘on or off domestic premises’ and the copy can be used by the recipient and the members of their family or household included. These are both supported. We agree that, for the purposes of ‘private and domestic use’, it is appropriate to limit commercial uses and broad dissemination of the material (such as on social media). We would like to see these points of clarification specifically mentioned in the Explanatory Memorandum.

Application of the ‘commercial availability test’

In the Act many provisions require an investigation by a specified person to determine if material ‘cannot be obtained within a reasonable time at an ordinary commercial price’, or a consideration of the possibility of obtaining copyright material ‘within a reasonable time at an ordinary commercial price’⁹² (commonly

⁸⁷ The Bill, cl 113KD.

⁸⁸ The Bill, cl 113KG.

⁸⁹ The Bill, cl 113KH.

⁹⁰ The Bill, cl 113KE.

⁹¹ Discussion paper, p 24.

⁹² The Act, ss 40 and 103C, 47E, 49, 50, 113F.

referred to as the 'commercial availability test'). The application of the 'commercial availability test' in relation to a number of provisions has led to it being well-understood by the industry.

We are supportive of the 'commercial availability test' continuing to apply in relation document delivery⁹³ and interlibrary loans⁹⁴ where a request relates to the whole or more than a reasonable portion of the copyright material requested. And we support the application of the 'commercial availability test' in situations where libraries and archives make material available on the internet under the new provision for making material available online.⁹⁵ We will provide comments on the 'commercial availability test' itself and what constitutes a 'reasonable portion' as the trigger for the test now.

The 'commercial availability test'

While the 'commercial availability test' is well-established throughout the Act and is well-understood by the industry, we welcome the further guidance included in the discussion paper.⁹⁶ In particular, we support the following clarification, and would like to see this specifically mentioned in the Explanatory Memorandum:

- A search for a commercially available electronic copy of the copyright material does not need to be exhaustive.
- The mere existence of a commercially available electronic version of a physical item held in collection does not mean the provision doesn't apply.⁹⁷ For example, the provision may still apply in situations where:
 - A licence to the material is not available to Australian libraries, archives and cultural institutions.
 - An electronic version is not commercially available in a resolution or format that is suitable for the intended purpose.
 - A copy of the material is not able to be purchased individually, and is only available when purchased as part of a more substantial item or service (e.g. through a box set, a subscription covering several titles or volumes or some other bundled offer).

⁹³ The Bill, cl 113KD.

⁹⁴ The Bill, cl 113KE.

⁹⁵ The Bill, cl 113KC.

⁹⁶ Discussion paper, p 24.

⁹⁷ We note that NSLA have also identified these kinds of licensing practices as a barrier to providing better access to important content in their submission.

A point that is not included in the discussion paper but needs to be addressed is situations where a licence to material is unreasonably expensive. NSLA also raises this issue in their submission, and specifically points to the licensing of Australian Standards as an example. Like NSLA, we are very concerned that Australians are currently unable to access Australian Standards material through the NSLA libraries because of inflexibility in the licensing of Standards material by Standards Australia, and the high fees required under the licensing model – to illustrate, it was calculated that a physical copy of each of the 139 electricity and gas Australian Standards prescribed in Western Australian legislation would cost the State Library of Western Australia \$53,000. For more on the licensing of Standards material see NSLA's submission and the joint submission by ALIA, NSLA and the ALACC (then known as the Australian Libraries Copyright Committee (ALCC)) in response to Standards Australia's Distribution and Licensing Policy Framework Discussion Paper.⁹⁸

The 'reasonable portion' test

Simplifying the 'reasonable portion' test is welcome. The current language of the test is complicated, requiring different measures depending on the type of material and other factors. Applying a more standardised approach will make compliance easier for users.

We also support making the application of the 'reasonable portion' test uniform throughout the Act. As such, we welcome that the 'reasonable portion' test for the fair dealing exception for research or study⁹⁹ will also be updated.

Clarifying s 47H's impact on 'contracting out'

The statement in the discussion paper¹⁰⁰ that s 47H does not create a presumption that agreements can exclude or limit the operation of other provisions in the Act is a welcome clarification. This amendment will provide further guidance as to whether provisions of the Act can be overridden by the terms of a contract (commonly referred to as 'contracting out' or 'contractual override'). We note, as NSLA does, that the drafting seemingly confirms that the standard rule of legal interpretation does continue to apply to copyright law, namely that legislative provisions, especially exceptions, should take precedence over any

⁹⁸ ALIA et al. (2019) *Standards Australia Distribution and Licensing Policy Framework – Submission from the Australian Library and Information Association, National and State Libraries Australia and the Australian Libraries Copyright Committee*. Available at <https://alacc.org.au/standards-distribution-and-licensing-consultation-joint-submission/>.

⁹⁹ The Act, s 40.

¹⁰⁰ Discussion paper, p 27.

conflicting contractual clause, and that any contractual clause should be read-down to allow the operation of an exception.

Even if this is the case, we are uncertain what this clarification may mean for copyright licensing in practice. If this view of the drafting of the provision related to 'contracting out' is not shared by players such as publishers we are concerned that the potential benefits that will come with the Bill – updates to the provision for making material available online¹⁰¹ and adding 'private and domestic' uses to other provisions for example – may be undone by licensing agreements from some copyright owners continuing to purport to exclude or limit provisions of the Act. The licensing of Australian Standards referred to by NSLA is also an example where licensing arrangements seek to restrict libraries from providing remote access to material and would be unlikely to be changed merely because subs 47H(2) was introduced.

The ADA and ALACC still supports the comments made by the Australian Law Reform Commission (ALRC) in its *Copyright and the Digital Economy Final Report* on the issue of contracting out, specifically that not permitting contractual override is critical to ensure public interests protected by copyright exceptions are not prejudiced by private contractual arrangements.¹⁰² Favouring freedom to contract over protecting the public interest exceptions risks reducing the utility and value of those exceptions.

It is worth remembering that the *Copyright modernisation consultation paper* put out by the former Department of Communications and the Arts in March 2018 presented much stronger options for contractual override protections.¹⁰³ We would welcome further consideration of this important topic by the Department in the future.

¹⁰¹ The Bill, cl 113KC.

¹⁰² Australian Law Reform Commission (ALRC) (2013) *Copyright and the Digital Economy Final Report*, p 436.
Available at
https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_alrc_122_2nd_december_2013_.pdf.

¹⁰³ Department of Communications and the Arts (2018) *Copyright modernisation consultation paper*, pp 15–18.
Available at
<https://www.infrastructure.gov.au/sites/default/files/documents/copyright-modernisation-consultation-paper.pdf>.

Modernising the exceptions for education providers (Schedule 4—Education)

The ongoing disruptions of schools, universities, TAFEs and other educational institutions by the COVID-19 pandemic has laid bare the reality that the Australian copyright system was ill-equipped to fully support online educational delivery. To remain attractive and competitive Australian education providers need greater flexibility in how they can use copyright material, especially for remote and online learning. As such, the proposed amendments within Schedule 4—Education of the Bill are welcomed.

We support moving all the general education exceptions to a new Division in Part IVA of the Act (Uses that do not infringe copyright). Placing them together in the Act will make identifying the relevant provisions in the Act easier.

In our opinion two exceptions will not significantly change and are dealt with together below. We then provide comments specifically on the provision for the use of material in the course of educational instruction and restoring the scope of the registered charities' sound recording exception.¹⁰⁴

Education exceptions that will not significantly change

Two of the proposed education exceptions provisions will be significantly similar to the current provisions. As such, we have no specific comments on the provisions related to the use of works and broadcasts for educational purposes¹⁰⁵ or the provision for web caching by educational institutions.¹⁰⁶

Use of material in the course of educational instruction

We have raised concerns in the past that the Act does not enable education institutions to engage in contemporary online teaching and learning practices, including remote and online learning options. The provision will make educational instruction online easier for education institutions, including by bringing a range of other parties within the scope of the provision. This is designed to align the provision with the objectives of the [Alice Springs \(Mparntwe\) Education Declaration](#) made by all Australian Education Ministers in 2019. The Declaration emphasised the importance of schools working in partnership with parents, carers, families and the broader community to foster supportive learning environments

¹⁰⁴ The Act, s 106.

¹⁰⁵ The Bill, cl 113MB and the Act, s 200.

¹⁰⁶ The Bill, cl 113MC and the Act, s 20AAA.

We wish to make the following points in relation to the new provision for the use of material in the course of educational instruction:

- We are supportive of the provision applying equally to any copyright material. This is particularly welcome given the increasing importance of audio-visual content in learning environments. And it will reduce the complexity for educators and education providers in the copyright regime.
- We support limiting the scope of the provision to educational instruction that is not wholly or partly for the purpose of the educational institution obtaining a commercial advantage or profit. This contributes positively to striking the right balance between copyright owners' interests and the needs of educational providers in relation to online instruction.
- We welcome the range of reasonable uses that will be within the scope of the new provision. In particular, we support that these uses include:
 - A performance of the material or an adaptation of it;
 - An act that causes the material to be seen or heard;
 - Copying or communication of the material or an adaptation of it resulting in a performance of the material or that causes the material to be seen or heard;
 - Making an audio or audio-visual recording of the whole or part of the material resulting in a performance of the material or that causes the material to be seen or heard;
 - Only making an audio or audio-visual recording of the whole or part of the material available on a temporary basis to people taking part in the giving or receiving of the educational instruction; and
 - Taking reasonable steps to limit online access to the material (whether at the educational institution's premises or on the internet) to people taking part in the giving or receiving of the educational instruction.

'A person taking part in the giving or receiving of the educational instruction'

We are supportive of the new provision covering any person taking part in the giving or receiving of the educational instruction. We welcome the list of people outlined in the discussion paper¹⁰⁷ who may be within the scope of the provision, including:

¹⁰⁷ Discussion paper, p 30.

**JOINT SUBMISSION IN RESPONSE TO AN EXPOSURE DRAFT
OF THE COPYRIGHT AMENDMENT (ACCESS REFORM) BILL 2021**

- Teachers;
- Students
- Parents, family members or friends assisting a student;
- Parents, family members or friends who are in the 'audience' of a class performance;
- Tutors;
- Work placement supervisors of a student; and
- Guest speakers from the community or industry who were invited to speak to the class.

To avoid any doubt as to the application of the provision in relation to the parties listed above, we strongly recommend those people be specifically included in the Explanatory Memorandum.

Temporary access to recordings

We welcome further clarification in the discussion paper¹⁰⁸ relating to audio or audio-visual recording of the whole or part of the material so students and those assisting them can access the lesson at a later time. Being clear that the provision includes pre-recording a lesson for online teaching or recording a 'live' lesson is particularly useful. As the discussion paper notes, this will allow necessary flexibility for teachers and students. To ensure these types of uses are permissible under the provision, they should be included in the Explanatory Memorandum.

Limiting the period of time that recordings are available to people taking part in the giving or receiving of the educational instruction is a reasonable balance. It is encouraging that the discussion paper anticipates situations where an educational institution may want to retain a recording or to make that recording available to other people such as students or staff outside of the course it was recorded for or the public. The discussion paper states that in such situations either another exception would need to apply or remuneration under the statutory licence or other licence would be required, or the permission of the copyright owner would need to have been secured. Both points are reasonable and should be included in the Explanatory Memorandum.

¹⁰⁸ Discussion paper, p 30.

Limiting online access to recordings and ‘reasonable steps to ensure copyright is not infringed’ – Response to Question 4.1

Here we will respond to Question 4.1 posed in the discussion paper. The discussion paper¹⁰⁹ suggests that an education provider restrict access to students by authenticating students using a username and password before giving them access to a closed learning environment. Limiting access through technical means to online learning materials to people taking part in the giving or receiving of the educational instruction is a well-established practice and is supported. Doing so would not require significant changes to how many education institutions are currently managing access to material.

As with the application of the ‘reasonable steps’ that libraries and archives must undertake to ensure that copyright is not infringed when making access to collections material available, we caution that the application of any steps imposed on education institutions must be flexible to ensure the steps are appropriate in the circumstances, that factors such as the size and available resources of an institution are factored in, and that the steps are able to adapt over time as industry practice and technologies change. The flexibility of the provision would be lost if the steps were specified in detail in the drafting of the legislation or through regulation. Such a move is not encouraged or supported.

We also note that the ‘reasonable steps’ for educational institutions would not necessarily be the same as those used by libraries and archives. The audiences and use cases of the two sectors are different, as are the resources available to the different institutions. We believe that this provides a good example of why it is essential that the meaning of ‘reasonable steps’ be kept flexible under the Act, to ensure there is no confusion or unintended consequences for the different sectors.

Restoring a wider scope to s 106

We welcome restoring the scope of s 106 to re-enable government educational institutions and other nonprofit bodies to rely on this exception to play sound recordings in certain situations. The disruption to the provision caused by the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* was unintentional and it is great to see it corrected. As anticipated in the discussion paper,¹¹⁰ the provision allows the use of sound recordings for non-curricular activities such as during school concerts, assemblies and graduation ceremonies. This should be expressly stated in the Explanatory Memorandum.

¹⁰⁹ Discussion paper, p 30.

¹¹⁰ Discussion paper, p 30.

Updating the exceptions for federal and state governments (Schedule 5—Use of copyright material by the Commonwealth or a State)

We welcome the updates that will come with the commencement of Schedule 5—Use of copyright material by the Commonwealth or a State. In 2022 it is very common for Commonwealth and State government information, application processes, grants programs, consultation processes, initiatives and programs to be delivered wholly or partly online. With such an emphasis on the internet to support government activities it is astounding that the government statutory licensing scheme does not cover communication of copyright material. Coupled with the provision related to the use by governments of materials provided to them, the reforms will make government processes quicker and easier.

We also support renumbering the provisions to make it easier to read the Division.

We will respond to the changes to the government statutory licensing scheme and the government use of incoming material provision separately below.

Expanding the scope of the government statutory licensing scheme

Direct licensing is a common practice for government agencies now, so we also support giving governments the ability to negotiate directly with copyright owners to secure permissions. Relatedly, we welcome clarification that the government statutory licence is a ‘safety net’,¹¹¹ that is to say that it is designed to apply if the use of material would normally infringe copyright were it not for the presence of the statutory licence.

We also agree with the statement in the discussion paper that these changes will provide greater certainty to government agencies that they can rely on unremunerated exceptions or limitations to the extent that they apply.¹¹² This extends to licences other than the statutory licence, including implied licences.¹¹³

We cautiously support opening up the government statutory licensing scheme to negotiation between a government and the declared collecting societies. However, we are mindful of the result of the negotiations

¹¹¹ Discussion paper, p 35.

¹¹² Discussion paper, p 35.

¹¹³ The Bill, cl 183C.

between UA and the Copyright Agency that resulted in a Tribunal hearing. For more on this matter see UA's submission.

Government use of incoming material

Stakeholders provide lots of copyright material to governments for a range of reasons. Supplying material to a government may be necessary in order to comply with a legal requirement or material may be provided voluntarily to a government. Likewise, in some situations there are obligations on governments to provide public access to material provided to them. We support the introduction of a provision to clarify how governments can use this material internally and make that incoming material available to the public as necessary or reasonable.¹¹⁴

Limiting the provision to uses that are not wholly or partly for the purpose of the government obtaining a commercial advantage or profit is appropriate.

Safeguards for government use of incoming material – Response to Question 5.1

We are of the opinion that the safeguards incorporated into the new provision for government use of incoming materials provides adequate protection for copyright owners and will avoid unwarranted harm to their commercial markets.

¹¹⁴ The Bill, cl 183G.

Review of the exceptions to the Technological Protection Measures (TPMs) provisions

The potential stifling impact of TPMs should not be understated. This regular review mechanism provides an opportunity for stakeholders to make comments on the ongoing relevance and suitability of the existing TPM exceptions in reg 40 of the Regulations. The regular review also allows parties to make recommendations for other scenarios that should be considered for inclusion in the list of acts of circumvention that are not actionable. For this reason the ADA and the ALACC welcome the opportunity to contribute to the review of the TPMs exceptions.

Ensure current exemptions are carried over

To that end, all current provisions of the Act exempted from the prohibition on circumventing access control TPMs currently listed in reg 40 the Regulations should continue to be exempt. To avoid any doubt, where any proposed provision in the Bill corresponds with a current provision in the Act, and that current provision is an exempt circumvention act, the Regulations should be updated to ensure the corresponding new provision is also an exempt circumvention act. This must include updating the list of exemptions to take account of any current provision that is slated to be replaced by a new provision included in the Bill (e.g. the updated library and archives provisions).

We agree with NSLA that this is particularly important for all the library and archives provisions that apply to audio-visual materials, including the preservation, onsite research, administration of the collection provisions and the expanded document delivery and interlibrary loan provisions included in the Bill. These types of content are more likely to be distributed with access control TPMs applied. Mechanisms in the existing exceptions, such as the 'commercial availability test' or the 'reasonable steps', already act as a sufficient safeguard for copyright owners' interests.

Include the new provisions

We also recommend that all new access provisions proposed in the Bill be considered for inclusion in the list of non-actionable acts of circumvention. These provisions should be exempt from the prohibition on circumvention of access control TPMs unless there is strong justification for not including them.

Of particular note is the orphan materials scheme: we would welcome the ability for users to circumvent an access control TPM if doing so is required to make use of the orphaned content under the orphan material

scheme, but we recognise that this may be complex to achieve given the mechanism for exemption of an exception from the TPMs provisions. We would welcome comments from the Department on this issue.

Regardless, there remains a question of public policy in relation to access control TPMs. Encryption, access tokens, file permissions and other control technologies can be used to 'lock down' the uses of digital content even where an exception would apply. From a public interest perspective, this is a similar issue to that of contractual override (see above). We continue to support the point made by the ALRC in the *Copyright and the Digital Economy Final Report* that '... there may be little point in restricting contracting out of exceptions if TPMs can be used unilaterally by copyright owners to achieve the same effect'.¹¹⁵ Favours TPMs locks users out of otherwise legitimate uses of copyright material.

Include flexible dealings (s 200AB)

We join NSLA in calling for library and archives use of s 200AB to be added to the circumvention acts exempted from the prohibition on circumventing access control TPMs listed in the Regulations. Education providers currently enjoy the certainty of being able to circumvent access control TPMs for flexible dealings made under s 200AB. This would harmonise the application of the TPM provisions for cultural collections and education providers. In particular, this will further enable libraries to engage in best practices for providing access to digital content. As NSLA notes, without TPM exemptions for all library and archives uses, we run the risk that valuable 'born digital' content will be lost due to technological obsolescence.

On this issue, we draw the Department's attention to the Australian Research Council-supported project [The Australian Emulation Network: Born Digital Cultural Collections Access](#). Led by Swinburne University in partnership with a number of Australian universities and collecting bodies the project aims to introduce an Emulation as a Service Infrastructure (EaaSI) network to Australia to support legacy computer environments needed to emulate access to material tethered to such systems, including video games, computer hardware or software applications and digital content created using specific software.

¹¹⁵ ALRC (2013), p 436.

Other matters

The Bill proposes to make a number of additional minor measures which are outlined in Schedules 6–10. Comments on each are outlined below.

Schedule 6—Registrar of the Copyright Tribunal

We support simplifying the process for appointing the Registrar of the Tribunal and aligning it with current practices for the appointment of other Australian court registrars.

Schedule 7—Regulations relating to technological protection measures

We support simplifying the process for making regulations to create or amend exceptions to liability for circumventing an access control TPM. Removing the requirement that a 'submission' must be made before the Minister can recommend changes to the regulations will open the process up to respond to changes that are consequential to amendments to the Act or to changes identified through consultations, reviews or proceeding. This also has the potential for other scenarios to raise awareness of the need for new exemptions, such as academic scholarship.

Schedule 8—Archives

We support updating the definition of 'archives', however we feel it would be more prudent for the definition to avoid specific identification of Commonwealth and State archives offices. Rather the definition should be drafted to define an 'archives' to the effect that it includes any government body established for the purposes of custodianship and preservation of public records under a Commonwealth or State law. This would remove the need to update the definition in the future, and would cover the currently listed bodies, as well as the Queensland State Archives, State Records Office (WA) and Office of State Records (SA) (which will be added to the definition if the drafting remains as it is currently written). It will likely also include the ACT Archives and Libraries and Archives NT which aren't included in the drafting.

Schedule 9—Referrals

We support the use of consistent language to the extent possible in the Act. As such, we support the move to improve the consistency of language referring to applications and references to the Tribunal in the Act.

Schedule 10—Notifiable instruments

We support updating the mode of notification required by the Act by changing references to 'by notice in the Gazette' to 'by notifiable instrument' in the relevant provisions.

Legislative drafting

Generally, we welcome the focus on introducing consistency into the Act taken in the Bill. We also support the layout changes that will be added. Subheadings and other stylistic decisions help users to understand the provisions in the Act.

Where possible, we encourage the Department to prioritise easy-to-read drafting. We agree with NSLA that this will increase understanding by smaller libraries, archives and collecting institutions and members of the public.



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