

Information for organisations seeking to be prescribed as a 'key cultural institution'

1. Introduction

Currently only libraries and archives with a mandate to develop and maintain a collection, such as state libraries, or the National Archives of Australia, are able to take advantage of the preservation provisions contained in sections 51B, 110BA and 112AA Copyright Act 1968. However, the provisions can also apply to any other bodies administering a library or archives if they are prescribed by the Attorney-General.

The Attorney-General's Department has just released its guidelines on the kinds of factors the Attorney-General will consider when deciding whether to prescribe other libraries or archives as "key cultural institutions". If prescribed, the library or archive can then take advantage of these new preservation provisions. Key considerations taken into account are whether the library or archives hold material that is of historical or cultural significance to Australia, and whether this material is accessible to the public for research and study purposes.

The guidelines are available here:

http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_PrescriptionasaKeyCulturalInstitution.

2. The preservation provisions that apply to “key cultural institutions”

The provisions that these guidelines relate to are sections 51B, 110BA and 112AA. These are new exceptions that were introduced at the end of 2006. Broadly they allow key cultural institutions to make up to 3 copies from the work for the purpose of preserving against loss or deterioration.

The table below summarises how sections 51B, 110BA and 112AA operate:

Material	Provision
<ul style="list-style-type: none"> ➤ Manuscripts ➤ First sound recording or unpublished sound recording ➤ First copy or unpublished copy of film 	<p>An authorised officer may make up to 3 copies from the work for preservation purposes.</p> <p>The officer needs to be satisfied the work is of historical or cultural significance to Australia.</p>
<ul style="list-style-type: none"> ➤ Published work ➤ Published sound recording ➤ Published film ➤ Published edition 	<p>An authorised officer may make up to 3 copies from the work for preservation purposes.</p> <p>The officer needs to be satisfied the work is of historical or cultural significance to Australia.</p> <p>AND The officer must also check if the material is commercially available:</p> <p>The officer also needs to be satisfied that a copy can't be obtained within a reasonable time, at an ordinary commercial price. This includes electronic versions, but the officer doesn't need to check for second hand copies.</p> <p>The officer should also check if a different <i>edition</i> of the published work is commercially available. However, if there is something about the particular edition that is of significance, the officer need only check the availability of that particular edition, and need not check the availability of other editions.</p>
<ul style="list-style-type: none"> ➤ Original Artistic work 	<p>An authorised officer can make up to 3 photographic copies from the work for preservation purposes.</p> <p>The officer needs to be satisfied the work is of historical or cultural significance to Australia.</p> <p>AND The officer must also check if the material is commercially available:</p> <p>The officer also needs to be satisfied that a photographic reproduction can't be obtained within a reasonable time, at an ordinary commercial price. This includes electronic versions, but the officer doesn't need to check for second hand copies.</p>

These provisions operate *in addition to* the other existing exceptions for libraries and archives. Some other library and archive exceptions are:

- Reproduction of works for users for their research and study, for inclusion in another collection, or to assist a member of parliament (sections 49 & 50)
- Reproduction of works for preservation and for administrative purposes (section 51A, 110B and 112). Note that there are limitations on some of these provisions. For example, under this provision a library cannot make a preservation copy of a published work unless it is damaged, deteriorated, lost or stolen. That is, the library cannot proactively preserve the work before damage etc occurs.
- Reproducing materials under the flexible dealing provision (section 200AB). This section was also introduced at the end of 2006 and is intended to allow copying for ‘socially beneficial purposes’.

3. Applying to be prescribed as a ‘key cultural institution’

Any organisation that administers a library or archives can apply to be prescribed as a ‘key cultural institution’. This includes libraries and archives such as:

- University libraries and archive collections;
- School libraries;
- Government Department libraries;
- Public libraries;
- Libraries and archives in private organisations such as law firms; and
- Private library or archives collections.

Making the application

Organisations wishing to take advantage of these provisions need to make a **written application** to the Attorney-General, seeking to be prescribed key cultural institution for the purposes of ss 51B, 110BA and 112AA.

The application needs to be made by the “body administering” the library or archives. This is the person / body / corporation etc who has the ultimate responsibility for the administration of the library or archives. For example, in the case of a library within a law firm, it would be the law firm that should apply. In the case of a university it would most likely be the university that should apply. For a public library the administering body may be the local council. You may need to seek advice on who or what organisation has ultimate responsibility for your library or archive.

Content of the Application

The guidelines released by the Attorney General’s Department make suggestions on the content of the application. As noted in these guidelines, this is not a fixed list so you can provide less or more information if you wish. However, the Attorney-General will make the decision based on the information that you provide, so you should try to include sufficient relevant information and details.

The guidelines suggest the following information should be included:

- Name and address of the body seeking to be prescribed.
- Location of the library or archive if this is not the same address as the body administering the library or archives.
- Details of the collection, material, or item/s the body would wish to copy for preservation.

We would suggest that in many cases you would not need to individually name each item you would wish to make preservation copies of. You could perhaps give details of the groups of collections you have, and include some examples of particular items of interest or value within the collection.

- Reasons why the body considers this material to be of cultural or historical significance to Australia.

The guidelines suggest that an example of this would be where it is the only collection of material of this kind in Australia.

- Information on whether or not the public has access to the material in the library or archive for research or study purposes. If there is no public access, then the application should explain how the public will otherwise benefit from the preservation copying.

We would suggest that there may be some cases where material is not accessible to the public for important reasons such as cultural sensitivities or privacy concerns. In these kinds of cases it may be that the public will still benefit from preservation copying, for example, if the material will be available to the public in the future so it will need to be adequately preserved until then.

- Any other information the body considers relevant to support its application.

One example in the guidelines is to include any relevant qualifications of people involved in the collection, such as the person who assesses the material to be of significance to Australia, and/or the qualifications of the “authorised officer” who would be making the decisions to make preservation copies under these provisions.

We would suggest that you could also include in your application some information on why other exceptions in the Copyright Act 1968 might not be sufficient. For example, your collection may include rare published editions. Under section 51A you could not make preservation copies of these works unless they are damaged, deteriorated, lost or stolen. In the case of rare editions, if they are lost or damaged you may have no remaining edition from which to make the preservation copy. It would therefore be important that you are able to make preservation copies before it deteriorates, or in case it is lost.

After submitting the Application

The Attorney-General will consider all the information in the application. These are the possible outcomes:

1. The Attorney-General is not satisfied by information provided and so rejects the application.
2. If the Attorney-General is not satisfied by the information provided in the application, and believes further information will assist the decision, he may consult as considered appropriate. This may also include seeking further information from the body
3. The Attorney-General decides that the body should be prescribed as a key cultural institution. A notice will be placed in the Commonwealth Gazette. The body is now a “key cultural institution” and can make use of these provisions.

One further point to note: Once a body becomes a prescribed body, they can use these ‘key cultural institution’ provisions for *any* materials held in the collection. So, even if you outlined only certain items or certain collections in your application, once you are prescribed you are not limited to using the provisions for the collections or items you named. This is important as it means that as you add to your collection you can still rely on the ‘key cultural institution’ provisions if you need to, provided your authorised officer has determined that the materials are of significance to Australia.

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