

The Auditor-General  
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Performance Audit

# **Management of intellectual property in the Australian Government sector**

Australian National Audit Office

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Canberra ACT  
6 February 2007

Dear Mr President  
Dear Mr Speaker

The Australian National Audit Office has undertaken a performance audit across agencies in accordance with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit and the accompanying brochure to the Parliament. The report is titled *Management of intellectual property in the Australian Government sector*.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McPhee', is positioned above the printed name.

Ian McPhee  
Auditor-General

The Honourable the President of the Senate  
The Honourable the Speaker of the House of Representatives  
Parliament House  
Canberra ACT

## AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office. The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits and financial statement audits of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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# Abbreviations

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AASB	Australian Accounting Standards Board
AGD	Attorney-General's Department
ANAO	Australian National Audit Office
APS	Australian Public Service
AUSFTA	Australia – United States Free Trade Agreement
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CFS	Consolidated Financial Statements
CPGs	Commonwealth Procurement Guidelines
DCITA	Department of Communications, Information Technology and the Arts
DITR	Department of Industry, Tourism and Resources
Finance	Department of Finance and Administration
FMA Act	<i>Financial Management and Accountability Act 1997</i>
GITC	Government Information Technology and Communications Framework
IDC	Inter-departmental committee
IFRS	International Financial Reporting Standards
IP	Intellectual property
IP Manual	IP Better Practice Manual (draft)
IP Principles	Statement of IP Principles (draft)

IT	Information technology
IT-IP	Information technology – intellectual property
JCPAA	Joint Committee of Public Accounts and Audit
MAC	Management Advisory Committee
PM&C	Department of the Prime Minister and Cabinet





# **Summary and Recommendations**



# Summary

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## Importance of intellectual property to the Australian Government

### Intellectual property as a significant Australian Government resource

1. Intellectual property (IP) is a form of intangible property that arises from intellectual activity in the industrial, scientific, literary or artistic fields.<sup>1</sup> Intellectual property includes written and online publications, computer software, logos and other trade marks, inventions, designs, sound recordings, films, broadcasts and music. Intellectual property rights refer to the rights granted by law in relation to IP, and in general, they protect the outcomes of economic investment made by an individual or organisation in pursuing such intellectual activity.<sup>2</sup>
2. The Australian Government, due to the breadth and diversity of its activities, is a significant generator, acquirer and user of IP. The business of government involves the extensive development, collection, storage, analysis, retrieval and publication of information. This involves the creation of documents, drawings, computer programs, spreadsheets, films and recordings in which the Australian Government owns copyright. Also, as a major contributor to research and development in Australia, through the direct engagement in, commissioning, or funding of research in the medical, health and natural sciences, the Australian Government creates, or helps to create, valuable IP.
3. The IP required by Australian Government agencies for their ordinary activities has increased.<sup>3</sup> For example, the value of intangible assets reported in the *Commonwealth Consolidated Financial Statements* (of which IP comprises part), has steadily increased. In 2005–06, the value of intangible assets was

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<sup>1</sup> World Intellectual Property Organisation, *WIPO Intellectual Property Handbook: Policy, Law and Use*, WIPO, Geneva, 2004. Available from WIPO's website <[www.wipo.int/about-ip/en/iprm/index.htm](http://www.wipo.int/about-ip/en/iprm/index.htm)>.

<sup>2</sup> Refer to Chapter 2 for further information on intellectual property and intellectual property rights.

<sup>3</sup> In this report, the term agency is used broadly and is intended to include government bodies subject to the *Financial Management and Accountability Act 1997* or the *Commonwealth Authorities and Companies Act 1997* (but not including government business enterprises).

reported at \$7.7 billion, comprising computer software assets valued at \$3.8 billion, and other intangibles at \$3.9 billion.<sup>4</sup>

4. The Government has recognised the need to successfully manage, develop and use available IP to meet ongoing demands and capitalise on potential opportunities. Agencies must, therefore, make decisions about how best to acquire and manage their IP requirements.

### **Why is IP management important?**

5. The value of IP developed by agencies in the course of their routine operations is becoming more apparent. Intellectual property issues are also becoming an increasingly important aspect of contract management as agencies outsource, consult and contract with third parties to provide services and produce IP for government use, as well as for the benefit of the Australian community.

6. Just as the tangible assets of an agency should be properly identified, protected and maintained, so too should the intangible assets, including IP. However, because IP assets are less tangible than physical assets, managing and accounting for IP can be difficult and complex. Agencies are often unaware of the IP they create and use. They often do not recognise the benefits that can arise from the ownership and use of such assets. However, like other property, IP can be bought, sold, licensed, lost or stolen.

7. The management of IP involves the implementation of measures to ensure that an agency identifies, adequately protects and controls IP assets and, where appropriate, facilitates exploitation of those assets for operational and public benefit. Effective management of IP can result in improved operational and financial performance, better use of existing resources, and improved accountability for resources. By considering risks and ownership issues in decisions to distribute, acquire and internally manage IP, agencies are better able to fulfil their management and accountability obligations, and ensure that agency resources are put to productive and efficient use. Poor management of IP can result in a failure to identify and protect IP, resulting in

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<sup>4</sup> The reported value includes both internally generated and purchased intangible assets. Although recognised as an important resource, much of the Australian Government's IP is not reported in the financial statements since it does not meet the recognition criteria that Australian accounting standards require. In addition, recent harmonisation of Australian accounting standards with the International Financial Reporting Standards has raised the threshold and narrowed the range of IP that can be reported in an entity's financial statements (see paragraph 2.8 for further information). This means that the scope and value of agency IP is not immediately brought to the attention of Australian Government chief executives through traditional financial reporting.

loss of control, liability for infringement of third party IP and improper disposal of IP that is necessary for the agency's work.

8. Managing IP in the public sector presents unique challenges. In addition to the different policy environment compared to that faced by private sector organisations, public sector agencies may see the management of their IP as a means of:

- stimulating economic growth, industry development, improved competitiveness and even increased employment prospects by the transfer of IP to the private sector;
- encouraging the adoption of agency IP by the wider community thereby benefiting the public; and
- generating revenues from agency IP as an additional source of agency operating revenue.

9. Due to the diverse nature of Australian Government activities, types of IP managed and the extent to which IP is critical to core business, strategies for IP management will differ between agencies and sometimes within an agency. Although there is no one-size-fits-all approach to IP management, there are general principles that should underpin the management of IP in any agency. Successful IP management also requires that agencies be first aware of and understand their IP management needs, and then implement appropriate measures for the management of IP within their agencies.

## IP management by Australian Government agencies

### Earlier ANAO audit of IP policies and practices

10. ANAO Audit Report No. 25 of 2003–04, *Intellectual Property Policies and Practices in Commonwealth Agencies* ('the earlier audit') was a cross-agency audit that examined the extent to which a selection of agencies had systems in place to manage their IP assets. The earlier audit found that, although 61 per cent of agencies rated IP as of medium or high importance to their operations, only 30 per cent had developed policies or plans addressing the management of IP within the agency.

11. The earlier audit noted that there was no Australian Government policy approach to the management of Australian Government IP. Leadership, through a clear senior commitment to IP management, was seen as crucial to achieving the culture necessary for appropriate management of IP. The

absence of an overarching policy meant that there were few means by which the importance of IP management could be clarified and brought to the attention of agencies. There was also no clear source of support or guidance for agencies on how to develop and implement measures to better manage their IP. Such guidance would support agencies in applying IP management practices according to their individual needs and circumstances.

12. To improve IP management, the earlier audit recommended that agencies develop IP policies and implement procedures appropriate to the management of IP within their agencies.

13. To facilitate increased awareness amongst agencies of their individual responsibility for IP management and of the importance for individually tailored approaches to IP management, the earlier audit also recommended that:

In order to ensure that the Commonwealth's interests are protected, the ANAO recommends that the Attorney-General's Department, the Department of Communications, Information Technology and the Arts, and IP Australia (along with other relevant agencies), work together to develop a whole-of-government approach and guidance for the management of the Commonwealth's intellectual property, taking into account the different functions, circumstances and requirements of agencies across the Commonwealth, and the need for agency guidance and advice on intellectual property management.

14. The Joint Committee of Public Accounts and Audit (JCPAA) supported the findings of the earlier report, agreeing that there is a need for a whole-of-government approach to IP management. Among other things, in its November 2005 report the JCPAA recommended that:

The Attorney-General's Department commence development of a whole-of-government approach and guidance for the management of the Commonwealth's intellectual property, for completion by May 2006. The Attorney-General's Department should consult widely with Commonwealth agencies, particularly those which are major generators of intellectual property.<sup>5</sup>

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<sup>5</sup> Joint Committee of Public Accounts and Audit, *Report 404, Review of Auditor-General's Reports 2003–2004 Third & Fourth Quarters; and First and Second Quarters of 2004–2005*, JCPAA, Canberra, 2005. The report is available from the JCPAA's website <[www.aph.gov.au/house/committee/jpaa/reports.htm](http://www.aph.gov.au/house/committee/jpaa/reports.htm)>.

15. In May 2006, the Attorney-General communicated to the JCPAA his Department's in-principle acceptance of this recommendation and outlined the actions being taken in response to the recommendation.

## Re-examining IP policies and practices in the Australian Government

### Audit rationale and objective

16. This audit reports on the progress of the responsible agencies in developing the overarching approach and guidance on IP management, given the earlier audit found that some agencies were waiting for finalisation of this approach before developing their own tailored approaches to IP management.

17. The audit objective was to examine progress in the development of an overarching approach and guidance for the management of the Commonwealth's intellectual property (Recommendation No. 2 of Audit Report No. 25 of 2003–04).

18. The audit involved the four agencies (the Attorney-General's Department (AGD), the Department of Communications, Information Technology and the Arts (DCITA), the Department of Finance and Administration (Finance), and IP Australia) that have been working towards developing an overarching approach to IP management.

### Overall audit conclusion

19. The earlier audit found that few agencies had developed policies or plans addressing the management of IP within the organisation. The development of an overarching approach and guidance on IP management was recommended as a way of improving awareness of IP and facilitating improved management of IP by agencies. The JCPAA agreed and further recommended that the approach and guidance be completed by May 2006.

20. By December 2006, the overarching approach and guidance on IP management was not finalised. Although there has been progress in developing both a *Statement of IP Principles* (the IP Principles) and a manual of better practice guidance on IP management (the IP Manual), it is still not clear when either the IP Principles or the IP Manual can be expected to be finalised or released.

**21.** As a result, there continues to be little profile given to the importance of IP management. Nor is there a clear source of support or guidance for agencies on how to develop and implement measures to better manage their IP, according to their individual needs and circumstances.

**22.** The ANAO has recommended that the overarching approach to IP management be finalised as soon as is practicable. The approach will assist in raising awareness amongst agencies of their individual responsibility for IP management. Appropriately communicated, the overarching approach could give the necessary profile to the importance of IP management. The approach could clearly define the Government's expectation that all agencies manage IP within their control according to their individual needs and circumstances. Because of the complexities of IP, improving its management will be an incremental process and the approach should take account of this position.

**23.** In order to be effective in raising awareness, ANAO considers the overarching approach should include:

- what is expected to be achieved;
- what is expected of agencies to which the approach applies; and
- who is responsible for ensuring that the approach is achieving what was intended and how will this be evaluated.

**24.** In considering implementation of the approach, particular attention will need to be paid to the question of which agency will be responsible for providing advice to agencies on the approach and assistance with its implementation.



## Key Findings

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25. AGD, DCITA, Finance, and IP Australia have been working towards developing an overarching approach to IP management. Although there has been some progress, Recommendation No. 2 of the earlier audit has not yet been implemented. The target date (May 2006) nominated by the JCPAA in its subsequent recommendation (and agreed to by AGD) for completion of the approach has also passed.

26. Several factors have contributed to delays in the development of the approach. The ANAO was advised that some delays resulted from:

- increased workload associated with the development and implementation of the Australia – United States Free Trade Agreement; and
- changes in administrative responsibility for IP following the 2004 federal election.

27. The ANAO also identified a number of other factors associated with the development of the approach that further delayed progress. These included:

- the failure of the agencies involved to resolve key questions that would lead to a shared understanding of the approach, including:
  - the underlying purpose of the approach;
  - whether the approach is supported by existing policy;
  - whether it is intended that the approach create rules binding on agencies;
  - which agencies are subject to the approach; and
  - how the approach will be communicated;
- a lack of clarity of purpose and inconsistencies within the documents comprising the approach;
- insufficient attention having been paid to questions of implementation of the approach; and
- inadequate structures for dealing with disputes and for recording decisions of the agencies involved in developing the approach.

28. The often complex nature of whole-of-government challenges means that early attention to establishing structures and processes to identify, discuss and resolve different views in reaching a shared understanding and formal agreement amongst the various agencies is necessary.

29. Earlier attention to questions of implementation may have enabled more timely identification (and resolution) of some of the issues that eventually arose and that have delayed development of the overarching approach.

30. It is also important to note that each agency involved in developing the approach is responsible for working together in a way that facilitates timely responses to the whole-of-government challenge of IP management.

## Agency responses

31. The following summaries of comments on the proposed audit report were received from agencies. Additional agency comments on the proposed report are contained at paragraphs 4.34 and 4.35.

### Attorney-General's Department

The Attorney-General's Department supports both the recommendations contained in the report.

### Department of Communications, Information Technology and the Arts

DCITA suggests that where an ANAO report recommends that a whole-of-government approach be undertaken on a particular issue there should be specific recognition of the need for the approach to be lead by an agency with whole-of-government responsibilities.

### Department of Finance and Administration

Finance supports both recommendations. Finance will continue to work with relevant agencies, including the Attorney-General's Department, and others including those represented on the interdepartmental committee.

### IP Australia

IP Australia has fully and openly participated in the IDC process for the current project. This participation included IP Australia providing comments to Attorney-General's Department (AGD) on the draft *Statement of IP Principles* in September and November 2006. IP Australia also provided comments in July and September 2006 to AGD on the draft chapters of the IP Manual for

input to the next revision of the manual. IP Australia's main concern is that the final manual is useful and accurate and meets the purpose it was designed for.

IP Australia confirmed its agreement with the draft *Statement of IP Principles* at a meeting of the IDC held on 13 November 2006. IP Australia also fully endorses the timelines developed by AGD and presented at the November IDC meeting for progressing the IP management process.

Although IP Australia was fully aware of the role it played as an adviser and contributor to the IDC and felt that the group worked well together, we do support the adoption of a more formalised approach, appropriate for this particular issue, to assist in progressing the outcome more effectively.

# Recommendations

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## **Recommendation No. 1**

### **Para. 4.34**

The ANAO recommends that work to implement Recommendation No. 2 of the earlier audit and the subsequent recommendations of the JCPAA be finalised as soon as is practicable.

#### *Agency responses:*

All agencies agreed or agreed in principle.

## **Recommendation No. 2**

### **Para. 4.35**

The ANAO recommends that the development of the overarching approach and guidance to IP management should:

- include a clear statement of intended purpose, outlining what outcomes the approach is expected to achieve and how it will achieve these outcomes; and
- clearly identify and assign responsibility for reporting and reviewing the effectiveness of the approach in achieving the defined outcomes, including through the development of appropriate performance indicators to measure progress.

#### *Agency responses:*

All agencies agreed or agreed in principle.

## **Audit Findings and Conclusions**



# 1. Introduction

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*This chapter provides an overview of the audit, including the audit objective, rationale, approach and methodology. It briefly describes the findings of an earlier ANAO audit, as well as of a Parliamentary committee inquiry into the earlier audit. It concludes with an outline of the structure and contents of this report.*

## Audit approach

### Audit objective

**1.1** The audit objective was to examine progress in the development of an Australian Government approach and guidance for the management of the Commonwealth's intellectual property (Recommendation No. 2 of Audit Report No. 25 of 2003–04, *Intellectual Property Policies and Practices in Commonwealth Agencies*).

### Audit approach

**1.2** Audit Report No. 25 of 2003–04 ('the earlier audit') was a cross-agency audit that examined the extent to which a selection of agencies had systems in place to efficiently and effectively manage their intellectual property (IP) assets.<sup>6</sup> The earlier audit noted that IP can be a valuable asset and that agencies are accountable for its management in the same way as for other Australian Government resources entrusted to them. The earlier audit found that, although 61 per cent of agencies rated IP as of medium or high importance to their operations, only 30 per cent had developed policies or plans addressing the management of IP within the agency.

**1.3** The earlier audit also noted that there was little overarching support for agencies in developing approaches for the management of IP and no comprehensive policy approach to the management of IP. This was in contrast to all but one of the state and territory jurisdictions. Leadership, through a clear senior commitment to IP management, was seen as crucial to achieving the culture necessary for appropriate management of IP. The absence of an overarching policy approach meant that there were few means by which the

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<sup>6</sup> In this report, the term agency is used broadly and is intended to include government bodies subject to the *Financial Management and Accountability Act 1997* or the *Commonwealth Authorities and Companies Act 1997* (but not including government business enterprises).

importance of IP management could be clarified and brought to the attention of agencies.

**1.4** The earlier audit made two recommendations, both of which were accepted by all agencies involved. Both recommendations were aimed at improving agency recognition and awareness of the principles involved in IP management and consequent improvements in the proper administration of agency IP:

Recommendation No. 1

The ANAO recommends that, in order to ensure the effective and efficient management of intellectual property, agencies develop an intellectual property policy appropriate for agency circumstances and functions, and implement the required systems and procedures to support such a policy.

Recommendation No. 2

In order to ensure that the Commonwealth's interests are protected, the ANAO recommends that the Attorney-General's Department, the Department of Communications, Information Technology and the Arts, and IP Australia (along with other relevant agencies), work together to develop a whole-of-government approach and guidance for the management of the Commonwealth's intellectual property, taking into account the different functions, circumstances and requirements of agencies across the Commonwealth, and the need for agency guidance and advice on intellectual property management.<sup>7</sup>

**1.5** The Joint Committee of Public Accounts and Audit (JCPAA) held an inquiry into the earlier audit and reported its findings in November 2005.<sup>8</sup> The JCPAA report supported the findings of the earlier audit, agreeing that there was a need for a whole-of-government approach to IP management. The JCPAA made three recommendations in its report, supporting the recommendations of the earlier audit:

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<sup>7</sup> Australian National Audit Office, *Intellectual Property Policies and Practices in Commonwealth Agencies*, Audit Report No. 25 of 2003–04, ANAO, Canberra, 2004, p. 24. ANAO reports are available on the ANAO's website <[www.anao.gov.au](http://www.anao.gov.au)>.

<sup>8</sup> Joint Committee of Public Accounts and Audit, op. cit.



### Recommendation 1

The Committee recommends that the Attorney-General's Department commence development of a whole-of-government approach and guidance for the management of the Commonwealth's intellectual property, for completion by May 2006. The Attorney-General's Department should consult widely with Commonwealth agencies, particularly those which are major generators of intellectual property.

### Recommendation 2

The Committee recommends that the whole-of-government approach to the management of the Commonwealth's intellectual property within a framework for IP management should leave each Commonwealth agency free to optimise its role within the framework.

### Recommendation 3

The Committee recommends that the Department of Finance and Administration, in consultation with the Attorney-General's Department, develop guidelines to assist agencies in developing valuation systems for their intellectual property.<sup>9</sup>

**1.6** The JCPAA also noted that the ANAO planned to conduct a further performance audit of IP management and that:

The Committee looks forward to reviewing this ANAO audit in due course and hopes that the audit reveals a comprehensive whole-of-government approach to intellectual property management, with agencies following agreed policies and procedures.<sup>10</sup>

**1.7** In May 2006, the Attorney-General communicated to the JCPAA his Department's in-principle acceptance of this recommendation and outlined the actions being taken in response to the recommendation.

**1.8** It was intended that this audit would examine agency practices in IP management, focusing on IP management in agency contracting. In planning for the proposed audit, it was expected that the development and release of an overarching approach and guidance would have been finalised by the time the audit commenced. Agency performance was to be measured against the recommendations of the earlier audit and the principles and requirements outlined in the overarching approach and guidance.

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<sup>9</sup> *ibid.*, pp. 12, 17.

<sup>10</sup> *ibid.*, p. 17.

**1.9** As noted in the earlier audit, it is important that decisions identifying, clarifying and securing IP rights are taken at an early stage since such decisions will often govern long-term use and ongoing management of the IP throughout its useful life. Appropriate management of intellectual property in agency contracting is necessary so that agencies:

- ensure efficient, effective and ethical use of Commonwealth resources and receive value for money; and
- identify, define and clarify ownership of IP under the contract enabling opportunities to benefit from the IP and avoiding potential infringement of third party IP.

**1.10** However, preliminary audit work found that the overarching approach and guidance was yet to be finalised. Preliminary work also found that many agencies were awaiting the finalisation of guidance on IP management to inform the development of their individual approach to IP management within the agency. Although agencies are individually responsible for their proper management of IP, proceeding with an examination of individual agency practices in IP management would provide limited value in the absence of implementation of the overarching approach and guidance. As the earlier audit noted, it was the absence of co-ordinated leadership and guidance that contributed to agency inactivity with respect to IP management.

**1.11** For this reason, it was considered that initial plans to audit agency implementation of IP management measures in contracting be rescheduled until finalisation and release of the overarching approach. The current audit, therefore, reports on the progress of the responsible agencies in developing the approach and guidance on IP and IP management.<sup>11</sup> This enables timelier audit reporting on development of the approach and guidance (including AGD progress in implementing the recommendation of the JCPAA noted earlier).

**1.12** The audit also enables examination of a multi-agency approach in the light of recent attention to whole-of-government issues in the Australian Public Service.

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<sup>11</sup> The agencies involved in developing the guidance are the Attorney-General's Department (AGD), the Department of Communications, Information Technology and the Arts (DCITA), the Department of Finance and Administration (Finance) and IP Australia.

## Audit outcomes

**1.13** The audit focus was to:

- report on agency progress in implementing Recommendation No. 2 of the earlier audit, and the relevant recommendations of JCPAA Report No. 404, particularly the development and release of an overarching approach and guidance; and
- improve public administration by further increasing agency awareness of IP management and its disciplines.

## Audit methodology

**1.14** In conducting the audit, we:

- reviewed relevant legislation;
- reviewed various Australian Government policies and guidelines on, and relevant to, IP;
- reviewed relevant Australian and international accounting standards and policies;
- interviewed various Commonwealth officials responsible for IP policy and related functions;
- interviewed Commonwealth officials responsible for matters relevant to whole-of-government policy development; and
- reviewed various files and correspondence relevant to the development of the overarching approach and guidance for IP.

**1.15** The audit involved interviews and discussions with officials of the agencies involved in the implementation of the Australian Government IP policy principles and better-practice guidance being developed in response to the earlier audit. Documents and files relevant to the audit were provided by the agencies involved and were examined by the audit team.

### *Audit cost*

**1.16** The audit was conducted in accordance with ANAO Auditing Standards at an estimated cost of \$324 000.

## Other relevant audits

**1.17** In addition to the earlier audit, the following ANAO performance audits are relevant to this audit in that they address or touch upon issues of IP management or IP management in contracting:<sup>12</sup>

- Audit Report No. 32 of 2005–06, *Management of the Tender Process for the Detention Services Contract*, ANAO, Canberra, 2006.
- Audit Report No. 15 of 2005–06, *Administration of the R&D Start Program*, ANAO, Canberra, 2005.
- Audit Report No. 57 of 2004–05, *Purchasing Procedures and Practices*, ANAO, Canberra, 2005.
- Audit Report No. 36 of 2004–05, *Centrelink's Value Creation Program*, ANAO, Canberra, 2005.
- Audit Report No. 29 of 2004–05, *The Armidale Class Patrol Boat Project: Project Management*, ANAO, Canberra, 2005.
- Audit Report No. 32 of 2003–04, *Wedgetail Airborne Early Warning and Control Aircraft: Project Management*, ANAO, Canberra, 2004.

## Structure of this report

**1.18** This report details the findings of the performance audit and the conclusions reached against the audit objective. The report is structured as follows:

- Chapter 1—Introduction
- Chapter 2—Background to IP and IP management
- Chapter 3—Development of an overarching approach and guidance for the management of IP
- Chapter 4—Finalising the overarching approach and guidance

**1.19** An introduction to the audit, including an outline of the rationale, objective and methodology for the audit, has been provided in this chapter. The next chapter provides additional background information, including an overview of IP and IP management and the relevance and importance of IP to

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<sup>12</sup> Financial statement audits conducted by the ANAO also examine reporting of intangible assets, which may include reporting of intellectual property. These reports are available on the ANAO's website <[www.anao.gov.au](http://www.anao.gov.au)>.

the Australian Government. Chapter 3 presents the findings of the performance audit. It details progress in the development of the overarching approach and guidance for IP management. It also provides an account of the way in which development of the approach and guidance has proceeded: describing the processes employed in their development; the roles of the various agencies involved; and the major issues that have been dealt with and those that remain to be resolved. Chapter 4 builds upon the findings in chapter 3, and lists possible factors to consider when dealing with the development of a response to a whole-of-government challenge such as IP management.

## 2. Background

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*This chapter provides an overview of the concepts of intellectual property and intellectual property management. It describes the relevance and importance of intellectual property to agencies and to government as a whole. It briefly outlines the agencies with primary responsibility for intellectual property within the Australian Government.*

### Intellectual property and its management

#### What is intellectual property?

**2.1** Intellectual property is a form of intangible property that arises from intellectual activity in the industrial, scientific, literary or artistic fields. Intellectual property includes logos and other trade marks, written and online publications, music, sound recordings, films, broadcasts, computer programs, designs and inventions.

**2.2** Intellectual property rights refer to the rights granted by law in relation to IP, and in general, they protect the outcomes of economic investment made by an individual or organisation in pursuing such intellectual activity. These legal rights granted to an owner of IP include the right to control the use of the IP created, and to preclude others from using the IP without permission, usually for a fixed period of time.

**2.3** Intellectual property rights include:

- **copyright** for the original expression of ideas in literary (written), artistic, dramatic or musical works, including books, plays, databases, music and computer programs, and for sound recordings, films and broadcast and multimedia works;
- **circuit layout rights** for the 3-dimensional configuration of integrated circuits in computer chips;
- **designs** for the distinctive shape and appearance of manufactured goods;
- **patents** for new or improved products or processes;
- **plant breeder's rights** for new plant varieties;

- **trade marks** for words, symbols, pictures, shapes, sounds, smells or a combination of these, when used to distinguish the goods and services of one trader from another; and
- **confidential information**, including trade secrets, know-how and other confidential proprietary information.

**2.4** A complex scheme of statute and common law provides for, and governs, the legal rights associated with IP. Commonwealth IP statutes govern all IP types, except for confidential information, which relies predominantly on common law. These IP laws operate on a national basis. However, subject to formal requirements, IP rights can be recognised in other countries due to Australia's participation in bilateral and multilateral treaties.

## **What is intellectual property management?**

**2.5** Intellectual property management requires measures to ensure that an organisation identifies, adequately protects, and controls IP assets and, where appropriate, exploits those assets for commercial, operational and public benefit.

**2.6** Just as the tangible assets of an organisation should be properly identified, protected and maintained, so too should the intangible assets of an organisation, including its IP. Australian Government agencies are entrusted with the stewardship of significant Australian Government resources, including IP. The obligation that requires proper use of Australian Government resources applies to the management of IP in the same way as it does to any other Australian Government resource.

**2.7** Good management of an organisation's IP assets will enable the organisation to make better use of its existing resources and to identify opportunities for improved transfer and uptake of IP assets. This may also enable, where relevant or appropriate, opportunities for commercialisation of IP assets.

## **IP management is not limited to reporting IP in the financial statements**

**2.8** Recent harmonisation of Australian accounting standards with the International Financial Reporting Standards (IFRS) has raised the threshold

and narrowed the range of IP that can be reported in an entity's financial statements.<sup>13</sup>

**2.9** Figure 2.1 shows the value of intangible assets reported in the Commonwealth Consolidated Financial Statements (CFS) from 1995–96 to 2005–06. Intellectual property comprises part of the items reported as intangible assets in these statements. There has been growth in the reporting of the Commonwealth's intangible assets over the last eleven years—both in the total value reported and in the relative value of software and other intangibles. However, under the current accounting framework, much agency IP is unlikely to meet the recognition criteria and hence will not be reported in the financial statements. In 2005–06 the CFS report intangible assets totalling some \$7.7 billion, comprising computer software valued at \$3.8 billion and other intangibles at \$3.9 billion.

**2.10** Since much of the Australian Government's IP is not reported in the financial statements because it does not meet the recognition criteria that Australian accounting standards require, the scope and value of agency IP is not immediately brought to the attention of agency chief executive officers through traditional financial reporting.<sup>14</sup> Therefore, there is not and is unlikely to be a complete picture of the value of intellectual property assets in agencies nor for the Australian Government as a whole. Nevertheless, it is important that agencies properly manage their IP, and recognise that the principles of IP management extend beyond financial accounting and reporting.

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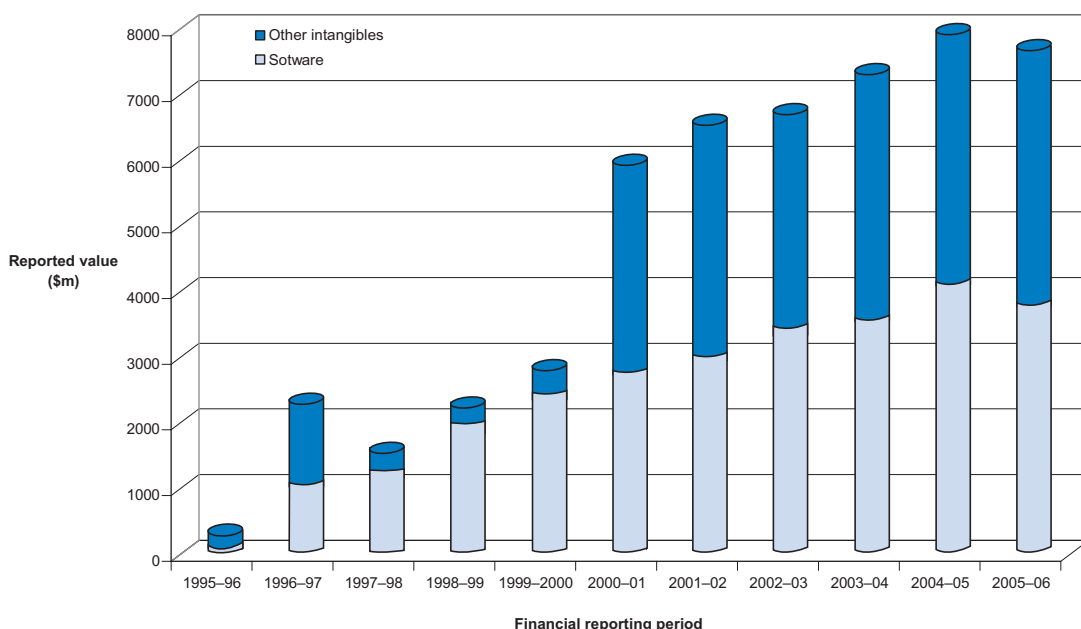
<sup>13</sup> For example, the new Australian Standard AASB 138 "Intangible Assets", excludes certain types of IP from reporting on the balance sheet, such as 'internally generated brand, mastheads, publishing titles, and customer lists'.

<sup>14</sup> AASB 138 provides that an intangible asset shall be recognised, if and only if:

- (a) it is probable that the expected future economic benefits that are attributable to the asset will flow to the entity; and
- (b) the cost of the asset can be measured reliably.

There are also additional criteria that apply to internally generated intangible assets (see paragraphs 48–67 of AASB 138).



**Figure 2.1****Value of intangible assets reported in Commonwealth Consolidated Financial Statements from 1995–96 to 2005–06**

Source: ANAO analysis of the Commonwealth Consolidated Financial Statements.

## Intellectual property management in the Australian Government

**2.11** The value of, and demand for, government information and services is increasing. Therefore, it is important that governments are able to successfully manage, develop and use available intellectual assets to meet such demands and capitalise on potential opportunities. The South Australian Auditor-General has noted:<sup>15</sup>

Intellectual property and government information represent major government assets. In many cases, significant expenditure has been committed to the development of these assets and they should be managed in accordance with prudent commercial, financial and budgetary practices.

<sup>15</sup> South Australian Auditor-General, Report of the Auditor-General for the year ended 30 June 1997 - Part A Audit Overview, *Managing Intellectual Property Assets and Government Information When Outsourcing*, Adelaide, 1997. Available from the South Australian Auditor-General's website <[www.audit.sa.gov.au](http://www.audit.sa.gov.au)>.

**2.12** Agencies are entrusted with the stewardship of significant Australian Government resources, including IP. In those agencies subject to the *Financial Management and Accountability Act 1997* (FMA Act), the obligation upon all agency heads for the ‘efficient, effective and ethical’ use of Australian Government resources applies to the management of IP in the same way as it does to any other Australian Government resource.

**2.13** The earlier audit noted that:<sup>16</sup>

The pro-active management of intellectual property is becoming an increasingly important consideration for our agencies and other bodies in maintaining our capabilities to achieve required outputs and outcomes or, more simply, results.

**2.14** Some of the consequences of not properly identifying, protecting and managing IP assets include:

- the loss of the ability to protect that IP;
- exposure to the risk of infringement of others’ IP rights;
- an inability to identify ownership of IP under the agency’s control;
- duplication of effort to redevelop existing assets;
- a lack of awareness of the value of IP assets—meaning that assets may be disposed of without a sound process to assess value and ensure probity;
- efficiency losses from duplication in procurement;
- the loss of operational benefits resulting from loss of strategic control over assets that are necessary for agency work;
- the loss of potential benefits from the commercialisation of that IP including revenue, advice and comments from a broader user group, increase in reputation, industry development and employment growth; and
- a lack of guidance for staff that may result in risk averse behaviour and stifled innovation.

**2.15** Due to the diverse nature of agency activities, types of intellectual property managed, and the extent to which IP is critical to core business, strategies for IP management will differ between agencies and possibly within

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<sup>16</sup> Australian National Audit Office, op. cit., paragraph 1.35, p. 36.

an agency. The approach that an agency takes to managing IP will be influenced by:

- the nature of IP activity and the type of IP managed;
- the extent to which an agency relies on revenues generated by the sale of IP;
- whether the agency owns IP in its own right, acts as a custodian of the IP on behalf of the Crown, or licenses the use of IP from another party;
- the mandate of the agency to undertake IP activities; and
- whether IP is developed or procured as part of a planned activity or emerges incidentally as part of routine operations.

**2.16** The objectives of public sector management of IP may differ from those for the private sector. Whereas a private sector organisation may only be interested in capturing and managing IP for its own competitive advantage, the same imperatives often do not apply to a public sector organisation.

**2.17** However, the broad principles underlying management of IP will still be generally relevant to public sector organisations. As mentioned earlier, the accountability obligations imposed upon public sector officials and organisations alone will often provide sufficient cause for agencies to pay close attention to the management of their IP assets.

**2.18** Good IP management requires the implementation of measures that will ensure that an agency identifies, adequately protects, and controls its IP assets and, where appropriate and consistent with agency objectives, facilitates use and transfer of those assets for commercial, operational and public benefit.

**2.19** Government agencies can benefit from the effective use of IP, particularly through improved:

- accountability for resources;
- management of risk;
- operational performance;
- efficiency and effectiveness in the use of IP resources;
- budgeting and financial management; and
- asset management.

**2.20** As mentioned earlier, managing IP in the public sector presents unique challenges. In addition to the different policy environment compared to that faced by private sector organisations, public sector agencies may see the management of their IP as a means of:

- stimulating economic growth, industry development, improved competitiveness and even increased employment prospects by the transfer of IP to the private sector;
- encouraging the adoption of agency IP by the wider community thereby benefiting the public; and
- generating revenues from agency IP as an additional source of agency operating revenue.<sup>17</sup>

**2.21** These goals may diverge and will influence an agency's management of, and its ability to capitalise on, its IP. In addition, public sector agencies may have an obligation to make material (which may include IP) freely available for the benefit of the public. An IP asset that may have commercial potential in a market environment may be provided at no charge due to pricing and access considerations.

**2.22** This also highlights the potential conflict between public interest and commercialisation. Due to the non profit-making nature of the public sector, commercialisation of IP is unlikely to be the central objective of an agency. Commercialisation is usually regarded as a bonus activity, capable of generating additional income. However, there may be limited recognition that IP can sometimes have an additional benefit to the purpose for which it was produced.

**2.23** Intellectual property management allows an agency to fulfil its accountability obligations for IP it holds, and to ensure that agency resources are put to productive and efficient use. In the case of third party IP that the agency uses, good management of IP will ensure that the risk of infringement of third party rights is minimised, thereby reducing possible detrimental consequences for the agency such as legal action, liability for unnecessary financial costs, and potential loss of reputation. Agencies need to consider the most appropriate options for ownership of IP, including whether to retain the

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<sup>17</sup> However, agencies will need to be aware of requirements of the Australian Government financial framework associated with retaining revenues from commercialisation activities. For example, an agreement under section 31 of the FMA Act may be required in order to retain revenue from commercialisation for future spending. Statutory bodies or Commonwealth companies will also be subject to the terms of their incorporating legislation or constituting documents.

IP itself or to transfer or otherwise share the IP with third parties, and on what basis.

## **Intellectual property management in agency contracting**

**2.24** The management of IP will often involve a series of complex decisions regarding the appropriate level of ownership and control of a particular IP asset. This will be dependent on the type of IP, its mode of acquisition (that is, whether it is created internally, created by another party under contract, or obtained from another party), and its intended use, relative value and strategic importance to the agency.

**2.25** Dealing with issues regarding ownership and use, and even identification and definition of IP at early stages enables greater ease of management throughout its lifecycle. It is at this stage that agencies can consider questions of need for a particular IP asset, whether the agency holds existing IP that may already meet that need, and the most appropriate ownership options consistent with intended long term use of, and need for, control over the asset. Considering these questions early would ensure agencies receive value for money by avoiding duplication of effort and through ensuring only those IP rights required by the agency are actually acquired or retained. Documenting these rights also minimises the risk of infringement by the agency and/or third parties involved.

**2.26** Consideration of IP issues should therefore be a standard part of agency approaches to the deployment of resources and the creation and acquisition of assets or services. Contractual agreements may incorporate a requirement for the agency to identify its intellectual property needs; to document potential IP arising or transferred under the contract; and to define the appropriate rights associated with such IP.

## **Australian Government intellectual property policies**

**2.27** Within the Australian Government, the following three agencies play a role in developing and implementing IP policy:

- the Attorney-General's Department (AGD) is responsible for administering copyright legislation and providing advice on copyright policy and law;
- the Department of Communications, Information Technology and the Arts (DCITA) produced guidelines for the management of Information

Technology related IP. It previously shared responsibility for copyright policy with AGD and administered the licensing of Commonwealth copyright material (although AGD has now assumed responsibility for these functions); and

- IP Australia examines and grants rights for patents, trade marks, industrial designs and plant breeder's rights; and is responsible for promoting awareness and understanding of these IP rights to individuals and organisations. It is also responsible for providing IP policy advice to government and develops legislation to support the patent, trade mark, design and plant breeder's rights systems in Australia.<sup>18</sup>

**2.28** Apart from these agencies that have primary responsibility for IP policy, there are other agencies within the Australian Government that may have an interest in or role to play in relation to matters involving IP and any overarching approach to IP. For example, because of its responsibility for matters related to Australian Government finance, as well as policy related to Australian Government procurement, the Department of Finance and Administration (Finance) has a particular interest in the development and implementation of the approach to IP management. It is to be expected that other agencies may have varying roles in developing the approach in the Australian Government because of their interest in IP or experience in dealing with IP matters.

**2.29** As already noted, the earlier audit recommended that AGD, DCITA, IP Australia and other relevant agencies work together to develop a whole-of-government approach and guidance for the management of the Commonwealth's IP. All agencies agreed or agreed in principle to the recommendation.

**2.30** Although work has progressed on developing an overarching approach and guidance on IP management, it is yet to be finalised. In its report the JCPAA noted:

In February 2005 the Committee sought an update on progress on the development of a whole-of-government approach to IP. DCITA advised that due to changes in portfolio responsibilities following the October 2004 Federal Election, IP matters are now handled by the AGD. The Committee was also

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<sup>18</sup> From 10 December 2004, the Plant Breeder's Rights Office moved from the Department of Agriculture, Fisheries and Forestry to IP Australia.

advised that due to these portfolio changes, and reallocation of resources dedicated to the implementation of the Australia-United States Free Trade Agreement, work on progressing the development of IP principles had been delayed. In May 2005 AGD advised the Committee that 'options for progressing the response to the ANAO report are currently being considered'.<sup>19</sup>

**2.31** As noted earlier, in its report the JCPAA recommended that AGD commence development of a whole-of-government approach and guidance for the management of the Commonwealth's IP, for completion by May 2006, commenting:<sup>20</sup>

The Committee is disappointed to note that more than 18 months after the ANAO's audit report was tabled, there is little progress towards developing a whole-of-government approach to IP management. DCITA and other agencies outlined plans to develop an IP strategy at the Committee's public hearing in August 2004, however it appears little has been done since that date.<sup>21</sup>

**2.32** Chapter 3 details the development of the overarching approach and guidance, and reports the progress of the agencies involved.

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<sup>19</sup> Joint Committee of Public Accounts and Audit, op. cit., p. 11.

<sup>20</sup> *ibid.*, p. 12.

<sup>21</sup> *ibid.*, p. 12.

### 3. Development of an overarching approach and guidance for the management of IP

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*This chapter details the findings and conclusions of the audit. It provides an overview of the content and stated purpose of the IP Principles and IP Manual being developed as the Australian Government approach and guidance to IP management. It then goes on to examine how the IP Principles and IP Manual were developed, and ends by describing their current status.*

#### Background

**3.1** As noted earlier, ANAO Audit Report No. 25 of 2003–04 examined IP policies and practices across a range of agencies. The earlier audit found that there was no overarching policy approach to managing IP in the Australian Government. As a result, agencies were responsible for devising their own approaches to the management of the IP they generate and/or acquire.<sup>22</sup> Only 30 per cent of agencies surveyed had developed policies or procedures dealing with the management of IP.<sup>23</sup>

**3.2** The two recommendations made in the earlier audit were aimed at improving the efficient, effective and ethical use of Australian Government IP. This would be achieved through (i) the development of an overarching approach and guidance, taking into account the different functions, circumstances and requirements of agencies; (ii) agencies developing and implementing an IP policy appropriate to its circumstances and functions. The earlier audit noted:

A whole-of-government policy on the management of intellectual property by Commonwealth agencies may be one means by which the importance of, and individual agency responsibility for, the management of intellectual property under their control is clarified and brought to the attention of all agencies.<sup>24</sup>

**3.3** In its inquiry into the earlier audit, the JCPAA asked all agencies at the public hearing for their views on the recommended whole-of-government approach to IP management. The JCPAA noted in its subsequent report that:

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<sup>22</sup> Australian National Audit Office, op. cit., paragraph 27, p. 22.

<sup>23</sup> *ibid.*, paragraph 27, p. 19.

<sup>24</sup> *ibid.*, paragraph 27, p. 22.



All agreed that it was a step in the right direction. Agencies explained that such an approach would:

- guide agencies to improve their management of their IP;
- encourage government Chief Executive Officers to focus appropriate attention on IP management issues;
- overcome agencies' lack of understanding of IP; and
- acknowledge that IP management is an issue that needs to be addressed.<sup>25</sup>

**3.4** As mentioned earlier, the JCPAA expressed its disappointment that at the time of publication of its report, some 18 months after the earlier audit report was tabled, 'there had been little progress towards developing a whole-of-government approach to IP management'.<sup>26</sup> The JCPAA recommended that the whole-of-government approach and guidance be completed by May 2006.<sup>27</sup>

**3.5** The present audit examined the progress and development of the overarching approach and guidance, reviewing the progress of the responsible agencies in implementing Recommendation No. 2 of the earlier audit (the earlier recommendation), and Recommendations 1 and 2 of the JCPAA report.

**3.6** An overarching approach for the management of IP is under development. Development of a draft *Statement of IP Principles* (the IP Principles), initially led by DCITA but more recently by AGD, has been continuing since shortly after the release of the earlier audit report. More recently, a draft *IP Better Practice Manual* (the IP Manual) has been developed to support the IP Principles and is being finalised.

**3.7** This chapter reports on the progress of the development of the overarching approach and guidance, examining the IP Principles and the IP Manual. It first provides an overview of the IP Principles and IP Manual, describing their purpose and contents. It also examines the relationship between the IP Principles and IP Manual and other relevant Australian Government policies (such as the *Commonwealth Procurement Guidelines*).<sup>28</sup>

<sup>25</sup> Joint Committee of Public Accounts and Audit, op. cit., p. 9.

<sup>26</sup> *ibid.*, p. 11.

<sup>27</sup> *ibid.*, p. 12.

<sup>28</sup> The *Commonwealth Procurement Guidelines* (CPGs) are issued by the Minister for Finance and Administration pursuant to the *Financial Management and Accountability Act 1997*. They establish "the core procurement policy framework and articulate the Government's expectations for all departments and agencies...in relation to procurement". Although the CPGs are defined to apply to procurement of intangible property, such as IP, little specific guidance is provided by the CPGs in relation to managing aspects of procurement involving IP. The CPGs are available from Finance's website <[www.finance.gov.au/procurement/procurement\\_guidelines.html](http://www.finance.gov.au/procurement/procurement_guidelines.html)>.

**3.8** The chapter then goes on to examine how the IP Principles and IP Manual were developed. It outlines the way in which the agencies involved coordinated the development of the IP Principles, including consultations with other agencies. The chapter provides an insight into the reasons that the IP Principles and IP Manual remain yet to be finalised and released, and to identify the issues that remain to be resolved. The next chapter (chapter 4), draws together the findings in this chapter and provides a summary of the matters that should be considered when dealing with issues that are whole-of-government in nature.

## **Australian Government approach and guidance: the IP Principles and IP Manual**

**3.9** The draft *Statement of IP Principles* consists of a set of 16 ‘principles’ accompanied by a brief introduction and short explanation of the principles. The 16 principles are categorised under four headings, as shown in Figure 3.1.<sup>29</sup>

**3.10** The introduction to the IP Principles note that they provide:

a focal point for understanding legislation, policies and guidelines as they apply to the management of IP by Australian Government agencies.

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<sup>29</sup> In September 2005, a draft of the IP Principles was released for public comment. A copy of this consultation draft is available from the Attorney-General's Department website at <[www.ag.gov.au/cca](http://www.ag.gov.au/cca)>. Further development of the IP Principles continues.

**Figure 3.1****Overview of the draft IP Principles released for public comment**

Category heading	Main text of the principles
General principles	<ol style="list-style-type: none"> <li>1. Australian Government agencies are required to exercise due care, skill and diligence in the management of IP materials which are under their control.</li> <li>2. It is the responsibility of each agency to manage IP materials in their custody in an accountable manner and in accordance with all relevant legislation, policies and guidelines.</li> <li>3. Agencies should periodically evaluate the effectiveness, cost, and benefits of the policies and practices they have in place for the management of IP.</li> </ol>
Corporate framework	<ol style="list-style-type: none"> <li>4. Each agency should have an IP management policy which reflects its corporate objectives.</li> <li>5. Implementation of the IP management policy should be supported by appropriate training and resources, including access to expert advice.</li> <li>6. Agencies should, as appropriate, maintain a register(s) of valuable IP.</li> <li>7. IP materials should be protected.</li> </ol>
Creating and acquiring IP	<ol style="list-style-type: none"> <li>8. Agencies should maintain a flexible approach in considering options for ownership, management and use of IP.</li> <li>9. Agencies should recognise innovation and creativity in the development of IP in an appropriate manner which is consistent with agency objectives.</li> <li>10. Contracts and other agreements must address IP issues where relevant.</li> </ol>
Sharing, commercialisation, disposal and public access to IP	<ol style="list-style-type: none"> <li>11. In considering whether to allow public access to IP material through sharing, commercialisation or otherwise disposing of the asset, an agency should be mindful of its legal rights and obligations, its core objectives, and the Government's policy objectives including industry development and broader innovation policy.</li> <li>12. Agencies should be responsive to opportunities for commercial use and exploitation of IP for which they are responsible.</li> <li>13. Agencies should encourage broad public use and distribution of IP material that has been developed for the purpose of: <ul style="list-style-type: none"> <li>• informing and advising the public of government policy and activities;</li> <li>• providing information that will enable the public and organisations to understand their own obligations and responsibilities to Government;</li> <li>• enabling the public and organisations to understand their entitlements to government assistance;</li> <li>• consulting, seeking views and engendering community discussion;</li> <li>• facilitating access to government services;</li> <li>• complying with public accountability requirements; or</li> <li>• expressly informing and advising the Australian community on matters of public interest (including security, health and welfare).</li> </ul> </li> <li>14. Commonwealth agencies should be mindful of opportunities to share IP for which they are responsible with other Commonwealth agencies.</li> <li>15. Unless commercial activities are expressed as an integral part of an agency's objectives, commercialisation of IP should be no more than an ancillary part of its activities and should not become a core business activity.</li> <li>16. Where IP materials are commercialised, an agency should do so in an open, accountable and competitive manner.</li> </ol>

Source: Extract from draft IP Principles.

**3.11** The principles are framed as statements relating to expected behaviour and practices in relation to different aspects of IP management. For example, Principle 4 and its accompanying explanatory note are as follows:

*Principle 4*

*Each agency should have an IP management policy which reflects its objectives*

Policies and practices established for the management and use of IP should be an integral part of an agency's broader governance framework, including procurement, accountability, and records and asset management.

The IP management policy should provide guidance to staff. It should describe the agency's principles, practices and procedures for managing IP and how these relate to the achievement of the objectives of the agency.

The IP management policy should outline the agency's approach to:

- dealing with acquisition, ownership, sharing and commercialisation of IP
- identifying and recording ownership of IP, and
- monitoring and protecting IP.

It should also detail any broader policy considerations that affect the agency's approach to management and use of IP.

**3.12** The draft IP Manual aims to provide practical guidance and advice on IP management, including on implementation of the IP Principles. The introduction to the draft IP Manual notes that its objective is to:

provide a tool for agencies to implement the IP Principles in the context of their operations.

**3.13** The draft IP Manual is divided into 12 chapters, providing guidance on IP management practices across the IP life-cycle. Figure 3.2 provides an outline of the structure and content of the IP Manual.

**Figure 3.2****Overview of the draft IP Manual**

Chapter No.	Chapter title	Description of chapter content
1	Introduction	Contains a copy of the IP Principles, along with a brief description of the purpose of the manual.
2	What is IP? Who owns it?	Introduces the concept of IP, provides detailed description of different types of IP. Covers assessment of IP ownership.
3	Creating an IP management framework	Guidelines to assist in development of an IP management framework.
4	Identifying, recording and managing IP	Guidance on identifying existing and newly created IP; reviewing IP; keeping appropriate records of IP; and monitoring and managing IP.
5	Making IP protection decisions	Outlines the decision making processes with respect to IP protection.
6	Assessing and valuing IP	Guidance on assessing the value of IP.
7	Dealing with IP in government contracts	Guidance on determining a preferred IP position in Government procurement and funding contracts; and IP management during life of contract and upon contract termination or expiry.
8	Using the IP of another party	Guidance on how to identify IP of other parties and how to access identified IP ethically.
9	Sharing and granting public access to IP	Guidance on sharing IP and making IP publicly available.
10	Commercialisation of government IP	Step by step process for agency commercialisation of IP; describes forms of commercialisation and information on managing risks.
11	Enforcing IP rights	Outlines when, why and how to enforce IP rights, associated risks, and different forms of enforcement.
12	Further assistance and guidance	Brief list of further reading and information.

Source: Extracted from draft IP Manual.

**3.14** A stated objective of the overarching approach to IP is to ‘assist agencies in the management of their IP and encourage adoption of good practice in the creation, procurement and use of IP’.<sup>30</sup> The IP Principles were meant to ‘articulate the Government’s approach to IP use and management’. It was not expected that the approach would create any new Government policy, but rather would ‘assist agencies interpret and apply existing government policies as they relate to IP’.

<sup>30</sup> Draft Issues Paper prepared by AGD on *A Whole of Government Approach to IP Management*.

**3.15** However, these objectives and intentions are not clearly communicated in the IP Principles. The introduction to the IP Principles notes that while they provide an overarching framework for IP management:

agencies are encouraged to develop individual IP management frameworks that reflect their own needs and objectives, consistent with existing Australian Government policies and requirements.

**3.16** The way in which the individual principles are currently drafted would create some ambiguity for agencies. Some of the principles use language which could be seen as setting mandatory standards with which agencies must comply. This ambiguity means it may be difficult for agencies to determine the extent of the obligations the IP Principles impose in relation to IP management practices, and whether compliance is mandatory. In addition, the interaction between the IP Principles and existing relevant policies, for example, the *Commonwealth Procurement Guidelines*, is not clear. This means that it may be difficult for agencies to understand the nature of the obligations arising under the IP Principles and the interaction between these obligations and other existing policies.

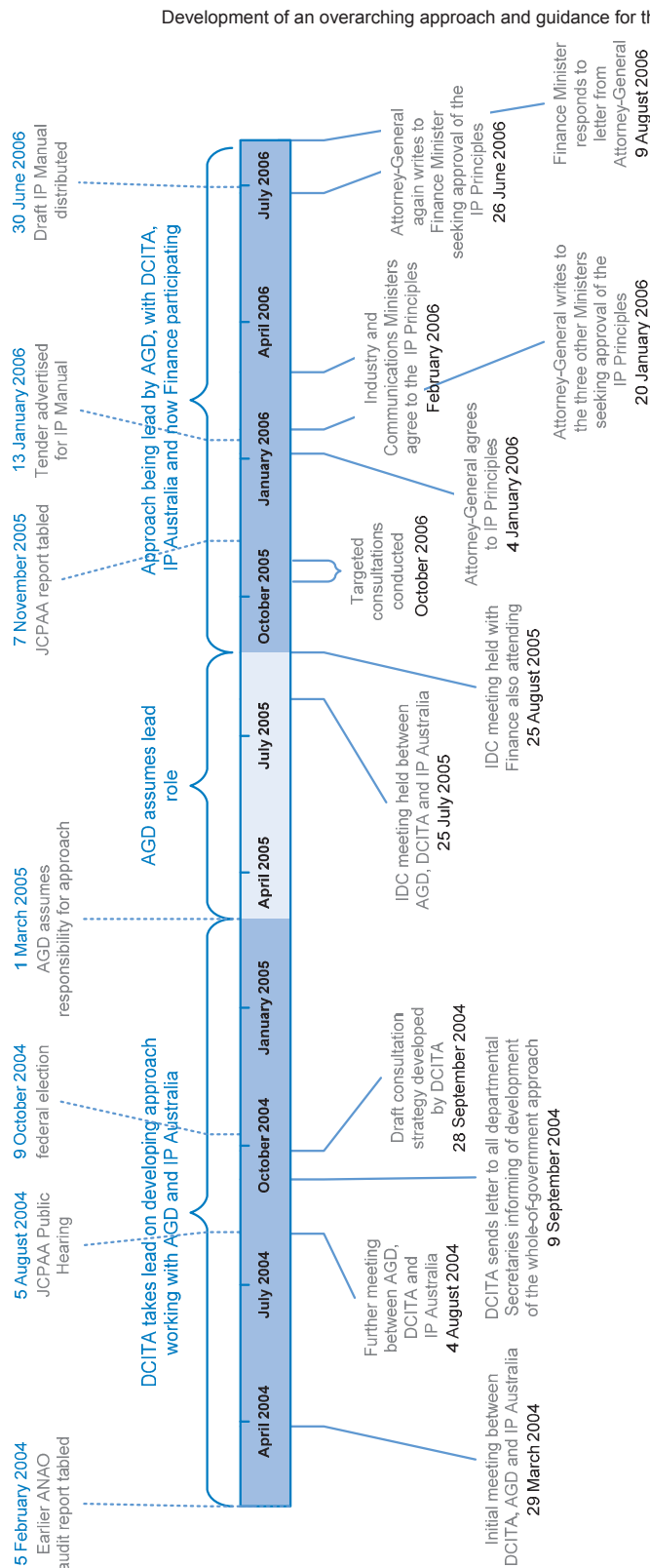
**3.17** These are matters that the agencies can address prior to finalising the IP Principles. The IP Manual can also be expected to assist in further clarifying the extent of obligations and expectations.

## Development of the IP Principles

**3.18** This section catalogues the events following release of the earlier audit report in February 2004 leading to the development of the overarching approach to IP management. It outlines the way in which the agencies involved co-ordinated the development of the IP Principles (and associated IP Manual), and the key events in its development. The major events in the development of the IP Principles are depicted in Figure 3.3.

Figure 3.3

Development of the whole-of-government approach to IP management



Source: ANAO

## Events immediately following release of earlier audit

**3.19** At the time of the earlier audit, immediate leadership and responsibility for IP matters was shared across a number of agencies, including AGD, DCITA, and IP Australia, (as well as Environment Australia, the Department of Agriculture, Fisheries and Forestry and the Department of Foreign Affairs and Trade). It was against this background of shared responsibility for IP matters that the recommendation of the earlier audit left open the possibility that agencies other than the three listed may have a role to play in the development of any overarching approach and guidance on IP management.

**3.20** Following tabling of the earlier audit, both AGD and DCITA commenced preparations for the work required to respond to the earlier recommendation. Although AGD originally considered convening an inter-departmental committee (IDC) to discuss ways of responding to the recommendation, it was DCITA that initially took the lead in co-ordinating a response.

**3.21** A proposed approach for responding to the earlier recommendation was prepared by DCITA and distributed to AGD and IP Australia for discussion in March 2004.<sup>31</sup> The approach proposed by DCITA consisted of two stages. Firstly, a *Statement of IP Principles* would be developed articulating ‘the Government’s approach to IP management’. Secondly, an *IP Better Practice Manual* would be prepared, drawing on the IP Principles, ‘to provide a source of guidance and advice on their implementation’. The work would be done in conjunction with a review by DCITA of the *Commonwealth IT IP Guidelines*, as part of which DCITA would consider ways of extending the IT IP Guidelines into broader guidance and support for agencies on the management of IP assets.

**3.22** The initial DCITA proposal noted that:<sup>32</sup>

The overarching statement of principles on IP management would be developed by DCITA, AGD, and IP Australia, in consultation with other relevant agencies. Finalisation of the statement would follow consultation with all key agencies.

It is not anticipated that the statement would contain any new government policies, but rather would be an expression of existing government policies as

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<sup>31</sup> The proposed approach was also provided to the ANAO for comment.

<sup>32</sup> DCITA, *ANAO IP Audit Response – Discussion Paper*, DCITA, 2004, p. 1.



they relate to IP, particularly as expressed in terms of policies affecting management of Government assets.

**3.23** Following an initial meeting between AGD, DCITA and IP Australia in March 2004, it appears little further progress was made in responding to the earlier recommendation until August 2004, when a further meeting was convened to discuss the forthcoming JCPAA public hearing into the earlier audit.<sup>33</sup> At that meeting, it was agreed that DCITA would:

- prepare a draft letter to agency heads providing information on the work being undertaken by AGD, DCITA and IP Australia to develop an overarching approach to IP management;
- prepare a strategy for consultation with agencies in order to identify current practice and issues upon which further advice and guidance was required, as well as to seek comments on the proposed approach; and
- draft a general set of IP principles for circulation to departments for comment.

## JCPAA public hearing

**3.24** On 9 August 2004 the JCPAA held a public hearing as part of its review of the earlier audit. Among others, officials representing AGD, DCITA, IP Australia and the Department of Finance and Administration (Finance) attended the hearing and gave evidence to the JCPAA. At the hearing, DCITA noted that it had begun work with AGD and IP Australia towards a whole-of-government approach to IP management. DCITA told the JCPAA that the IP Principles were expected to be completed by October 2004.<sup>34</sup>

**3.25** Following the JCPAA hearing, DCITA prepared the letter to be sent to departmental secretaries alerting them that work had commenced on developing an overarching approach to IP management. The letter was distributed to AGD and IP Australia for comment in August 2004, and at this stage it was still intended that IP Principles be finalised by October 2004.

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<sup>33</sup> The delay was attributed to priority being given to the additional work arising from implementation of the Australia – United States Free Trade Agreement (AUSFTA). Negotiations on the AUSFTA were finalised in February 2004, with the final text of the AUSFTA being signed in May 2004. The AUSFTA entered into force on 1 January 2005. Further information on the AUSFTA can be found on the website of the Department of Foreign Affairs and Trade <[www.dfat.gov.au](http://www.dfat.gov.au)>.

<sup>34</sup> Commonwealth of Australia, *Official Committee Hansard*, Joint Committee of Public Accounts and Audit, 9 August 2004, p. 9.

However, there appeared to be some difference of opinion between agencies over the contents of the letter, stemming from uncertainty over the details and direction of the proposed approach. Records of correspondence between agencies indicate that there was not yet clear agreement on the direction of the work: neither on the scope of any overarching policy on IP, nor on a strategy for consultation with agencies on the proposed approach.

**3.26** Despite not having yet reached agreement on these issues, in order to continue to work towards finalisation of the IP Principles by October, it was agreed that the letter be sent to departmental secretaries. It was noted that agreement on the content of the letter did not require finalisation of a consultation strategy or final agreement on the scope of the work to be done. A letter was agreed amongst AGD, DCITA and IP Australia and sent to all departmental secretaries in September 2004. Among other things, the letter noted:

DCITA has commenced work in cooperation with AGD and IP Australia to develop a whole of government approach to IP management. At this stage we are proposing the development of a statement of principles outlining in broad terms the Government's approach to IP management. It is envisaged that the statement will be finalised in November of this year. We are also proposing to follow this with the development of an IP Better Practice Manual which reflects the statement of principles and provides a source of guidance and advice on its implementation.

It is proposed that neither the statement of principles, nor the IP Better Practice Manual will set new policy, but rather draw on existing sources of advice and guidance, including the *IT IP Guidelines* released by this Department in February 2001. A review of the Guidelines was due in 2003, but was re-scheduled to allow it to draw upon the outcome of the ANAO report on IP management. This review is expected to be incorporated into the development of the whole of government approach to IP management.

We expect to commence a wide ranging process of consultations shortly to ensure that agencies views are fully considered. This will include any comments you may have on the proposed approach, particularly in relation to the development of an IP Better Practice Manual. It is envisaged that consultations in the first stages of the process will be focussed on the statement of principles. We will also be seeking to collect information on current practice (including possible case studies) and identifying specific issues relating to IP management for advice and guidance.

**3.27** A draft consultation strategy was provided by DCITA to AGD and IP Australia in September 2004. The strategy outlined the proposed approach to responding to the earlier ANAO recommendation. It was intended that the IP Principles (which would articulate the Government's approach to IP use and management) would now be finalised in November 2004. The IP Manual would follow on from this, drawing on the IP Principles and providing a source of guidance and advice on the implementation of the IP Principles. A draft of the IP Manual was expected to be completed by June 2005.

**3.28** The consultation strategy outlined an indicative timetable for consultations with stakeholders on the IP Principles and IP Manual. It was expected that a series of targeted consultations would be conducted over a week in October 2004, with the draft IP Principles circulated more broadly to Australian Government agencies towards the end of October. Concerns were raised that the proposed timeframe for consultations was unrealistic and would not be able to be met.

**3.29** It was also proposed that the process of the development of the IP Principles and IP Manual would be supervised by a steering committee comprising four permanent members:

- the core IP agencies (IP Australia, AGD and DCITA); and
- the Department of Finance and Administration (which was included given its primary responsibility for policies affecting Government ownership and use of assets, and for responsibility for issues related to accounting standards and valuation of assets).

**3.30** Although the strategy noted that the three core IP agencies, DCITA, AGD and IP Australia had agreed to work together to develop a whole of government approach to IP management, the strategy did not establish which agency would ultimately be responsible for the release of the IP Principles and IP Manual, or who would be responsible for their implementation. The strategy gives a role to the steering committee in developing, considering, distributing and finalising the IP Principles, but did not elaborate further on the processes by which the steering committee would operate and how decisions on the approach would ultimately be made.

**3.31** Following the release of the draft consultation strategy, there appeared to be little further progress on the overarching approach in the months before the federal election in October 2004. Progress was said to be also delayed by

the increased workload associated with preparations for implementation of the Australia – United States Free Trade Agreement (AUSFTA).

### **Changes in administrative arrangements following the 2004 federal election**

**3.32** A federal election was held on 9 October 2004. Changes in administrative arrangements following the federal election transferred the Commonwealth Copyright Administration to AGD from DCITA.<sup>35</sup> As a result of these changes, AGD took sole responsibility for copyright and for the review of the IT IP Guidelines from 1 March 2005. The changes also led to AGD assuming the lead role in the development of the approach to IP management.

**3.33** Prior to the federal election, the Coalition released two policy statements of relevance to the development of the overarching approach. The policy statement *Connecting an innovative Australia* noted a Coalition Government would use the *Government Information Technology and Communications* (GITC) framework to ensure that 'all agencies have appropriate intellectual property management strategies' and that the revised *IT IP Guidelines* 'clearly articulate to Government agencies that appropriate opportunities to commercialise joint development projects should be able to be capitalised on by the private sector partner'. The policy statement *Strengthening Australian Arts* stated the Coalition's commitment to making government IP available to the public wherever appropriate. In particular, the policy stated that 'this material should be available to businesses that are able to use Government IP to create Australian jobs and commercial opportunities'.

**3.34** Apart from AGD assuming from DCITA the lead role in the development of the approach, little activity occurred from then until towards the middle of 2005.

### **Subsequent work by AGD**

**3.35** In July 2005, AGD convened a meeting of an IDC comprising representatives from AGD, DCITA and IP Australia. At that meeting, AGD presented three draft papers for discussion:

- a scope and consultation strategy for developing an overarching approach to IP management;

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<sup>35</sup> The Commonwealth Copyright Administration responds to copyright enquiries concerning published Commonwealth copyright materials on behalf of all Commonwealth agencies.

- Australian Government IP Principles; and
- an issues paper for circulation during consultations on the IP Principles.

**3.36** The draft consultation strategy remained mostly unchanged from the earlier consultation strategy presented by DCITA at the meeting held in September 2004 (discussed earlier). The consultation strategy continued to propose that the development of the overarching approach be supervised by a steering committee comprising AGD, DCITA, and IP Australia, as well as Finance. It was agreed by those present that Finance would be invited to participate in the IDC.

**3.37** It was anticipated that the IDC would quickly agree on the draft consultation strategy and IP Principles so that consultations on the IP Principles could commence in late August.

**3.38** A further meeting of the IDC occurred in August 2005, this time with representatives from Finance attending. At that meeting the three draft papers were again discussed and it was agreed that the documents would be revised to include comments made by those participating. It was also agreed that the revised documents would be circulated to all members of the IDC for comment and approval.

**3.39** A revised draft of the IP Principles was circulated to a selection of agencies and made available for public comment in September 2005. AGD received submissions from 27 agencies in response to the request for comment on the draft IP Principles.<sup>36</sup> In addition, 17 agencies also participated in targeted consultations conducted by AGD in October 2005. Following consideration of these views by the IDC, the IP Principles were revised by AGD.

## **Release of the JCPAA report**

**3.40** The JCPAA presented the report of its inquiry into the earlier audit to the Commonwealth Parliament on 7 November 2005.<sup>37</sup> As mentioned earlier, the JCPAA observed that progress on the development of the whole-of-government approach to IP management had been slow.<sup>38</sup> The report noted

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<sup>36</sup> Six of these from organisations outside the Australian Government.

<sup>37</sup> Joint Committee of Public Accounts and Audit, op. cit., 2005.

<sup>38</sup> *ibid.*, p. 11.

that AGD had attributed this to delays caused by the change in administrative responsibilities following the federal election and to work associated with implementation of the AUSFTA.<sup>39</sup> The JCPAA supported the ANAO's earlier recommendations and further recommended that AGD complete the whole-of-government approach by May 2006.<sup>40</sup>

## **Further development of the overarching approach**

**3.41** AGD continued to work with the other three agencies to finalise the IP Principles. A meeting of the IDC was held in December 2005 to discuss the results of the consultation process. IDC members agreed to the IP Principles in late December 2005.

**3.42** In January 2006, the Attorney-General wrote to the Minister for Industry, Tourism and Resources, the Minister for Communications, Information Technology and the Arts and the Minister for Finance and Administration seeking their agreement to the IP Principles. It was proposed that the Attorney-General would publicly release the IP Principles once agreement was received from each of the Ministers.

**3.43** In response to the Attorney-General's letter, both the Minister for Industry, Tourism and Resources and the Minister for Communications, Information Technology and the Arts agreed to the IP Principles in February 2006. Agreement was not received from the Minister for Finance and Administration at that stage, because the Ministerial correspondence gave rise to issues that needed further consideration.

**3.44** One issue related to whether or not compliance with the IP Principles (and accompanying IP Manual) would be mandatory. For example, it had been regularly stated within the IDC that the IP Principles were not intended to create new policy, but rather drew on 'existing policy' as it applied to IP.<sup>41</sup> However, it was noted during IDC discussions that this may lead to uncertainties about the exact extent and nature of any obligations in relation to IP management, especially since there was uncertainty over how any existing policies applied to IP management. It was suggested in IDC discussions that

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<sup>39</sup> *ibid.*, p. 10.

<sup>40</sup> *ibid.*, pp. 11–12.

<sup>41</sup> There was also some disagreement about whether aspects of the IP Principles could in fact be linked to any existing policies and in fact did represent new policy in the area.

the IP Principles could benefit from a clearer expression of what was expected in terms of changes in agency policies and practices for IP management.

**3.45** Another related issue was to which agencies the IP Principles and IP Manual apply.<sup>42</sup> This question was seen to be of particular importance in respect of information technology – related IP (IT-IP), since there was a desire to ensure that the IP Principles influenced changes in agency practice that gave effect to particular Government policy outcomes for access to IT-IP. It was suggested that one way of achieving this would be to mandate compliance with the relevant policies relating to IT-IP by promulgating them as policies of the Australian Government so that regard would have to be had to them when decisions on spending public money were being made.<sup>43</sup>

**3.46** While the discussions on the IP Principles continued, work commenced on the IP Manual. External expertise was sought through an open tender process to develop the IP Manual. The tender opened on 13 January 2006 and following completion of the tender selection process, a contract was signed with the successful tenderer on 4 April 2006.

**3.47** A subsequent meeting of the IDC discussed the process for developing the IP Manual, including its objective and scope. IDC members provided comments throughout the drafting of the IP Manual. A draft copy of the IP Manual was prepared and provided to IDC members by AGD at the end of June 2006.

**3.48** Concurrently, in May 2006, both AGD and Finance provided Executive Minutes to the JCPAA addressing the relevant recommendations of the

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<sup>42</sup> For example, whether the IP Principles would apply equally to bodies subject to the FMA Act as to those subject to the *Commonwealth Authorities and Companies Act 1997*.

<sup>43</sup> As noted earlier, it was intended that the IP Principles and IP Manual would replace the *IT IP Guidelines* which outlined certain requirements in relation to access to and management of IT-IP. Under the Australian Government financial framework, an approver must not approve a proposal to spend public money unless the approver is satisfied that, among other things, the proposed expenditure is in accordance with the policies of the Commonwealth: *Financial Management and Accountability Regulations 1997*, reg 9. The meaning of the expression 'policies of the Commonwealth' is not further defined in the Regulations. However, Finance has produced guidance to assist agencies to comply with this requirement: Department of Finance and Administration, *Financial Management Guidance No. 10, Guidance on Complying with Legislation and Government Policy in Procurement*, Finance, Canberra, 2005.



JCPAA's report and outlining the actions being taken by the agencies in response to the recommendations.<sup>44</sup>

## **Current status of the overarching approach**

**3.49** The Attorney-General subsequently wrote to the Minister for Finance and Administration in March and June 2006 requesting that the Minister indicate whether he approved of the IP Principles. The Minister for Finance and Administration responded in August 2006. In his letter, the Minister reiterated the earlier concerns raised by Finance officials over the proposed approach. A further IDC meeting was held in late August to discuss these issues and agree on the policy status of the IP Principles, as well as a new timeline and process for their completion. Concurrent with discussions on the IP Principles, drafting of the IP Manual continued.

**3.50** By December 2006, the overarching approach and guidance to IP management had not been finalised. Although there has been progress in developing both a *Statement of IP Principles* and a manual of better practice guidance on IP management, it is still not clear when either the IP Principles or the IP Manual can be expected to be finalised or released.

**3.51** Almost three years after agreement to the earlier audit report recommendations an overarching approach and guidance to agencies on IP management has not been achieved. As a result, there continues to be little profile given to IP management. The original concern that agencies are continuing to devise their own approaches to managing IP without the benefit of the assistance and guidance that an overarching approach could provide, still exists.

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<sup>44</sup> In this context, an Executive Minute is a response (prepared by the Chief Executive of an agency) to a recommendation of the JCPAA. Executive Minutes provide information to the JCPAA on the actions being taken by agencies in response to administrative recommendations (that is, recommendations that have no implications for existing Government policy) of the JCPAA. Executive Minutes are expected to be provided by the responsible Minister to the Chairman of the JCPAA within six months of tabling of the JCPAA report.



## 4. Finalising the overarching approach and guidance

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*This chapter explains the reasons why the overarching approach and guidance on IP management has not yet been finalised. It examines the way in which the approach was developed and outlines some issues that should be considered when working across portfolios in the development of whole-of-government initiatives.*

### Towards finalisation of the overarching approach

**4.1** A number of factors have contributed to delays in finalising the overarching approach and guidance. Some of the delay was attributed by the agencies involved in the audit to factors beyond their immediate control: the federal election in 2004 and the changes in administrative arrangements that followed; and the resource demands associated with preparations for implementing the Australia – United States Free Trade Agreement (AUSFTA). However, more recent delays are linked to the absence of agreement on important issues, including:

- whether or not compliance with the IP Principles (and accompanying IP Manual) would be mandatory;
- to which agencies it was intended that the IP Principles and IP Manual apply;
- how the IP Principles and IP Manual should be released; and
- the allocation of responsibility for ensuring that the approach is achieving its goal and how will this be evaluated.

**4.2** These recent delays are indicative of the complexities involved in developing a whole-of-government approach, particularly in identifying and resolving the types of problems that arise when co-ordinating and considering cross-portfolio issues.

**4.3** There has been renewed attention within the Australian Public Service (APS) to whole-of-government issues and the unique challenges they pose for policy and administration. It has been noted that special attention should be given to the processes used within government when dealing with problems that have a whole-of-government dimension. Recent efforts have focused on providing further guidance to agencies on more effective co-ordination when

dealing with whole-of-government issues. There are some areas that bear particular relevance to the development of the overarching approach to IP management.

## **The increasing focus on improving co-ordination of whole-of-government activities**

**4.4** The renewed emphasis on improving efforts to co-ordinate activities across government is marked by the release of a report in 2004 by the Management Advisory Committee (MAC) that focused on identifying better, practical ways of working across organisational boundaries on activities that span more than one agency.<sup>45</sup> The report noted that the increasing pressure on the APS to offer sophisticated policy advice on complex policy challenges meant that successful approaches to whole-of-government work was becoming increasingly important.

**4.5** The report defined whole-of-government in the APS as follows:

Whole-of-government denotes public service agencies working across portfolio boundaries to achieve a shared goal and an integrated government response to particular issues. Approaches can be formal and informal. They can focus on policy development, program management and service delivery.<sup>46</sup>

**4.6** The Secretary of the Department of the Prime Minister and Cabinet (PM&C), Dr Peter Shergold AM, has stated that whole-of-government approaches are important in ensuring that the collective decision-making of the Australian Government is based upon the best-informed articulation of the challenges faced and an assessment of the different means by which they might be addressed.<sup>47</sup> According to Dr Shergold, the key to providing a whole-of-government perspective is to:

ensure that the policy presented to government for debate and decision has examined all aspects of the issue under consideration. It should clearly articulate the problems which the policy is seeking to address and the

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<sup>45</sup> Management Advisory Committee, *Connecting Government: Whole of Government Responses to Australia's Priority Challenges*, MAC, Canberra, 2004, p. 3. Available from the Australian Public Service Commission's website <[www.apsc.gov.au/mac/index.html](http://www.apsc.gov.au/mac/index.html)>

<sup>46</sup> *ibid.*, p. 4.

<sup>47</sup> Shergold, P., A speech to launch '*Connecting Government: Whole-of-Government Responses to Australia's Priority Challenges*', Canberra, 20 April 2004. Available from the Department of the Prime Minister and Cabinet's website <[www.pmc.gov.au/speeches/shergold/connecting\\_government\\_2004-04-20.cfm](http://www.pmc.gov.au/speeches/shergold/connecting_government_2004-04-20.cfm)>.

outcomes it is seeking to achieve. It is not unknown for the purpose even of well-developed policy proposals to remain opaque. Indeed in many cases the precise objective of policy is only revealed through 'strategic conversation' between the central, line and operational agencies that share an interest in its development. It is not just answers that emerge through discussion and debate: so do many of the questions.<sup>48</sup>

**4.7** The MAC report reviewed approaches to successful whole-of-government work, and provided practical guidance to agencies on dealing with whole-of-government issues. The report noted that development of whole-of-government issues require that special attention be given to the processes used within government to achieve whole-of-government outcomes. There is an expectation that the APS works across organisational boundaries to develop well informed, comprehensive policy advice and implement government policies in an integrated way.

**4.8** Although there is no 'one size fits all' approach for developing whole-of-government initiatives, the report did note that there is a series of common principles and challenges that need to be met for whole of government initiatives to be successful. The report provided a set of principles and best practice guidance to assist agencies when working on whole-of-government issues.

**4.9** Responding to the report, in March 2005 Secretaries of APS agencies issued a practical guide on how members of the APS should work together to implement whole-of-government approaches.<sup>49</sup>

**4.10** Both the report and the Secretaries' practical guide outline a number of principles that are relevant to the development of the whole-of-government approach to IP. One area given particular attention is the need to establish appropriate structures for co-ordination and co-operation amongst agencies working on whole-of-government challenges. Progress in finalising the current overarching approach to IP has been hindered by differences of opinion amongst the agencies involved on a number of issues. Greater attention to the principles applying to establishing and maintaining an appropriate structure and process for co-ordination may have assisted in more effectively progressing the IP principles and IP Manual.

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<sup>48</sup> *ibid.*

<sup>49</sup> Management Advisory Committee, *Working together: principles and practices to guide the Australian Public Service*, MAC, Canberra, 2005, p. 1 available from the Australian Public Service Commission's website <[www.apsc.gov.au](http://www.apsc.gov.au)>.

## Formalising the structure and process

**4.11** There is a need for careful choice about the way in which whole-of-government work will be conducted and supported.<sup>50</sup> Choosing an appropriate structure for co-ordination of views and co-operation in the development of whole-of-government approaches helps ensure that relevant views are considered, opinions expressed, risks identified, options proposed, decisions made and ultimately that the chosen approach is supported.

**4.12** Recognising the cross-portfolio nature of the task, it was identified early on that a 'steering committee' comprising AGD, DCITA, IP Australia, and Finance would supervise the development of the overarching approach to IP. However, it was not until July 2005 that Finance was formally invited to participate in the IDC that had been established. The first subsequent IDC meeting was held in August 2005—seventeen months after the first meeting of AGD, DCITA and IP Australia in March 2004 and a year after their meeting prior to the JCPAA hearing.

**4.13** By August 2005, there had already been significant work done on developing the approach, including the drafting and circulation of the IP Principles, as well as the proposed consultation strategy and consultation issues paper. The IDC continued to be working to tight timeframes. At the time of that August 2005 meeting, it was still intended that the IP Principles be released for public comment the next month, with consultations on the IP Principles to occur in October 2005 and the IP Principles to be finalised and published in December 2005. These pressures left little time for dealing with new perspectives raised by Finance and for resolving the issues that had arisen, since they had the potential to require significant revision of the work already done on the approach.

**4.14** This was compounded by gaps in understanding amongst IDC members of the exact nature and role of the IDC, its purpose and the respective responsibilities of IDC participants. Clear terms of reference for a chosen working structure, formally communicated to appropriately senior members of agencies invited to participate, can help to ensure that appropriate resources and attention are given to the particular issue or participation in the process. This can also help to establish a clear understanding of the roles of the participants and the responsibilities associated with participation, as well as to

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<sup>50</sup> Management Advisory Committee, *Connecting Government: Whole of Government Responses to Australia's Priority Challenges*, MAC, Canberra, 2004, p. 3.

ensure appropriate authority and leadership for decision-making. Both the MAC report and the Secretaries' practical guide provide further advice on good practices in organising appropriate structures to deal with cross-portfolio co-operation on whole-of-government issues.

**4.15** The absence of a shared understanding of the role of the IDC and of the intended process for decision-making and resolving disputes meant that some important issues, rather than being given an appropriate opportunity for resolution at departmental level, were often raised in correspondence between Ministers. Clear and early agreement on the processes for resolution of disputes within the IDC may have meant that some of these issues were able to be more readily resolved in that forum.

## **Documenting progress, deliberations and decisions**

**4.16** Gaps in record-keeping also made it harder to ascertain what decisions had been made, the various views and perspectives proposed and considered, and any risks that had been identified and addressed. Preparing (and circulating where necessary) records of meetings and key decisions are important in ensuring that there is a shared understanding of the status and direction of the group and also in facilitating and recording agreement amongst participants. As MAC notes in the good practice guide that accompanies its report:

Whole of government issues being considered by IDCs will, by definition, be important. Everyone involved has a part to play in making sure a full paper trail of the IDC deliberations is left behind. This includes relevant actions and discussions taken outside the formal IDC process.<sup>51</sup>

**4.17** The gaps in recording and circulating deliberations and decisions made engaging in discussions and resolving disagreements on aspects of the approach more difficult, since the reasons for adopting earlier approaches and options were not immediately obvious, nor was it clear whether associated risks were properly identified and addressed.

**4.18** Insufficient recording and reporting of key events, decisions and differences of opinion, also make it more difficult to track and report on progress against expected milestones, and to identify reasons for and respond to delays.

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<sup>51</sup> Management Advisory Committee, *Connecting Government: Whole of Government Responses to Australia's Priority Challenges, Good Practice Guides*, MAC, Canberra, 2004, p. 22.

**4.19** Differences in views and perspectives can be expected when dealing across portfolios and hence with complex policy issues. Choosing an appropriate structure and agreeing on a process for co-ordination of such views, however, can ensure that the reasons for such differences are fully explored and understood. This enables advice to be formulated and decisions made on how to proceed with a shared understanding of the relative risks, benefits and impact of the various possible approaches.

**4.20** The earlier involvement of Finance (as was originally identified as necessary by the early IDC participants), along with a clearer understanding and statement of the purpose, processes and roles of the IDC and IDC members may have facilitated earlier identification, discussion and resolution of the current issues that continue to delay finalisation of the overarching approach.

## **Considering implementation**

**4.21** There has, to date, been little attention paid to issues associated with how the approach will be implemented. In other words, the question of how the IP Principles and IP Manual will be used and supported to achieve the intended changes in organisation behaviour has not been fully explored. Indeed, there has been renewed discussion about whether, on their face, it is clear exactly what the IP Principles are aimed at achieving, in terms of what behaviours they are expected to drive and at which agencies they are directed. That is, there appears to be uncertainty about the intended purpose of the IP Principles, in terms of what they are expected to achieve and how they are expected to do it. It is not clear who will be responsible for providing advice to agencies on the effect of the IP Principles and IP Manual and assistance with their implementation. There still remain uncertainties around how the IP Principles and IP Manual will be released. It is not clear who will be responsible for maintaining the IP Principles and IP Manual or for reviewing their effectiveness in achieving their intended goals.

**4.22** Considering how a policy is to be implemented should be an integral part of policy design.<sup>52</sup> Earlier attention to questions of implementation can ensure that these questions are resolved at an early stage, with risks to implementation being considered and incorporated into the proposed approach. A better understanding of what is intended to be achieved, how,

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<sup>52</sup> Australian National Audit Office and Department of the Prime Minister and Cabinet, *Implementation of Programme and Policy Initiatives, Better Practice Guide*, ANAO, Canberra, 2006, p. 7.

and by who, can influence the development of the approach itself by sharpening focus on its underlying objective(s) and lead to better, clearer and more practical policy more clearly focused on intended outcomes. It will also ensure that consideration is given to what will occur once the approach is finalised.

**4.23** Greater and earlier consideration of how the overarching approach to IP management would be implemented could have also helped resolve some of the current discussion that surrounds the underlying purpose and basis for the approach. Focusing on these issues early could also have helped to ensure that the IP Principles (and the associated IP Manual) clearly enunciate the obligations and expectations placed on agencies as a consequence of their promulgation.

**4.24** Considering implementation early enables a critical appraisal of whether the proposed approach itself is the most efficient and effective way of achieving the defined objectives. It forces questions about intended purpose, how this purpose will be achieved and by who, to be considered and resolved early in the development process.

## **Performance measuring and reporting**

**4.25** Monitoring and review are fundamental elements of sound governance and quality management.<sup>53</sup> Good performance measurement, evaluation and reporting supports ongoing assessment of progress and provides an opportunity to assess whether or not intended objectives or outcomes are being achieved. Performance reporting will assist in identifying whether the chosen approach (that is, the IP Principles and IP Manual) is itself effective in contributing to the goal of improving IP awareness and management across the Australian Government.

**4.26** Good performance reporting involves clear and concise specification of well-chosen indicators and a balanced set of measures for reporting on and comparing performance.<sup>54</sup> Performance indicators should be designed to enable an assessment of progress towards achieving the desired outcome. For example, where an intended outcome is to improve IP awareness within the Australian Government, a possible performance indicator could involve

<sup>53</sup> Australian National Audit Office and Department of the Prime Minister and Cabinet, *op cit.*, p. 52.

<sup>54</sup> Australian National Audit Office and Department of Finance and Administration, *Better Practice in Annual Performance Reporting, Better Practice Guide*, ANAO. Canberra, 2004, p. 8.



measuring awareness of IP and IP management within agencies. Another indicator of improved IP management could be the extent to which agencies have developed individually tailored policies and practices for the management of IP within their organisations.

**4.27** As part of the process of developing the overarching approach to IP management, consideration should be given to clearly identifying and assigning responsibility for reporting and reviewing progress, and responsibilities for the achievement of milestones and outcomes (including the development of appropriate performance measures).

**4.28** Early consideration of performance measurement and indicators could have further assisted in clarifying the intended objectives and outcomes and in fostering analysis of how the proposed approach will contribute to their achievement.

### **Leadership: raising awareness of the need for IP management across the Australian Government**

**4.29** Recommendation No. 2 of the earlier audit was aimed at facilitating increased awareness amongst agencies of their individual responsibility for IP management, especially given the value of IP to the Australian Government.<sup>55</sup> As noted in the earlier audit, leadership, through a clear senior commitment to IP management, is crucial in achieving the culture necessary for appropriate management of IP. An overarching approach to IP management was recommended as one way by which awareness of the importance of, and the need for, individually tailored approaches to IP management could be achieved.

**4.30** As noted earlier, some of the benefits of improved IP management include improved:

- accountability for resources;
- management of risk;
- operational performance;
- efficiency and effectiveness in the use of IP resources;
- budgeting and financial management; and
- asset management.

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<sup>55</sup> As mentioned in paragraph 2.9, the total value of Commonwealth IP is likely to be several billion dollars.



**4.31** The ANAO still considers that the overarching approach to IP management should be finalised as soon as is practicable. An overarching approach will assist in raising awareness amongst agencies of their individual responsibility for IP management. Appropriately communicated, the overarching approach could give the necessary profile to the importance of IP management. An overarching approach could clearly define the Government's expectation that all agencies manage IP within their control according to their individual needs and circumstances.

**4.32** In order to be effective in raising awareness, any overarching approach should clearly describe:

- what is expected to be achieved;
- what is expected of agencies to which the approach applies; and
- who is responsible for ensuring that the approach is achieving what was intended and how will this be evaluated.

**4.33** In considering implementation of the approach, attention should be given to questions of who will be responsible for providing advice to agencies on the approach and assistance with its implementation.

## Recommendation No.1

**4.34** The ANAO recommends that work to implement Recommendation No. 2 of the earlier audit and the subsequent recommendations of the JCPAA be finalised as soon as is practicable.

*All agencies agreed or agreed in principle with this recommendation. Further specific comments received from agencies in relation to this recommendation are provided below.*

### Attorney-General's Department

Agree. Further consultation with agencies and consideration by Ministers is expected before a whole-of-government framework for management of IP can be completed. Consequently, it is not expected that the framework will be finalised until some time in the first half of 2007.

### Department of Communications, Information Technology and the Arts

DCITA agrees that implementing the Australian Government's approach to IP management across the Australian Government should be finalised as soon as possible and is working with the lead agency (since March 2005), Attorney-

General's Department (AGD) and other relevant Departments as part of an Inter Departmental Committee to achieve this goal.

## Department of Finance and Administration

Finance supports this Recommendation. Finance notes that new policy aspects may need to be put to the Government, by the relevant Minister, for formal approval.

## IP Australia

Agree in principle. The development of agreed roles and responsibilities for each member agency of the IDC will assist IP Australia in planning for appropriate resources to be available.

## Recommendation No.2

**4.35** The ANAO recommends that the development of the overarching approach and guidance to IP management should:

- include a clear statement of intended purpose, outlining what outcomes the approach is expected to achieve and how it will achieve these outcomes; and
- clearly identify and assign responsibility for reporting and reviewing the effectiveness of the approach in achieving the defined outcomes, including through the development of appropriate performance indicators to measure progress.

*All agencies agreed or agreed in principle with this recommendation. Further specific comments received from agencies in relation to this recommendation are provided below.*

## Attorney-General's Department

Agree in principle. It is expected that the whole-of-government framework for management of IP, as expressed through a *Statement of IP Principles*, will meet expectations with respect to clarity of intent.

The Department notes the recommendation by the JCPAA, that 'the framework should leave each Commonwealth agency free to optimise its role within the framework'.

Australian government agencies are individually responsible for management of resources, including IP, in their control or custody. While agencies are held individually accountable for these resources, there are limitations on the extent to which the use and management of the resources is controlled on a whole-of-government basis. It is therefore expected that agencies will be individually

responsible for implementation of the framework in accordance their own responsibilities.

A review of the effectiveness of the approach to IP management will be a matter for consideration by Ministers.

## **Department of Communications, Information Technology and the Arts**

DCITA notes the recommendation and will work with the lead agency, AGD, for this project.

## **Department of Finance and Administration**

Finance supports this Recommendation and notes that this would typically be part of any Government decision on the proposed policy. Finance also notes that it is important that the proposed Statement of IP Principles is approved by Government prior to release.

## **IP Australia**

Agree in principle. Responsibility for developing the intended purpose and outcomes etc. needs to be assigned at the earliest opportunity.

## **Conclusion**

**4.36** Although progress has been made, Recommendation No. 2 of the earlier audit has not been implemented. The target date of May 2006 set by the JCPAA in its recommendation for the completion of the overarching approach and guidance has passed. At this stage it still remains unclear when the approach will be finalised.

**4.37** Almost three years since the earlier audit identified a need for greater agency awareness of IP and IP management, there are few means by which the importance of IP management can be clarified and brought to the attention of agencies. Agencies continue to be left to develop their own approaches to managing IP without the benefit of the assistance and guidance that an overarching approach could provide. Indeed, some agencies have suggested that they are awaiting the finalisation of the approach before developing or reviewing their own individual approaches to IP.

**4.38** Although there has been progress in developing both a Statement of IP Principles and a manual of better practice guidance on IP management, it is still not clear when either the IP Principles or the IP Manual can be expected to be finalised or released. Early delays were attributed to administrative changes following the federal election in 2004, as well as pressures on resources caused by preparations for the implementation of the AUSFTA. However, recent

delays have stemmed primarily from continuing failure to resolve a number of issues regarding the proposed approach, including:

- whether the IP Principles are in fact supported by existing policy;
- whether it is intended that the IP Principles create binding rules or a merely guidelines to be taken into account, and whether this intention is made sufficiently clear by the IP Principles; and
- to which agencies the IP Principles will apply (or are relevant). For example, whether the IP Principles will apply equally to bodies subject to the FMA Act as to those subject to the *Commonwealth Authorities and Companies Act 1997*.

**4.39** Although disagreements and differences in view may be unavoidable, establishing appropriate structures and processes can help to speed co-ordination and understanding of different views and agreement on ways of dealing with the differences. Although early efforts identified the need to include Finance in the development of the overarching approach so as to ensure that its views were considered, it was not until relatively late in the process that Finance was first formally involved. When issues arose that led to disagreement or uncertainty in the proposed approach, gaps in documentation and circulation of key decisions contributed further to a lack of shared understanding of direction and the underlying rationale for the chosen approach. The informal structure that had developed, with no formal agreement or mechanisms for reaching agreement or resolving issues also contributed to difficulties in reconciling views and reaching agreement. Finally, insufficient early attention was paid to considering questions of implementation and the possible risks to implementation. This meant that some fundamental questions relating to the approach have only recently been raised and considered. Some of the recent areas of discussion relate to questions about the underlying purpose of the IP Principles. Improved initial recording of the decisions leading to the adoption of the current approach, including the rationale and analysis of risks, could have assisted in reaching a shared understanding amongst those involved and assisted in more timely resolution of these remaining issues.

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Ian McPhee  
Auditor-General

Canberra ACT  
6 February 2007

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