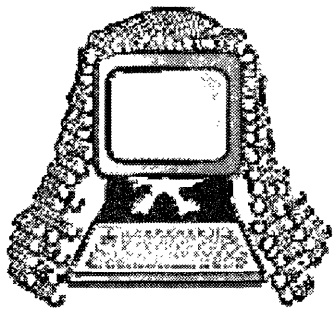

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Selling ICT to the Federal Government- "the times they are a-changing"

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Government is by far the largest purchaser of information and communications technology (ICT) products and services in Australia and the Federal Government is the largest single customer, accounting for approximately 46% of the total government market.[1]

The Federal Government market represents a huge opportunity for ICT suppliers but it can also pose significant challenges. To the uninitiated (and this would seem to include most small to medium enterprises)[2], the path through the Commonwealth procurement process can be long and arduous and opportunities can be lost due to a lack of appreciation of the purchasing agency's requirements and the constraints within which the agency must operate.

The purpose of this paper is to identify the various regulations and guidelines which apply to Federal Government purchases of ICT and to discuss some of the legal and procedural issues. It would seem to be a good time to undertake such a review given the changes to procurement policy recently announced by the Federal Government, changes which are informed by a greater degree of commerciality and flexibility than in the past.

The issues that will be touched on in this paper are:

(i) procurement policy and legislative requirements in the Federal Government market;

(ii) the "Endorsed Supplier Arrangement";

(iii) the "Government Information Technology and Communications" (GITC) framework;

(iv) the Federal Government review of the GITC framework;

Continues page 3

In this issue:

Continued from page 1

(v) the Federal Government review of liability provisions in ICT contracts;

(vi) the whole of government review of Federal Government IP management;

(vii) the "Commonwealth IT IP Guidelines"; and

(viii) the "Whole of Government Telecommunications Arrangements".

Procurement policy and legislative requirements in the Federal Government market

There is a significant body of regulations and policies that govern Commonwealth procurement. Generally speaking, the regulations and policies apply regardless of the nature of the goods or services (ICT or otherwise) being purchased.

They include:

(a) the *Financial Management and Accountability Act 1997* (FMA Act) and *Financial Management and Accountability Regulations 1997* (FMA Regulations);

(b) the "Commonwealth Procurement Guidelines";

(c) "Chief Executive's Instructions";

(d) "Finance Circulars" issued by the Department of Finance and Administration; and

(e) other guidance documents developed by the Federal Government to assist relevant agencies with their procurement decisions.[3]

A. The FMA Act and FMA Regulations

The FMA Act and FMA Regulations provide the legislative framework governing financial management in Federal Government agencies. They set out the requirements that must be satisfied before an agency can enter into a commitment to spend public money under a contract, agreement or arrangement.

For example, the Minister for Finance and Administration may from time to time issue the "Commonwealth Procurement Guidelines" (CPGs)[4] about matters relating to the procurement of property and services by relevant departments and agencies (Regulation 7).

Further, officials must have regard to the CPGs when performing duties related to procurement. Where officials act in a manner inconsistent with the CPGs they must document their reasons for doing so (Regulation 8).

Regulation 9 of the FMA Regulations requires that an approver of a proposal to spend public money must, among other things, not approve the proposal unless satisfied that the expenditure is consistent with the policies of the Commonwealth and the expenditure will make efficient and effective use of public money. This links in with Regulation 13 which provides that an agency must not enter into a contract, agreement or arrangement under which public money is or may become payable unless a proposal to spend public money has been approved under the relevant FMA Regulations.

B. The Commonwealth Procurement Guidelines

The CPGs set out the overall policy framework for Federal Government procurement. They apply to all departments and agencies subject to the FMA Act (core Federal Government agencies which account for a large percentage of Federal ICT spend) and their officials, when performing duties relating to procurement. Generally speaking, FMA Act agencies comprise Departments of State, Departments of the Parliament and prescribed agencies described in the FMA Regulations.[5]

With a limited number of exceptions, the CPGs do not apply to bodies subject to the *Commonwealth Authorities and Companies Act 1997* (CAC Act).[6] Examples of CAC Act bodies are the Reserve Bank of Australia and the Australian Nuclear Science and Technology Organisation.

The core principle underpinning Federal Government procurement is "value for money". This requires an assessment of alternative procurement options to select the option that achieves the required outcome and represents best value, while taking into account all relevant benefits and costs over the whole procurement cycle and all relevant legislation and government policies.[7]

Needless to say, value for money is not just about the lowest price. The Department of Finance and Administration suggests that to get the best value for money, agency customers may consider such matters as:

(i) the relative risk of a proposal;

(ii) the supplier's performance history;

(iii) all direct and indirect financial costs and benefits over the life of a procurement, eg ongoing maintenance costs;

(iv) the flexibility of a proposal to adapt to possible change; and

(v) the anticipated price that could be obtained, or cost incurred, at the time of disposal.[8]

The CPGs provide suppliers of ICT to the Federal Government with some comfort that probity, accountability and transparency are an integral part of Commonwealth procurement. They also offer useful guidance on the likely approach to be taken by agencies on important issues such as risk and liability.

For example, the CPGs provide that:

> As a general principle, risks should be borne by the party best placed to manage them- that is, the Commonwealth or relevant CAC Act body should not accept risks which another party is better placed to manage.[9]

However, the CPGs also reflect an acceptance that in certain circumstances the Federal Government may agree to limit a supplier's potential liability, for example through indemnifying the supplier or capping liability. They provide that if there is a compelling reason to agree to limit a supplier's liability, each indemnity, liability cap or similar arrangement must, wherever possible, be of a limited scope and with limited maximum liabilities, both in relation to each event that can cause

liability to arise and the number of those events.[10]

For any proposal to limit a supplier's liability to the Commonwealth, the CPGs require that a risk assessment be conducted and a risk management plan is prepared where necessary. Where a risk assessment is conducted, it must include an analysis of the potential for the limitation of liability to result in direct or indirect costs to the Commonwealth.

For example, where a limitation of liability is called upon by a supplier, this may result in the Commonwealth bearing the burden of costs that the supplier would otherwise have been contractually bound to pay. These potential costs must be considered by the agency as part of its overall assessment of value for money.[11]

The liability regime in Federal Government ICT contracts is currently under review and is discussed further below.

C. Chief Executive's Instructions

Section 44(1) of the FMA Act requires chief executives of FMA Act agencies to manage the affairs of the agency in a way that promotes "efficient, effective and ethical" use of Commonwealth resources for which the chief executive is responsible.

Chief executives may issue "Chief Executive's Instructions" (CEIs) on any matters necessary or convenient for carrying out or giving effect to the FMA Act or FMA Regulations. In the context of procurement, CEIs will generally relate to the interpretation of policy and financial management frameworks and may provide operational instructions to agency officials.[12] CEIs are legally binding upon the officers of FMA Act agencies.

D. Finance Circulars

"Finance Circulars" may be issued by the Department of Finance and Administration from time to time to advise on such matters as key changes and developments in the Federal Government's procurement policy framework.

There are a number of Finance Circulars which are relevant to Commonwealth procurement. These include Finance Circular 2003/02 "Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort"[13] (Indemnities Circular).

Ordinarily, the Federal Government will require a supplier to agree to give an indemnity in relation to loss or damage suffered as a result of a supplier's acts or omissions[14] but will be reluctant to give one in return. The Indemnities Circular provides direction on:

(i) when the Commonwealth will give an indemnity, guarantee, warranty or letter of comfort;

(ii) to whom the Commonwealth may give an indemnity, guarantee, warranty or letter of comfort;[15]

(iii) reporting and disclosure of these instruments; and

(iv) risk management principles associated with these instruments.

The Indemnities Circular provides that it is Federal Government policy to agree only to take on the risks associated with an indemnity, guarantee, warranty or letter of comfort where the expected benefits, financial or otherwise, are sufficient to outweigh the level and cost of the risk. As with the CPGs, the Indemnities Circular makes it clear that the risks and associated costs must be taken into account as part of the broader consideration of value for money.[16]

This is an important point. The commercial reality (not always acknowledged by government purchasers) is that risk imposed on the supplier (or refused to be assumed by the agency) will generally add to the price. In some cases, unrealistic contractual indemnities and other provisions which require the supplier to bear all liability might even result in the supplier refusing to enter into a contract at all.

The Endorsed Supplier Arrangement

The "Endorsed Supplier Arrangement" (ESA) is a pre-qualification program for suppliers of ICT goods and services (including major office machines) to the Federal Government and is administered by the Department of Finance and Administration. Use of the ESA scheme is mandatory for FMA Act agencies purchasing ICT and major office machines.

To become an "Endorsed Supplier", the supplier must satisfy a range of criteria including in relation to matters such as financial viability, industry development, quality, standards and service. A supplier which satisfies these requirements must then sign an ESA "Head Agreement". The main purpose of the Head Agreement is to provide a centralised facility to hold insurance policies and performance guarantees for Endorsed Suppliers.

It is important to remember that even if a supplier is an Endorsed Supplier there is no guarantee of receiving orders for supply of goods or services to the Federal Government. To be selected to provide goods or services, the Endorsed Supplier will still need to tender in relation to the relevant opportunity. If successful, the supplier will also need to enter into the GITC version 4 framework documents.

The ESA scheme is supported by an online application and assessment system. Information about Endorsed Suppliers is made accessible to prospective Federal Government buyers through an online search facility. More information on the ESA scheme can be found at www.esa.finance.gov.au.

The Federal Government has recently announced that the ESA scheme will soon be reviewed.[17] No time frame has been announced or any consultation paper released.

Government Information Technology and Communications Framework

The purchase of information technology and major office machines by both State and Federal Governments in Australia has been undertaken since the early 1990s pursuant to the "Government Information Technology and Communications" (GITC) framework.

The GITC framework provides standard terms and conditions for the purchase of ICT goods and services. Although not mandatory, the use of

the GITC framework is recommended by the Department of Communications, Information Technology and the Arts for use by all Federal Government agencies.[18]

The GITC framework provides for a term agreement entered into by the supplier with a central purchasing authority under which government customers can place orders from time to time. Each order incorporates a set of standard terms and conditions and forms a discrete contract of supply between the customer and the supplier.

The GITC framework has undergone a number of revisions since its inception in 1991. GITC version 2 superseded GITC version 1 in 1994 and is still used in Tasmania. Of the other versions that have since been released, GITC version 3, released in 1998, is used in the Northern Territory and GITC version 4, released in 2001, is used by the Commonwealth and, in a modified form, in the Australian Capital Territory, Victoria and Western Australia.[19] South Australia has been known to use a variety of different contracts for ICT procurement, including both GITC 2 and GITC 4.[20]

More recently, Queensland has drafted a GITC version 5, which replaces GITC 2 in that State. In New South Wales, the "Procure IT" standard terms and conditions for IT contracts have been developed to replace GITC 2. The intention is that as each panel arrangement is established or comes up for renewal, Procure IT will apply.[21]

GITC 2 is considered to be the "high water mark" in terms of the level of complexity and the bias of its terms and conditions in favour of the government. GITC 3 was drafted with the intention of being a more even-handed and simpler document. GITC 4 is a more refined and developed version of GITC 3.

Where a Federal Government contract is included in tender documents provided to potential suppliers, it is typical for the Commonwealth customer to require suppliers to indicate their compliance with the clauses of the contract in the tender response. In such circumstances, it is important for the supplier to review the contract before submitting its tender, indicating whether it wishes to negotiate alternative clauses. Failure to do so will generally mean the supplier will be bound by the customer's terms.[22]

One of the issues with the GITC framework is that although it is meant to be a standing offer by the supplier which can be accepted at any time by a qualified customer, in reality, the placing of an order often requires significant negotiation, including around contract scope and price, not to mention special terms and conditions which can amend the GITC standard terms. This is because the goods and services typically supplied under a contract are not "off-the-shelf" items but rather a complex mix of products and services which have been developed to meet a customer's requirements. The value, therefore, of the GITC framework as a standing pre-negotiated agreement is somewhat limited.

Another criticism of the GITC framework (especially GITC 2) is that it is overly biased in favour of the government customer. This criticism is warranted. It is an unfortunate consequence of the Federal Government's buying power that suppliers often find it difficult to negotiate reasonable terms with government customers.

In a significant development, the Federal Government is now in the process of comprehensively reviewing the GITC 4 framework. This is discussed in more detail below.

The Federal Government review of the GITC framework

The Federal Government has recently announced significant changes to its ICT policy, the stated aim of which is to make contracting with agencies simpler for ICT suppliers. The announcement follows the commencement in March 2005 of a review of GITC 4 in consultation with industry.

The review found that there is continued interest from suppliers in some form of model contract that could be used across government for ICT procurement. According to the review, "suppliers felt that model contracts help to reduce unnecessary variations between agencies and can significantly reduce the cost of doing business with Government."[23]

However, the review also acknowledged that the existing structure of GITC 4 (essentially, a set of standard clauses from which ICT contracts can be built by government agencies) is not useful for all types of procurement, particularly where smaller agencies with staff inexperienced with ICT contracts are involved in negotiations. It was recognised that adjustments to GITC 4 are needed to:

(a) reflect changes in technology since its last revision in 2001;

(b) focus greater attention on provisions relating to software development, managed services and open source software; and

(c) improve the wording of the provisions in a number of areas.

One of the major changes announced is the development of a series of "model contracts" which will be tailored to the different elements of ICT procurement (for example, hardware, software development, software licensing and managed services).[24] It is understood that the model contracts will not be mandatory but agency uptake will be encouraged.

The intention in moving to model contracts is to replace the range of contracts and non-standard terms currently used by Federal Government departments and agencies and thereby reduce the time and costs of negotiation. However, if use of the model contracts is not mandatory, it is difficult to see how this will be achieved.

The Federal Government has previously stated that it expects that the model ICT contracts will be available for use by the end of May 2006 following further industry consultation.[25] Ideally, the model ICT contracts should incorporate any recommendations arising from the three other reviews currently being undertaken at the Federal level: the review of liability in Federal Government ICT contracts, the whole of government review of Federal

Government IP policy and the review of the "Commonwealth IT IP Guidelines". These reviews are discussed further below.

As part of the Federal Government's review of the GITC 4 terms, it is hoped that the reviewers will bear in mind that both sides ultimately need to benefit from the arrangement. As has been recognised elsewhere, "there is no point writing a contract that puts a vendor in an unsustainable position, as it will eventually be reflected in the level of service that the vendor gives, and will be reflected in the agency's performance".[26]

The Federal Government review of liability provisions in ICT contracts

During the consultation process for the GITC review, ICT suppliers identified liability, IP and endorsed supplier arrangements as the key areas which need to be addressed.[27] When it comes to liability, it is the capping of supplier liability that is often the key issue.

The capping of supplier liability in ICT contracts with agency customers occurs more often in practice than many realise.[28] According to the Minister for Communications, Information Technology and the Arts, Senator Coonan, "evidence suggests that liability is capped in 90 per cent of contracts, but the Government will ensure that this is made explicit in the next version of GITC to avoid confusion and protracted negotiations".[29]

Unfortunately, it remains the case that the allocation of risk and liability under an ICT contract with a Federal Government agency is largely a function of the parties' respective bargaining power.[30] The problem for suppliers is that they are usually in a much weaker negotiating position than the government customer.

At the time of release of the outcomes of the GITC review, the Minister also released for consultation two draft documents on a proposed approach to limiting supplier liability under Federal Government ICT contracts. The documents released were:

(a) "A guide to limiting supplier liability in ICT contracts for Australian Government agencies- Developing and implementing a risk assessment and mitigation strategy" (2005) (Draft Guide).

(b) "Companion to the Guide to Limiting Supplier Liability in Australian Government ICT Contracts- Discussion draft for comment" (2005) (Companion Guide).

Included at Appendix 2 to the Draft Guide is the proposed ICT liability policy of the Federal Government, entitled "Limited Liability in Information and Communications Technology Contracts" (ICT Liability Policy). When finalised, the ICT Liability Policy will be issued as a Finance Circular by the Department of Finance and Administration.

Both the Draft Guide (including the ICT Liability Policy) and the Companion Guide are available from www.dcita.gov.au/ict. The period for comment closed on 15 February 2006.

According to the Draft Guide, the ICT Liability Policy has been specifically developed to reflect the following particular characteristics of ICT procurement:

(i) Always insisting on unlimited supplier liability significantly reduces market competition, as many ICT suppliers are not prepared to accept such liability.

(ii) Always insisting on unlimited supplier liability may result in agencies paying a higher than necessary contract price as suppliers may include the cost of excessive insurance and risk in the price.

(iii) Some IT development is high risk for both parties and a more co-operative approach to sharing risk is sometimes necessary to find a supplier willing to undertake the work.

(iv) It is often difficult to pinpoint the exact cause of a catastrophic IT system failure, particularly where there are more than two parties with interconnecting responsibilities.[31]

In the past, many suppliers have experienced difficulties in negotiating with the Federal Government in relation to the liability provisions in ICT contracts. With the release of the Draft Guide it is hoped that this is about to change. While liability will still be a focus of many negotiations, once the ICT Liability Policy is finalised the parties should be better informed and negotiations will have the potential to run more smoothly.

For industry, the Draft Guide provides an important insight into how the Federal Government identifies and assesses risk and liability under ICT contracts. It is effectively a "how to" guide for procurement officers for the negotiation of limitation clauses in ICT contracts and sets out a detailed risk management process for agencies to follow.

Importantly, the ICT Liability Policy will be mandatory for all FMA Act agencies and those bodies subject to the CAC Act which are required to comply with the CPGs. Compliance with the ICT Liability Policy will ensure that the procurement of ICT products and services is in accordance with the FMA Regulations, which requires the customer to be satisfied that the proposed expenditure is in accordance with Federal Government policies.

Some of the key points from the Draft Guide are as follows:

(a) When purchasing ICT from suppliers, Federal Government agencies should, in most cases, cap each party's liability at appropriate levels. Clauses that impose unlimited liability on suppliers should only be included when they are justified by the "size, complexity or inherent risk of a project". Unfortunately, there is little guidance as to what is meant by this phrase. It would be useful for all parties if the Federal Government provided guidance here.

(b) Ultimately, the extent to which an agency will agree to a liability cap will depend on a risk assessment conducted by the agency. The more complex or high-value a procurement, the greater the focus that is likely to be put on the risk assessment. In such cases, agencies will often need to seek external help in the

form of specialist risk assessment and legal advice.

(c) As a general rule, the ICT Liability Policy supports the capping, at appropriate levels, of direct liability arising from breach of contract and negligence. However, the policy does not support capping of direct liability for breach of IP obligations, breach of confidentiality and privacy obligations, breach of supplier security obligations, unlawful or wilfully wrong supplier acts or omissions, acts causing personal injury, sickness or death or damage to tangible property.[32]

(d) Liability for indirect or consequential loss will need to be addressed on a case-by-case basis. Agencies must accept that some ICT suppliers will seek to exclude or cap liability for consequential loss and, in some cases, may be prepared to walk away if this is not agreed. The policy recognises that the parties need to adopt a realistic attitude to consequential loss that may be caused by the supplier and that in many instances a cap will be appropriate.[33]

(e) The policy recommends that Commonwealth procurement officers be realistic when it comes to negotiating insurance provisions. Where a supplier is required to take out insurance specifically for the contract, the cost of such insurance is likely to be fully passed on to the Commonwealth customer. The policy notes that requiring unnecessary insurance or insurance for risks that are remote or of low value may result in unnecessary costs.[34] This is unlikely to achieve best value for money in ICT procurement.

Of course, the extent to which a Federal Government agency will agree to limit an ICT supplier's liability will also be guided by the CPGs. As always, value for money will be a key consideration.

Importantly, the Draft Guide recognises that achieving value for money includes balancing the likelihood of a risky event occurring against the cost of mitigating or insuring against that risk. Where liability rests wholly with the supplier, the supplier will usually build the cost of meeting that liability into its price, which will ultimately be borne by the agency.[35] Thus, for procurement officers it will be a delicate balancing process to determine what achieves best value for money when weighing matters such as liability, risk and price.

In this respect, it is important to recognise that the ICT Liability Policy qualifies the CPGs. Whereas the CPGs provide that only in certain limited circumstances should a Commonwealth customer agree to limit a supplier's liability, the ICT Liability Policy provides that, as a default position, supplier liability for ICT procurements should be capped.[36]

It is also significant that the Draft Guide recognises that the focus need not be solely on provisions limiting supplier liability. Suppliers need to be aware that Commonwealth customers will also consider other measures to mitigate risk, such as the inclusion of detailed specifications in an ICT contract, a formal test and acceptance regime, and requirements for formal skill levels and competencies for supplier staff.[37] Effective contract management will also be relevant.

The whole of government review of Federal Government IP management

In February 2004, the Australian National Audit Office released a report on "Intellectual Property Policies and Practices in Commonwealth Agencies" (ANAO Report)[38]. The ANAO Report was the culmination of a wide-ranging audit undertaken by the ANAO into the approach of various Federal Government agencies to the management of IP.

The ANAO Report recognised that there is no "one size fits all" approach to management of IP by an agency.[39] Ultimately, the approach that is taken must be consistent with Commonwealth procurement requirements including those relating to the "efficient, effective and ethical" management of resources.[40] It is up to an agency to adopt IP management practices that are consistent with its core functions and objectives, and which are appropriate to the circumstances.[41]

In practice, only 30 per cent of agencies were found to have developed specific policies or procedures for managing IP.[42] This has the potential to lead to inconsistent positions being taken within an agency and across government which is far from ideal as it leads to uncertainty for suppliers.

In terms of contractual arrangements, the ANAO Report found that ownership of IP was most commonly dealt with through standardised contractual terms. Although some agencies were flexible in their approach, in most cases the agency insisted on taking ownership of IP.[43] This is not encouraging for suppliers, especially where the exploitation of that IP by the supplier may be the sole reason for a supplier's profit.

The ANAO Report recommended that agencies develop appropriate IP management policies and implement supporting systems and procedures. It also recommended that a whole of government approach be developed to the management of the Commonwealth's IP.[44]

Work has now begun on this "whole of government approach" to IP. The Commonwealth Attorney General's Department, IP Australia, the Department of Communications, Information Technology and the Arts and the Department of Finance and Administration are working together to develop a whole of government approach to the management of IP by Federal Government agencies.[45]

The purpose of the whole of government approach is to assist agencies to interpret and apply existing Federal Government policies as they relate to IP. As part of the process, a draft "Statement of IP Principles" has been developed to provide a focus for consultation (IP Principles).[46] The intention is for the IP Principles, in broad terms, to articulate the Federal Government's approach to IP use and management. The period for comment on the IP

Principles closed on 11 November 2005.

Ultimately, the Federal Government intends to develop a more detailed set of guidelines on the implementation of the IP Principles in the form of an "IP Better Practice Manual" (Manual). It is expected that the Manual will also incorporate a revision of the "Commonwealth IT IP Guidelines" with the intention of making it a more useful resource for officers engaged in IT procurement activities.[47]

At this stage, the IP Principles consists of 16 high-level principles intended to provide guidance on matters such as the creation and acquisition of IP by the Commonwealth and sharing, commercialisation, disposal and public access to Commonwealth IP. Encouragingly for suppliers, the IP Principles provide that "agencies should maintain a flexible approach in considering options for ownership, management and use of IP".[48] Further, the IP Principles recommend that in considering ownership options an agency should be mindful of:

(a) the agency's core objectives and activities;

(b) opportunities for obtaining value for money in all IP arrangements;

(c) opportunities for financial savings in procurement contracts including through vesting IP in or licensing IP to the supplier; and

(d) Federal Government policy objectives, including the promotion of industry development.[49]

The IP Principles also state that "when procuring IP material (whether such material is already in existence or yet to be created) an agency should endeavour to only obtain the ownership or licensing rights it requires to meet the Government's objectives".[50]

A common complaint of suppliers is that despite the various options available, agencies are often inflexible in negotiations and IP rights tend to be retained by the customer.[51] Given that in many cases the exploitation of IP is not a core function of government, and there is often not the skills, experience and expertise necessary to identify and develop IP,[52] it should only be in rare cases that the Federal Government requires a full transfer of ownership.

The Commonwealth IT IP Guidelines

The "Commonwealth IT IP Guidelines" (Guidelines)[53] were issued by the Department of Communications, Information Technology and the Arts in 2000. The purpose of the Guidelines is to provide practical guidance to Federal Government decision-makers so that they can make appropriate choices about the management of IT-related IP by Commonwealth agencies.[54]

One of the most important issues for any supplier of IT to the Federal Government is retention of ownership of IP. The IP of a supplier is often its core asset, without which future opportunities are limited. A supplier will be reluctant to transfer its IP to a customer because doing so will restrict its ability to licence and develop the IP for new and existing customers.

The Guidelines provide that, as a rule of thumb, the party best able to support and enhance the technology and pursue appropriate markets for the benefit of consumers should exercise ownership rights.[55] In many instances, this should be the supplier.

The Guidelines encourage agencies to only acquire the IP necessary for achieving their missions and to be alert to opportunities for financial savings. A recommendation is that, in developing contracts, agencies should not automatically assume that all IP rights must be vested in the Commonwealth. Rather, agencies should actively consider whether vesting the IP in the supplier might yield savings and in the long term more effectively meet agency objectives.[56]

Notwithstanding these lofty aspirations, the situation in practice is often quite different. IP is one of the most contentious issues in negotiating contracts with the Federal Government. According to the Australian Information Industry Association, many procurement officers have a "we pay we own" attitude resulting from a lack of awareness of Commonwealth policies and the issues.[57] The disconnect between policy and practice translates into less suppliers being willing to tender for Federal Government ICT contracts and, for those that do, the contract price will usually be higher and commercialisation opportunities tend to be lost.

The Guidelines have been included in the whole of government IP review. Stakeholder views have been sought in relation to issues including:

(a) identification of elements of the Guidelines that require updating;

(b) appropriate strategies which would encourage use of the flexibility offered by the Guidelines with respect to use and ownership of IT IP;

(c) appropriate changes to reflect increased emphasis on greater sharing and re-use of ICT within the Federal Government; and

(d) practical advice in managing IP in government procurement contracts.[58]

It is significant that the review of the Guidelines is occurring at the same time as the GITC review. According to Senator Coonan, as part of the GITC review the Federal Government's standard IT contract:

> will be amended to better reflect the Government IT IP guidelines that are being drafted and will clearly set out the range of options on the ownership and management of IP. We will ensure that the option of the supplier retaining or capitalising on IP generated by a Government project is given greater prominence.[59]

For ICT suppliers, it will be a welcome development if the Federal Government carries through on its rhetoric. It may see a reversal of the "we pay we own" mentality of Commonwealth procurement officers.

The Whole of Government Telecommunications Arrangements

The "Whole of Government Telecommunications Arrangements" (WoGTA) are a standing offer between the Commonwealth and carriers and carriage services

providers under the *Telecommunications Act 1997*. They have been used at Federal level since 1997 and consist of a set of standard terms and conditions which apply to every contract for telecommunications services arranged between a Federal Government department or agency and a third party.

The types of services that are covered by WoGTA include:

(a) local, long distance and international telephony;

(b) mobile telephony, data and fleet management;

(c) all data services including integrated services digital network (ISDN), frame relay, asynchronous transfer mode (ATM), ethernet, asymmetric digital subscriber line (ADSL) and other leased line services;

(d) private branch exchange (PBX) installation and management;

(e) satellite based data and telephony;

(f) managed voice and data including spectrum and inbound services (1300/1800 and 13 services); and

(g) related telecommunications services such as voice over IP (VoIP), virtual private networks (VPN), bill consolidation and management and video conferencing.

To participate, a service provider must sign a WoGTA head agreement with the Australian Government Information Management Office (AGIMO) which then acts as a single purchaser. Generally speaking, licensed carriers under the *Telecommunications Act 1997* may sign a WoGTA head agreement without first obtaining "Endorsed Supplier" status. Carriage service providers, on the other hand, must first obtain Endorsed Supplier status from the Department of Finance and Administration.

The WoGTA head agreement contains the fundamental terms and conditions under which telecommunications services are offered and supplied to the Federal Government. Beneath the head agreement are a number of schedules which include the terms and conditions that are to apply in contracts between individual agencies and service providers, the official order and other relevant documents.

AGIMO is responsible for negotiating the terms and conditions and pricing with service providers, and for administering the WoGTA framework. Once again, value for money will be a key consideration for AGIMO in determining whether a proposed supplier, and the terms and conditions of supply, will be acceptable.

More information in relation to WoGTA is available at *www.agimo.gov.au/infrastructure/telecommunications*.

Conclusion

A first step in understanding how Federal Government procurement works is to appreciate how it is different from the private sector. Because Federal Government procurement involves the expenditure of public money, it is a regulated process. Purchasing officers are bound by regulations and guidelines which dictate not only the processes to be followed but contractual positions to be taken on such things as risk and liability. Although these requirements result in a high degree of probity, accountability and transparency (generally, a benefit) they can also produce complexity, an over-emphasis on process, inflexibility in decision-making and the adoption of uncommercial positions. All of this can make the process cumbersome for suppliers.

In the context of ICT procurement, there have been a number of recent developments at the Federal level. These include the review of GITC 4 and the promise of simpler contracts for some ICT products and services, new guidelines in relation to risk and liability which permit greater risk sharing between agencies and suppliers and a new, more flexible approach to IP issues.

Federal Government procurement remains highly regulated and the need will remain for suppliers and Federal agencies to understand the regulations and processes to be in a position to make informed decisions. However, in the ICT space, things might be becoming a little easier for suppliers, and this is to be welcomed.

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[1] Australian Information Industry Association, *"Better Practice, Better Outcomes: Reforming Liability Regimes Under Government ICT Contracts"* (2004) at 7; see also Department of Communications, Information Technology and the Arts, *"Selling ICT to Government: A guide for SMEs"* (2003) at 9.

[2] Department of Communications, Information Technology and the Arts, *"Final Report of the ICT SME Joint Industry Government Working Party to Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts"* (2005) at paragraph 2.1.

[3] The Federal Government's procurement policy framework is described in detail at *www.finance.gov.au/ctc/procurement_policy_framework.html*.

[4] Department of Finance and Administration, *"Commonwealth Procurement Guidelines- January 2005"* (2005).

[5] There are currently more than 100 departments, agencies, authorities and companies subject in some way to the CPGs- see Department of Finance and Administration, *"Selling to the Australian Government- A guide for business"* (2005) at 3.

[6] CAC Act bodies listed in the *Commonwealth Authorities and Companies Regulations (1997)* as subject to section 47A of the CAC Act can be directed by the Minister for Finance and Administration to apply the CPGs.

[7] Department of Finance and Administration, *"Guidance on Complying with Legislation and Government Policy in Procurement- January 2005"* (2005) at 4.

[8] Department of Finance and Administration, *"Selling to the Australian Government: A guide for business"* (2005) at 7.

[9] Department of Finance and Administration, *"Commonwealth Procurement Guidelines- January 2005"* (2005) at 23.

[10] Department of Finance and Administration, *"Commonwealth Procurement Guidelines- January 2005"* (2005) at 23.

[11] Department of Finance and Administration, *"Commonwealth Procurement Guidelines- January 2005"* (2005) at 23.

[12] See Regulation 6 of the FMA Regulations and section 52 of the FMA Act.

[13] Department of Finance and Administration, *"Finance Circular No 2003/02- Guidelines for Issuing and Managing Indemnities, Warranties and Letters of Comfort"* (2003).

[14] See Department of Communications, Information Technology and the Arts, *"Selling ICT to Government: A guide for SMEs"* (2003) at 62.

[15] While the instrument does not deal in specific terms with liability caps, agencies are encouraged to ensure that any proposed liability cap is consistent with the general principles described therein- see Department of Finance and Administration, *"Finance Circular No. 2003/02- Guidelines for Issuing and Managing Indemnities, Warranties and Letters of Comfort"* (2003) at 2.

[16] See Department of Finance and Administration, *"Finance Circular No. 2003/02- Guidelines for Issuing and Managing Indemnities, Warranties and Letters of Comfort"* (2003) at 7.

[17] See Australian Government Information Management Office, *"Outcomes of the Review of the Government Information Technology and Communications Framework, Version 4"* (2005).

[18] See Department of Communications, Information Technology and the Arts, *"Selling ICT to Government: A guide for SMEs"* (2003) at 34.

[19] Further information on GITC 4 can be obtained at *www.gitc.finance.gov.au.*

[20] Australian Information Industry Association, *"Better Practice, Better Outcomes: Reforming Liability Regimes Under Government ICT Contracts"* (2004) at 17- 18.

[21] See: *www.supply.dpws.nsw.gov.au/Procure+IT/Procure+IT.htm.*

[22] See Department of Communications, Information Technology and the Arts, *"Selling ICT to Government: A guide for SMEs"* (2003) at 59; and Department of Finance and Administration, *"Selling to the Australian Government: A guide for business"* (2005) at 29

[23] See Australian Government Information Management Office, *"Outcomes of the Review of the Government Information Technology and Communications Framework, Version 4"* (2005)

[24] See Australian Government Information Management Office, *"Outcomes of the Review of the Government Information Technology and Communications Framework, Version 4"* (2005)

[25] See Senator Coonan and Senator Abetz, *"Joint Media Release- Moves to make Government ICT contracting simpler and easier"* (2005)

[26] See Australian Government Information Management Office, *"A Guide to ICT Sourcing for Australian Government Agencies: Developing and Executing an ICT Sourcing Strategy"* (2004) at 44

[27] See Australian Government Information Management Office, *"Outcomes of the Review of the Government Information Technology and Communications Framework, Version 4"* (2005)

[28] See, for example, Australian Information Industry Association, *"Better Practice, Better Outcomes: Reforming Liability Regimes Under Government ICT Contracts"* (2004) at 12- 14 and 24

[29] Senator Coonan, *"Connecting an Innovative Australia ICT Policy Launch"* (2004) available at *www.dcita.gov.au/newsroom.* See also Senator Coonan, *"Supporting Australian innovation and enterprise- Address to the 2005 Consensus Software Awards Gala Dinner"* (2005) available at *www.dcita.gov.au/newsroom* and Senator Coonan and Senator Abetz, *"Joint Media Release- Moves to make Government ICT contracting simpler and easier"* (2005)

[30] See Department of Communications, Information Technology and the Arts, *"Selling ICT to Government: A guide for SMEs"* (2003) at 62

[31] Department of Communications, Information Technology and the Arts, *"A guide to limiting supplier liability in ICT contracts for Australian Government agencies- Developing and implementing a risk assessment and mitigation strategy"* (2005) at 2; see also Australian Information Industry Association, *"Better Practice, Better Outcomes: Reforming Liability Regimes Under Government ICT Contracts"* (2004) at 5 and 26- 29

[32] See Department of Communications, Information Technology and the Arts, *"A guide to limiting supplier liability in ICT contracts for Australian Government agencies- Developing and implementing a risk assessment and mitigation strategy"* (2005) at 7- 8

[33] See Department of Communications, Information Technology and the Arts, *"A guide to limiting supplier liability in ICT contracts for Australian Government agencies- Developing and implementing a risk assessment and mitigation strategy"* (2005) at 27

[34] See Department of Communications, Information Technology and the Arts, *"A guide to limiting supplier liability in ICT contracts for Australian Government agencies- Developing and implementing a risk assessment and mitigation strategy"* (2005) at 29

[35] Department of Communications, Information Technology and the Arts, *"A guide to limiting supplier liability in ICT contracts for Australian Government agencies- Developing and implementing a risk assessment and mitigation strategy"* (2005) at 2

[36] Department of Communications, Information Technology and the Arts, *"A guide to limiting supplier liability in ICT contracts for Australian Government agencies- Developing and implementing a risk assessment and mitigation strategy"* (2005) at 6

[37] Department of Communications, Information Technology and the Arts, *"A guide to limiting supplier liability in ICT contracts for Australian Government agencies- Developing and implementing a risk assessment and mitigation strategy"* (2005) at 19

[38] Australian National Audit Office, *"Intellectual Property Policies and Practices in Commonwealth Agencies"* (2004)

[39] See Australian National Audit Office, *"Intellectual Property Policies and Practices in Commonwealth Agencies"* (2004) at 17

[40] See section 44 of the FMA Act

[41] See Australian National Audit Office, *"Intellectual Property Policies and Practices in Commonwealth Agencies"* (2004) at 18

[42] See Australian National Audit Office, *"Intellectual Property Policies and Practices in Commonwealth Agencies"* (2004) at 22

[43] See Australian National Audit Office, *"Intellectual Property Policies and Practices in Commonwealth Agencies"* (2004) at 21

[44] See Australian National Audit Office, *"Intellectual Property Policies and Practices in Commonwealth Agencies"* (2004) at 24

[45] See *www.ag.gov.au/agd/WWW/agdhome.nsf/0/8337B045AD410E87CA25709E0018629B?OpenDocument*

[46] See Attorney-General's Department, *"Whole of Government Intellectual Property Principles- Draft"* (2005)

[47] See Attorney-General's Department, *"A Whole of Government Approach to IP Management Issues Paper"* (2005) at paragraph 5

[48] See Attorney-General's Department, *"Whole of Government Intellectual Property Principles- Draft"* (2005) at paragraph 8. More generally, see also Australian National Audit Office, *"Intellectual Property Policies and Practices in Commonwealth Agencies"* (2004) at 69- 77

[49] See Attorney-General's Department, *"Whole of Government Intellectual Property Principles- Draft"* (2005) at paragraph 8

[50] See Attorney-General's Department, *"Whole of Government Intellectual Property Principles- Draft"* (2005) at paragraph 10

[51] See Attorney-General's Department, *"A Whole of Government Approach to IP Management Issues Paper"* (2005) at paragraph 14

[52] see Barrett, *"Management of Intellectual Property in the Public Sector"* (2002) available at *www.anao.gov.au/WebSite.nsf/Publications/4A256AE90015F69B4A256B6D00086450*

[53] Department of Communications, Information Technology and the Arts, *"The Commonwealth IT IP guidelines: Management and commercialisation of Commonwealth intellectual property in the field of information technology"* (2000)

[54] Department of Communications, Information Technology and the Arts, *"The Commonwealth IT IP guidelines: Management and commercialisation of Commonwealth intellectual property in the field of information technology"* (2000) at 3

[55] Department of Communications, Information Technology and the Arts, *"The Commonwealth IT IP guidelines: Management and commercialisation of Commonwealth intellectual property in the field of information technology"* (2000) at 40

[56] Department of Communications, Information Technology and the Arts, *"The Commonwealth IT IP guidelines: Management and commercialisation of Commonwealth intellectual property in the field of information technology"* (2000) at 1; see also Department of Communications, Information Technology and

the Arts, *"Selling ICT to Government: A guide for SMEs"* (2003) at 65

[57] Australian Information Industry Association, *"A Whole of Government Approach to IP Management- Issues Paper: AIIA's Response"* (2005) at 3- 4

[58] See Attorney-General's Department, *"A Whole of Government Approach to IP Management Issues Paper"* (2005) at paragraph 21

[59] Senator Coonan, *"Connecting an Innovative Australia ICT Policy Launch"* (2004) available at www.dcita.gov.au/newsroom

iPod Therefore I Infringe...And Therefore Should Be Taxed?

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It is undeniable that modern Australians have the capacity to infringe copyright in a number of ways, whether by photocopying books, copying a CD from a friend, or downloading the latest episode of a favourite television show from a website on the Internet. Over the last few years, the success of one white, light, and small object has caused a re-think of the way academics, businesses, consumers and the government think about copyright infringement: the Apple iPod.

It is becoming increasingly rare for a day to pass without one seeing iPod related goods, an iPod competition, or an iPod advertisement. According to *The Age*, the iPod accounts for more than 70% of the global market for MP3 players,[1] although there have been higher estimates. The iPod explosion occurred in Australia between 2004 and 2005: in the first quarter of 2004 23,000 units were sold, jumping to more than 330,000 units in the same quarter of 2005.[2] The introduction of the video iPod and the sleek iPod nano will ensure its continuing popularity.

There is, however, a dark side to the iPod – the increasing problem of copyright infringement of musical works.

Digital Music Players and Copyright Infringement

The development and global distribution of increasingly sophisticated technologies are allowing a variety of works and subject matter other than works to be converted into digital forms and be stored on computers and the Internet. The problem is not limited to iPods and it would be unfair to place the blame entirely on this tiny MP3 player. However, when a person purchases an iPod, with a 20GB memory that can hold up to 10,000 songs, the question must be asked where are those songs coming from. The iTunes Music Store, where users can purchase songs and obtain the legal right to use that song in a number of different formats, was not available in Australia until October 2005. Certainly, a person could produce his or her own original music or obtain the legal right to copy music onto his or her iPod, but the reality is that most of the songs on iPods and other MP3 players are from regular compact discs.[3]

This is known as "format-shifting" or "space-shifting" – the practice of "copying material from one format to another."[4] This should not come as a huge surprise to anyone – even Apple has admitted that it has "no doubt" most music on iPods is "placed there through format-shifting."[5] This practice is also an act of copyright infringement and there is currently no defence or exception in the *Copyright Act 1968* (Cth) that legitimises this type of copying. The Australian Federal Government is definitely aware of this issue,[6] however, rather than condemning the practice, the Attorney-General, Philip Ruddock, has commented that "individuals who acquire legitimate copyright products should be able to reasonably use them for their own purposes without infringing the law,"[7] and he includes format-shifting as a reasonable use that does not harm copyright owners.[8]

The issue then becomes both about how users can obtain the legal right to copy tracks and how the copyright owners should be remunerated for this use. Copyright is granted as an incentive,[9] both economic and creative, for creators to make, among other types, musical works. It is both an unfair and unsatisfying response that this and future generations of musicians should be deprived of their economic right to reproduction because technology has developed so as to allow mainstream society to indulge in private copying – meaning copying for a non-commercial use[10] - on a massive scale. The question then becomes how we can ensure artists and record companies receive the remuneration their rights dictate they should receive. The answer, in a number of countries, has been the "iPod tax".

The "iPod Tax"

The "iPod tax" is a levy aimed at compensating recording artists and the music industry for any lost revenue resulting from the increasing production and use of digital music players and other technological devices.[11] Despite the name, as the money collected goes to artists, recording companies and composers, it is "technically not a tax."[12] In a number of countries, for example, Canada, this levy has been introduced to coincide with a relaxation of copyright laws that now allow for individuals to legally copy music for private purposes.[13] The levy is usually