

IP Law Policy and Practice Seminar 2007 - Case study:

The APEC Adventure

9 August 2007

The Case Study is an unfolding sequence of events relating to your work on APEC Australia 2007. It consists of six numbered 'scenarios', each being a snapshot of the facts at a point in time. You are to identify and discuss the IP issues arising from each scenario.

The Case Study continues some of the plot lines and characters from previous AGS Case Studies (referenced in the bibliography). However you do *not* need to read the earlier Case Studies.

Read carefully

Please read the scenarios carefully, reading between the lines as appropriate. Sometimes the issues are obvious; sometimes less obvious.

Focus on IP

Please confine yourself mainly to IP issues. You may see issues in other areas, e.g. privacy, procurement, probity, etc. You may note these issues, but the main focus should be on IP.

Analysis tips

If you think some critical item of information necessary to your decisions is not provided, state what that is and why it matters. Often the right answer is: 'it depends'. Express any assumption(s) on which your answers are based. And remember that identifying questions is more important than knowing all the answers. 'Model answers' will be provided at the end of the Seminar.

Timing

You have 15-20 minutes to discuss each scenario. Suggested timing is given in the heading for each scenario.

Role of facilitator

Each syndicate will be assisted by a facilitator, who will be responsible for monitoring time. The facilitator is not there to provide you with the answers. However they may occasionally raise issues or suggest factual assumptions on which discussion should be based.

Feedback

Syndicates will *not* be required to formally present outcomes from the Case Study. However, there will be an opportunity to share experiences and raise questions in the panel session.

De-briefing session

An additional informal session will be conducted on 10 August 2007 for those wishing to pursue further questions after having read the 'model answers'.

THE STAGE

After the bird flu pandemic described in last year's Case Study¹ the Department for the Defence of Government Infrastructure and Essential Services (**DoDGIES**) gets an extreme makeover. Functions are abolished and moved every which way. But as ever your old mate Bruce Bover (ex A/g Deputy Secretary, DoDGIES) lands on his feet.

Bruce is appointed to head up a high-profile new agency within the portfolio, called 'Task Force 10', with responsibility for 'logistics and communication' in connection with APEC Australia 2007. In this role he will work closely with Ministers, and it seems to you that he is being groomed for a political career.

Bruce doesn't forget his friends - all good 'mates' since your last supper together². Bruce recruits you and Mary Madeangel. Klaus Krescent is also engaged on some sort of consultancy basis, although details are not clear. The old team is back!

THE PLAYERS

Bruce Bover

Your boss in previous Case Studies.³

You first met in the *Mediwise* project. Then you worked together on the *SCAMGuard* project.

During the bird flu pandemic described in last year's case study, he used his political connections to be appointed as acting Deputy Secretary of DoDGIES, and later sought to ingratiate himself with the PM in an effort to secure a safe seat in Parliament.⁴

Impatient and autocratic, he wants to 'get things done'. Has no time for things that are too complicated⁵ - such as intellectual property.



¹ See Case Study 3: '*Bird Flu and the Da Vinci Code*'.

² See Case Study 3: '*Bird Flu and the Da Vinci Code*'.

³ Case Studies from previous AGS IP Law, Policy and Practice Seminars are available from: <http://www.ags.gov.au/whatweoffer/seminars/IPforumstudies/ipforumstudies.htm>

⁴ See Case Study 3: '*Bird Flu and the Da Vinci Code*'.

⁵ A sore point with him because of a past dispute with Copyright Agency Limited. CAL is a copyright collecting society which collects royalties for print copyright owners under various statutory and voluntary licence schemes.

Crunch, Chew and Snack

Your legal panel firm. A partnership between Phyle Crunch, Raelene Chew and the new boy Algernon Snack.⁶

You turn to Crunch, Chew and Snack whenever you feel you've bitten off too much!

Mystery surrounded Phyle Crunch's sudden excursion to London at the end of the previous Case Study.

Raelene has developed a sweet tooth - the consequence of a long-running trade mark case regarding colours used on chocolate wrappers.

You've heard Algernon is a keen practical joker.



⁶ The firm was originally called 'Pop, Crackle and Snap' but had to drop the name after an altercation with Kellogg (Aust.) Pty. Ltd.

⁷ Phyle Crunch 'inadvertently' mislaid each odd-numbered page of the joint venture agreement relating to the Cooperative Research Centre for Experimental Epidemiology (CRC-EE), and later exploited the confusion to do a side deal relating to the 'Black Death Data'. Phyle blamed the photocopier - well he would, wouldn't he? See Case Study 3: '*Bird Flu and the Da Vinci Code*'.

Klaus K Krescent

At one time employed in AGD as a software engineer, but has since built a reputation as a brilliant cryptologist and proponent of artificial intelligence. First came to notice in Case Study 2 when he published a paper on advanced data mining techniques in the Pacific Journal of Heuristic Computing. Engineered the scam behind SCAMGuard.⁸ A gothic dresser.

In last year's Case Study we suspected Klaus was involved in the untimely end of one Barry Bubonic, although at the time bird flu was blamed. We discovered he had been a grand master of the Priory of Sion before he established a splinter group, the Priory of Nimbin, over his alternative theory about the *real* meaning of the Holy Grail - however that's another story.⁹

Developed the *quantum digital cryptex* described below.



Mary Madeangel



A lasting treasure, now even more ancient than before. She is the repository of much corporate knowledge about comings and goings in government.

Has been assistant to Bruce Bowver in various roles in previous Case Studies, and in the course of that she has become a close friend of Raelene Chew from the legal panel firm.

Mary refers to DoDGIES affectionately as '*the Agency*', as if there were no other. Now calls Task Force 10 '*The Force*', a name which immediately sticks. A loyal warrior for the cause - whatever it might currently be.

Mary is pictured here whilst on holiday in Italy where she visited numerous churches, museums and art galleries.

We've always wondered what lies behind her enigmatic smile.

⁸ See Case Study 2: '*NCrypt and the ScamGuard Affair*'.

⁹ See Case Study 3: '*Bird Flu and the Da Vinci Code*'.

Peta Plotter

Singer and artist with indigenous ancestry. Occasional activist for social and political causes.

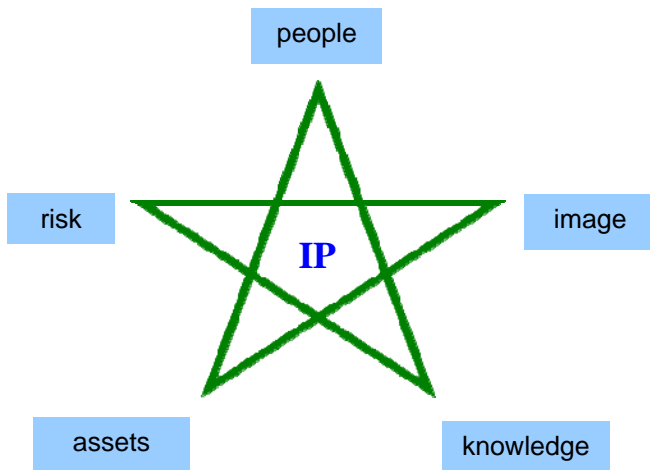
You once cheated her out of a spot on 'The Block', but she doesn't seem to bear a grudge.¹⁰ Later she opened up a coffee shop in Nimbin so that she could be close to Bruce while he plotted a political career. The *Peta Eater* becomes a convenient meeting place for local indigenous artists.

In the last Case Study Peta was engaged on a consultancy contract to develop visual elements for a publicity campaign on bird flu, but fell out with Bruce after a dispute about her 'moral rights'. She has a distinctive birthmark on her bottom which became a celebrated trade mark for designer jeans.¹¹

Will Bruce and Peta get back together? ... Read on!



You



You have acquired a reputation as an IP hotshot, and as a result all your exploits have featured in AGS IP Case Studies.

In your early days you learnt about franchising by helping develop a business strategy for a donut and coffee chain. This was followed by a stint on the *Mediwise* smartcard project. You had a short but stellar career on *The Block* before you were evicted under dramatic circumstances; but landed on your feet by scoring a plum job advising Channel Nine on character merchandising deals with the other contestants.¹² You then spent a period working on the *SCAMGuard* project.¹³

In the last Case Study you developed a conceptual model, based on the ancient pentangle popularised in Dan Brown's *Da Vinci Code*, to illustrate how IP relates to all the major areas of corporate governance.¹⁴

¹⁰ See Case Study 1: 'Dodgy Data and the Mediwise Project'.

¹¹ See Case Study 3: 'Bird Flu and the Da Vinci Code'.

The quantum digital cryptex

A modern device for protecting highly confidential information. To understand what it does some history is necessary.

In Dan Brown's *Da Vinci Code*, it is claimed that Leonardo Da Vinci invented the 'cryptex' device for storing secret documents. Any attempt to open it without the correct destroys the message inside. The modern use of encryption to protect documents is based on 'public key technology' which exploits the mathematics of prime numbers. But the possibility that someone might discover an efficient algorithm for cracking the associated 'private key' cannot be ruled out. If it occurred, the electronic authentication systems now in wide use would be vulnerable.

Klaus Krescent realised that encryption systems could make use of quantum effects, in particular the properties described by Heisenberg's uncertainty principle. Thus if a secret message composed of individual photons was intercepted it would be destroyed in the process of decryption.¹⁵ The *quantum digital cryptex* developed and patented by Klaus Krescent is the first working implementation of this concept, to the author's knowledge.

We had hoped to include an illustration taken from the patent specification for the quantum digital cryptex. We assumed that copyright could not be asserted in such illustrations, which seemed logical enough since the underlying deal with patent system is that you get a monopoly in return for divulging details of your invention to the world. However Phyle Crunch has cast doubt on that interpretation and we have decided to play it safe. You will need to use your imagination!

The *meta* quantum digital cryptex is a premium model which makes its appearance in Scenario 5.

The Secret Opinions

Contained within a vault within a vault within a vault in Robert Garran Offices. Their existence was revealed for the first time in last year's Case Study. As we saw then, Klaus used the prototype quantum digital cryptex to protect his collection of secret AGD legal opinions.¹⁶ Some of these concluded that, for copyright reasons, the end of the world was imminent.

A digital cryptex



The quantum digital cryptex



¹² See Case Study 1: 'Dodgy Data and the Mediwise Project'.

¹³ See Case Study 2: 'NCrypt and the ScamGuard Affair'.

¹⁴ See Case Study 3: 'Bird Flu and the Da Vinci Code'.

¹⁵ For an explanation of how this might work in theory, see: *Quantum Confidential*, by Simon Singh, in *New Scientist*, 2 October 1999, page 28.

¹⁶ See Case Study 3 - 'Bird Flu and the Da Vinci Code'.

SCENARIO 1: THE FORCE (20 MINUTES)

There is eight months to go before the APEC leaders meeting, and Task Force 10 (**The Force**) has just occupied swank new premises¹⁷. You are busily setting up your new office. Bruce is in his 'counting house' counting out his appropriations for Reg10 purposes, as there are a few contracts coming up. Mary Madeangel is decorating the expansive foyer with a sequence of original 'dreamtime' paintings on loan from **Artbank**. She shows you a 2 square metre framed collage which she created from chocolate wrappers discarded by Raelene Chew over the course of the recent trade mark dispute. She is thinking of displaying this too in the foyer.

Klaus bursts in lugging a large briefcase. Barely acknowledging you, and against Mary's protestations, he charges into Bruce's office. They confer for nearly 2 hours.

By this stage you have discovered that the stated purpose of The Force (logistics and communication) is partly a smokescreen. You are a member of a secret cell of operatives within The Force whose purpose is to coordinate various security agencies to ensure timely responses to any security threat to APEC. As part of this, you are to use advanced data mining algorithms to collate information from multiple sources such as:

- a. information on APEC delegates, venues, timetables and activities;
- b. engineering detail about critical infrastructure, and information about transport movements through airports, shipping terminals and railways. There is also a proposal to establish real time connections to automatic number plate recognition (ANPR) systems operated by toll ways;
- c. intelligence reports from the security agencies (including email traffic obtained by covert surveillance).

A major lesson emerging from attacks in New York, Madrid and London (not to mention the Canberra bushfires) was incompatible systems for communication and decision-making by emergency response agencies. The Force has been active in efforts to standardise systems used by Australian agencies.

Staff on The Force have been issued with custom-designed protective clothing to cope with Chemical, Biological, Radiological and Nuclear (CBRN) threats.

Meanwhile Peta Plotter has taken over the lease on the ground floor café called '*The Consultancy*', which is located on the other side of the foyer. She displays her menu just outside the café entrance, next to the Tender Box.

On your instructions, Raelene Chew has prepared a template for an *IP Register* for The Force - see **Exhibit A**.

¹⁷ The premises were previously occupied by the Advisory Council on Avian Influenza. ACAI was disbanded following a scandal over its failure to pay copyright fees to Phonographic Performance Company of Australia (PPCA) for its 'music on hold' service.

Scenario 1: Responses

1. Consider the Scenario and (making educated guesses) identify any IP that is likely to be relevant to The Force. Enter details where appropriate in the IP Register. Don't attempt to fill out the table completely; you should just regard this as a trial run to establish whether the template prepared by Raelene Chew will work for you or not . . .

. . . Refer to **Exhibit A**

2. After working with the table for a while, suggest improvements or variations to the format of the IP Register: For example: Are there any aspects that don't quite work? Is it helpful to break down the IP Register into 5 sections as shown? Can you think of any additional items that the template needs to allow for?

- The template probably needs to be accompanied by some explanatory material (the 'Guidance') to assist users in working with it.
- There should be a deliberate choice about the level of detail expected:
 - it may be appropriate to cover generic categories of material, rather than list each specific item, especially where the IP concerned does not have a measurable market value;
 - on the other hand, it may be important to track individual items if these need to be linked to a specific contract numbers, and IP registration numbers as in the case of patents and trade marks.
- Heading to column 3 (or the Guidance) could be refined to make clear that it involves consideration of:
 - the IP rights conferred by the relevant IP regime;
 - whether The Force owns the IP, or is merely a licensee of some rights;
 and (if the latter) ...
 - the particular rights that are licensed to The Force.
- A column might be added to allow for details of the valuation of the IP Rights. This might refer to historical cost, replacement cost, likely future royalties, *etc.* or may be qualitative.
- Guidance on column 4 could suggest the sort of linkages that would be appropriate , e.g. file number, contract number, registered trade mark number, patent number, *etc.* A lot depends on whether the IP Register is implemented as a standalone thing, or is integrated into some other corporate system such as a contracts register, a software register, *etc.*
- Guidance on column 5 may refer to:
 - where The Force is the owner - the duration of IP rights themselves;
 - where The Force is a licensee - the duration of the licence.
- You might query the footer containing the claim of copyright by *Crunch, Chew and Snack*. If it was developed from scratch as the footer implies then copyright ownership would be governed by any formal legal services agreement with the firm. To the extent the table is based on pre-existing IP material you need a licence from them. In this case it may be 'reasonable' (*i.e.* not an infringement of Raelene Chew's moral rights) to omit the attribution of her, since the form will be populated with details created internally in The Force.

SCENARIO 2: MAPPING IP PRINCIPLES 1-10 (15 MINUTES)

You attend a talk given by Phyle Crunch to the Australian Corporate Lawyers Association (ACLA) in which he develops 3 connected themes:

- a. IP goes through different stages in its **life cycle**;
- b. each stage in the life cycle is likely to involve characteristic **transactions or relationships**;
- c. the choices you make re managing IP in these transactions/relationships are driven by relevant **policy considerations** - both whole-of-Commonwealth and agency-specific.

Working with these ideas you illustrate the 3 themes in the form of a table. You anticipate that this analysis will assist in developing an IP Policy for The Force. Your table enables you to explore a number of important correlations . . .

<i>Stages in IP life cycle</i>	<i>IP relationships</i>	<i>Policies and strategies relevant to IP decisions</i>
develop	staff	PEOPLE: recruitment, IT/internet/email use policy, training, rewards/suggestion schemes, moral rights, privacy, code of conduct, conflict of interest, confidentiality
procure	advisors	
recognise	suppliers	IMAGE: branding, PR strategies, website, protection of domain names, program names & trade marks, marketing
catalogue	business partners	
protect	other government agencies	KNOWLEDGE: IT strategic planning, policy on use of 'open source', management of software licences, internet and email use, document management, informal know-how, confidentiality
use	clients / customers	
share / commercialise / dispose / public access	distributors	ASSETS, MONEY & CONTRACTS: value for money, open and effective competition, conflict of interest, asset management/register, contract management/register, competitive neutrality
improve	general public	
defend	target groups in community	RISK: illegal software, exceeding licence terms, loss of IP rights/opportunities, access to necessary IP in disaster recovery, licence terms re escrow/backup, other contract mechanisms addressing risk
accounting / reporting	other stakeholders	

. . . For example you can see that the use of licensed software entails relationships with the suppliers of that software and the staff who use it, and there is a risk of infringing licence terms if software licences are not policed, e.g. through a register of licence agreements - see elements highlighted above.

At this point you learn that the Attorney-General has released a set of *IP Principles* which are to apply to FMA Act agencies. You go to see Phyle Crunch to discuss the new IP Principles. While there you show him the table you developed based on his presentation, and he is enthusiastic about your approach. Working together you devise a way of mapping the first 10 IP Principles to elements in your table. Phyle Crunch explains that each Principle can be formulated as a statement about *policy considerations* applicable to IP *transactions/relationships* that arise at some *stage(s) in the IP life cycle*. See **Exhibit B**.

Scenario 2: Responses

1. *Complete the document developed by you and Phyle Crunch which shows how each of the first 10 IP Principles can be related to particular elements (life cycle stages, relationships, policies) from your table above . . .*

. . . Refer to **Exhibit B**

(NB: You are required to complete details in Exhibit B, using keywords from the table in Scenario 2. You and Phyle Crunch have already filled out the details relating to Principles 1 to 7. In your syndicate group you need to complete the details for Principles 8 to 10.)

2. *Do you have any other observations arising from this exercise?*

- You might consider whether The Force needs its own IP Policy at all, or whether it could it operate under DoDGIES' IP Policy. (The sub-text to Principle 3 states that agencies may have several IP Policies affecting different business areas.)

SCENARIO 3: MINING THE CONFIDENTIALITY GUIDELINES (20 MINUTES)

1. You have been asked to prepare an RFT for a 'data mining' software solution which The Force will use to collate information from multiple sources in order to assess security threats. You anticipate that any solution of the calibre sought will require tenderers to demonstrate a capacity for thinking outside the box, and you expect that tenders may contain original approaches to The Force's requirement that tenderers will want to claim as 'commercial in confidence'. Bruce Bover says the standard practice is that unsuccessful tenders are to be kept confidential, but the successful tender should not be confidential after the award of a contract. You're not sure it's that simple, so you call Algernon Snack to discuss whether you should be entertaining claims of confidentiality. Algernon advises that it is a balancing judgment, but that unless we make *some* allowance for confidentiality of the supplier's 'proprietary methodology' (i) we may not attract the best bids; (ii) the bids we get may not be forthcoming about the nature of the solution proposed.

Bruce leaves for a meeting in the Minister's office. While he is away you do more research. You extract a few 'nuggets' from the new confidentiality guidelines¹⁸ and put together the following clauses for the RFT:

Confidentiality

1. The Commonwealth undertakes to keep confidential any Confidential Information provided in tenders prior to the award of a contract and, in respect of unsuccessful tenders, after contract award. [Certain exceptions are given to cover reporting to the Minister, and that sort of thing.]
2. Notwithstanding clause 1, the Commonwealth may use and copy any part of a tender in order to conduct an efficient and effective tender process.
3. Tenderers may request in their tenders that specific information be treated as confidential following the award of a contract to it. The Commonwealth will consider any such request having regard to the matters covered by the Commonwealth's *Guidance on Confidentiality in Procurement*.

You show this to Bruce when he returns. 'Not happy!' he says. It is apparent that Bruce has ambitions that the solution developed for The Force could be of interest to security agencies in other countries, and he wants part of the action. You call Algernon Snack. Unfortunately he is at the snow fields. so as a last resort you ask to speak with Phyle Crunch. Phyle suggests a way to take the heat out of the issue: keep the above drafting, including clause 3, but provide in the selection criteria that claims for confidentiality under the clause will be taken into account in assessing value for money. Bruce is happy, and it is duly done.

2. Bover instructs you to specify in the RFT a form of contract that we expect the successful tenderer to sign. He wants to use a 'consultancy' form prepared by *Crunch, Chew and Snack* for The Force. You persuade him not to go down that path, because you anticipate that the contract will include features that a consultancy form can't really cope with. You instruct *Crunch, Chew and Snack* to develop a contract based on the *SourceIT* contract suite.

Meanwhile you learn that Peta Plotter has started collecting signatures for a petition which is displayed in *The Consultancy* - something about APEC and global warming.

¹⁸ *Guidance on Confidentiality in Procurement* (FMG3) - see link in Bibliography.

Scenario 3: Responses

1. *Comment on the confidentiality conditions in the RFT for the data mining solution. Is there anything else that might have been said? Do you anticipate any future issues or difficulties in applying the conditions?*

- The clauses might usefully begin by emphasising the accountability obligations of the Commonwealth which form the rationale of the conditions, so that tenderers understand the policy environment of the Commonwealth.
- It is not clear whether the RFT includes a definition of ‘Confidential Information’. The definition should refer to the *inherent character of confidentiality* that the particular information possesses. It is not a matter of putting a label on the material. Tenderers are inclined to claim that every page of their tender is ‘commercial-in-confidence’, including material that is plainly just advertising / promotional.
- You should ask tenderers to specify the *reasons* for any claim of confidentiality so that you can make a judgement whether to accept their claim. You might also make clear that claims will be assessed against the criteria in the Commonwealth’s *Guidance on Confidentiality in Procurement*:
 - the information to be protected must be specifically identified;
 - the information must be commercially sensitive. This means that the information should not be generally known or ascertainable;
 - disclosure would cause unreasonable detriment to the owner of the information or another party;
 - the information was provided under an understanding that it would remain confidential.
- Clause 2 is extremely broad, and seems to derogate from the principle admitted in clause 1. It could be used by *The Force* as a justification for disclosing the tenderer’s Confidential Information as part of a second-stage RFT process, e.g. ‘best and final offer’ (BAFO) or parallel negotiations with 2 or 3 short-listed tenderers.
 - In this Scenario it might have been appropriate to call for expressions of interest (EOI) instead, on the basis that we are looking for ‘approaches’ to a general problem, which we will use in a second, RFT process. In other words, we intend that anything in an EOI might be used to frame the statement of requirement and we would not admit claims of confidentiality at all.
- Clause 2 is arguably flawed for another reason. It mixes propositions about *copying* (essentially a copyright issue), and *use* (which impacts on any assertion of confidentiality). In Bruce’s mind they may be the same, but that’s no excuse for you, is it? More typically, one would expect to see a proposition that the Commonwealth can *copy* tender documents in order to conduct an efficient evaluation of tenders. This would appear in a quite separate place in the RFT, and would not detract from any obligation the Commonwealth might have in regard to confidentiality.
- It might be good to include a provision that any questions by a tenderer during the RFT open period, and the response given to them, will be circulated to all tenderers, *i.e.* not treated as confidential.

2. *Do you have any comments on the choice of contract form for the data mining solution?*

- Any standard consultancy type of contract would clearly be inappropriate. But the SourceIT contract suite is probably not appropriate either. It currently includes contract forms for:
 - IT consultancy services;
 - hardware supply and maintenance;
 - commercial off the shelf (COTS) software licence and support;
 - commercial off the shelf (COTS) software licence (no support).
- Also, the SourceIT website says that the contract forms are appropriate only for simple transactions. For more complex requirements the *Government Information Technology Conditions* (GITC4) may still be used.

SCENARIO 4: THE CONSULTANCY GETS A WORKOUT (15 MINUTES)

1. The **RFT for the data mining application** has been out for a week. You have a chance conversation in *The Consultancy* café with Klaus Krescent, who knows pretty much all there is to know about data mining and artificial intelligence. You had assumed you might be licensing-in a more-or-less standard data mining application, perhaps with some software development to customise it for The Force. But Klaus says a far more important component of a successful implementation will be the incorporation of expert rules. The 'rule-set' will need to be contributed by experienced professionals in law enforcement and security, to instruct the software what correlations to look for in the data in identifying potential threats. The rule-set will need to be supplemented and refined continuously in the production system. In addition, Klaus says the software will be 'rewarded' each time it issues a valid alert, and ultimately will be able to use its experience to supplement the rule-set and adjust 'rule weights' on its own. This conversation causes you to re-evaluate your assumptions about IP aspects of the project - see *question 1 on next page*.

2. Coincidentally, no sooner do you return to your office than you receive a call from one of the prospective tenderers, **Intelligent Design Inc.**, based in Utah. - see *question 2 on next page*. They wonder if you can provide a prototype 'rule-set' for use in developing their tender; they could dummy up some rules, but they'd prefer to have something 'realistic'. You ponder the request - see *question 2 on next page*.

3. Bruce Bover has another contract he wants you to manage, and hands you the file: '**Eventz Management Pty Ltd - Media Centres for APEC**'. He explains that the contractor is to establish a 'media facility' for delegates to APEC Australia 2007 to provide real-time information on sessions, delegates, timetables, excursions, press releases, papers, draft communiqués, as well as internet access so that delegates can monitor press reporting. Accredited delegates will be able to exchange secure emails with officials in their home countries. The centre will provide facilities for printing multiple copies of documents for circulation. Indeed Eventz Management boasts that their 'unique event management system will meet all the information needs of delegates in an efficient, seamless and secure manner'. They are keen to showcase their system, and have offered a heavily discounted price in return for 'sponsor status', including putting their logo on official APEC stationery.

Bruce suggests that you draft the necessary contract using the standard *Consultancy* form prepared by *Crunch, Chew and Snack* for The Force. It cost a packet and he wants his monies worth. It contains IP provisions which you recognise as typical of consultancy contracts - see *Exhibit C*. You head back to *The Consultancy* café with Bruce to discuss the proposed contract, anticipating possible disagreement - see *question 3 on next page*.

As you go into *The Consultancy*, you observe activity around the tender box. Surely bids for the data mining project can't be rolling in so soon? Distracted momentarily you almost miss the meaningful glance that Peta gives Bruce.



Scenario 4: Responses

1. *What are the implications of your conversation with Klaus Krescent for IP aspects of the data mining project?*

- One way of putting it is to say we have made a *wrong assumption about value*, that is the value of the different IP components needed for a working system. We assumed the data mining software is critical, while the 'rule-set' has been ignored or considered trivial.
 - At one extreme the reverse might be the case. Data mining software might be commonplace. The suppliers might not know the first thing about security, having only worked with supermarkets to figure out whether the weetbix should be near the yoghurt.
- If Klaus is right the quality of the rule-set (provided by 'experienced professionals in law enforcement and security') is going to be a key success factor in an operational system. This raises the question where we can source the rule-set. Possibilities:
 - it might come from the supplier (or might not, as noted above) - in which case the contract should accurately reflect this component of the Services and Contract Material;
 - it might be found in-house;
 - it might be in other Commonwealth agencies - in which case we may need an MOU to acquire the inputs of their experts;
 - we may have to look further afield - in which case we would need a contract to get those inputs.
- Under any of these possibilities, we will almost certainly want to own IP in the rule-set. It may be problematic claiming copyright in each rule taken on its own because it is too minor to constitute a 'work', but the aggregate rule-set might be considered a copyright 'compilation' and protected as a whole.
- Regardless, we should impose strict obligations of confidentiality on the supplier and any experts (and/or their organisations) to maintain confidentiality of the rule-set.
- It is arguable whether copyright subsists in the rules which are developed heuristically by the system, as there is no author. In practice we ought to be able to control this 'IP' by contractual arrangements.

2. *What response might you make to the request from Intelligent Design Inc. for a prototype rule-set?*

- If we can source it we might provide a prototype 'rule-set' under strict confidentiality conditions. This would probably take the form of a Deed, specifying 'nominated personnel' who have a need to see the material for the purpose of preparing *Intelligent Design Inc's* tender. These people might be asked to provide individual undertakings as well. All copies would have to be destroyed or returned after the RFT process. We should consider whether we will allow the prototype rule-set to be taken out of Australia.
- The same arrangements would need to be offered to all tenderers.
- An advantage of acceding to the request is that we may expect to get better tenders, which we might more easily evaluate against a consistent benchmark.

3. *Would a standard consultancy form do for the contract with Eventz Management Pty Ltd relating to the media centres? If not what embellishments might need to be made?*

. . . Refer to **Exhibit C**

- No, a consultancy type of contract would *not* do, without a lot of work. See '*Contra-indications*' in Exhibit C, especially 4, 6, 9, 10 and 12. Others may be relevant on further inquiry.
- In particular, the proposal involves a number of significant third party relationships, that either we, or the contractor, must manage. The IP provisions in a typical consultancy assume the contractor will be delivering 'Contract Material' that we have specified. But here the contractor will be building a system that will be used to process material of third parties, and we (or the contractor on our behalf) will need to ensure there are sufficient express or implied licences in place.

- You should consider the Commonwealth *Design Guidelines* which deal with branding of Australian government departments and agencies - see *Bibliography*. There are policy issues with use of the Commonwealth Coat or Arms in conjunction with commercial logos. There may also be guidelines concerning commercial uses of the APEC logo.

SCENARIO 5: ENTER THE META QUANTUM DIGITAL CRYPTEX (15 MINUTES)

At a meeting with Bruce Bovver and Phyle Crunch you are brought up to date regarding the work being done by Klaus Krescent, which concerns development and commercialisation of the *Quantum Digital Cryptex* (QDC). You are informed that Klaus has patented the *Meta Quantum Digital Cryptex* QDC in his own name. As you know the QDC destroys the data in it if an attempt is made to decrypt it. It defeats all known methods of forensic detection, and for that reason should not be allowed to fall into the wrong hands. Klaus Krescent Pty Ltd was formed to develop an improved model, the *Meta Quantum Digital Cryptex* (MQDC). Any attempt at decryption destroys not just the data but the MQDC itself, so that the underlying technology can't be reverse engineered and copied. It is proposed to implement the concept in the form of a secure laptop, which police, military and security personnel can take with them while travelling.¹⁹ However Klaus Krescent Pty Ltd doesn't have adequate finance for this development work and has turned to The Force seeking a 'co-development' agreement. Bruce envisages that given the powerful security considerations the IP in the MQDC must be controlled by The Force; however Klaus Krescent Pty Ltd will be appointed as distributor.

Bruce asks Phyle if he has a standard 'co-development agreement' that could be used. Phyle rolls his eyes. 'Well - not exactly' he says. 'A co-development agreement could mean half a dozen things. The sort of relationship you want to create will depend upon your Purpose.' he speaks as if 'Purpose' has a capital 'P'. 'Please explain' says Bruce. In response, Phyle tables a little list, which he explains he has adapted from the *IT IP Guidelines*:

Common Purposes underlying Commonwealth dealings in IP

- a. to make money by sale of products embodying IP, or by incorporating IP as part of a service delivered to a customer
- b. to procure a product or service or to develop a solution (e.g. an IT system) for the benefit of the agency
- c. to defray acquisition / development cost in relation to a solution or application or research intended initially and/or primarily to meet agency needs (i.e. a combination of the preceding two situations)
- d. to assist Australian industry
- e. to subsidise a particular target group of consumers
- f. to promote the image of the agency or the Commonwealth, and/or to protect associated insignia or brands
- g. to prove a point, e.g. that a particular technology or approach is viable
- h. to disseminate important messages to the community or particular communities
- i. to protect the integrity of agency or Commonwealth material
- j. to develop a product or service that embodies a standard, or promotes inter-operability in a particular sector or field
- k. to comply with an obligation, e.g. a statutory requirement that a particular category of material be published or tabled
- l. to recognise (by attribution and/or appropriate tangible rewards) the creative contribution of staff to the agency's intellectual capital or corporate image

Bruce asks you to 'work on it'. He dismisses you, so that he and Phyle Crunch can discuss an important 'publication agreement'.

Mary hangs the chocolate wrapper collage in the foyer.

¹⁹ This follows a spate of incidents in which sensitive information had been compromised because travellers had forgotten their laptops in airports.

Scenario 5: Responses

1. *What did Phyle Crunch mean when he said that a 'co-development' agreement could mean several different things? Can you identify some possibilities?*

There are various permutations based on: who does the development work, who owns the IP (background and/or foreground), who distributes (sells and/or sub-licences) the technology, who pays whom for what, *etc.* Note that Bruce refers to 'control' but that doesn't necessarily mean ownership of IP. Some possibilities:

- We could accept an exclusive licence from Klaus which would enable us to supply the technology he has developed (and is continuing to develop). In return we would pay him a licence fee or royalties and consult regarding future development. He would retain ownership of all IP.
- We could finance his further development work on the MQDC and claim IP in this, whilst Klaus retains IP in the underlying technology (the QDC). Or we could agree that both IP layers (background and foreground) are to be merged in joint ownership. Further agreement would be necessary for any commercialisation utilising IP rights of both parties.
- We could simply agree to purchase the existing patent (background IP) for a price, and engage Klaus to do the work on the MQDC (foreground IP) for a fee on the basis that we own that IP too. Again, further agreement would be necessary for any commercialisation utilising IP rights of both parties.
- To the extent that we own IP, we could appoint Klaus as distributor. Of course the fact that he has the skill set to develop the technology does not necessarily mean he has the skill set to market it. We should consider the CPGs and the possible need to test the market.
- It could be a joint venture in which each of the parties contributes some combination of money, facilities, intellectual effort, *etc.*

Under any arrangement we would want warranties from Klaus that he owns all the existing IP. Note that the time of commencement of work on the MQDC is not clear from the Scenario, and the basis of his engagement by *The Force* is not clear either. You may need a contract which is backdated so as to apply to things already done. We would want to bind Klaus with obligations of confidentiality. We should get a warranty he hasn't inserted an undisclosed 'master key' function in the MQDC.

2. *What 'Purposes' do you think are relevant to the 'co-development' arrangements relating to the MQDC?*

... Refer to the list provided by Phyle Crunch

- The following may be relevant:
 - to develop a solution for the benefit of *The Force* - if this is the primary purpose then it would be served by merely licensing in the technology;
 - to prove that the technology is viable;
 - to develop a product that embodies a standard, or promotes inter-operability between security agencies;
 - to make money by sale of the MQDC to friendly security agencies, whilst possibly exercising our control of the IP to ensure that it is confined to those agencies.
- In addition it may be useful to recognise by attribution the creative contribution made by Klaus if this is useful in securing the deal we need.

3. *What sort of deal should we make with Klaus Krescent Pty Ltd, based on what you know?*

- Bruce evidently sees control of the technology as paramount. For that reason (putting aside CPG issues) the most attractive solution would be one in which we acquire ownership of all the relevant IP from Klaus, for a price. We could engage him by contract to undertake the further development work. Whether we use him as a distributor is more doubtful.

PS: hanging the chocolate wrapper collage in the foyer might raise issues about the moral rights of the artist(s) responsible for the set of original 'dreamtime' paintings - see Scenario 1.

SCENARIO 6: IN WHICH WE LEARN THE SECRET OF MARY MADEANGEL (15 MINUTES)

You have observed Bruce on the phone to the lawyers, *Crunch, Chew and Snack*, rather a lot lately. Two months before the APEC leaders meeting you find out why, and it is all to do with Mary Madeangel.

Bruce explains that Mary's real job is as an 'official historian', appointed to trace the history of APEC from its inception in 1987 (as an Australian initiative). For this purpose she has been granted special, scholarly access to all cabinet documents and other Commonwealth records under the so-called 'access conventions'. Her placement in *The Force* is designed to enable her to observe APEC planning processes from the inside, without attracting undue attention which would inhibit frank disclosures in her presence.²⁰ The glossy, coffee-table book, called '*The Road to APEC 2007*' will be published by Longshot Books Ltd.

But there is a problem which has Bruce worried. He had contacted Phyle Crunch initially asking for a standard publication agreement. When nothing came of that after a week he called Raelene Chew with the same request. And when nothing came of that after a further week, he tried Algernon Snack. Due to lack of communication in *Crunch, Chew and Snack*, Bruce has now received three different drafts of a 'standard publication agreement'.

The letter from Phyle Crunch attaching his draft publication agreement (for which Bruce has been invoiced \$3,800) explains:

I refer to your telephone instructions of 7 July in which you explained that Mary Madeangel has approached *The Force* for access to current and historical APEC material, which she may quote from in her proposed publication. She requires a licence to reproduce material which is Commonwealth copyright. I gather she has been working in *The Force* for some time on this basis and you both require that the understanding be formalised. I couldn't agree more. Mind you, *The Force* may not be in a position to grant a licence for use of material in which the Commonwealth does not own copyright. So in the draft (attached) I have avoided giving any blanket warranties and left it to Mary to seek all necessary third party copyright permissions. I have made provision in the Schedule for you to insert a licence fee that Mary will pay (if any). I have also provided in the Schedule to specify the research assistance she is to get from staff in *The Force*, and you may or may not specify a fee for that. You can also stipulate the form of any acknowledgment (of assistance by *The Force*) that she is to arrange when she publishes her work.

The letter from Raelene accompanying her draft (costing \$3,900) states:

I refer to your phone call on 14 July re the publication agreement, and am sorry about the delay. Attached is an initial draft. I gathered from your urgency that it will be a major project for *The Force*, and will reflect political, historical and cultural currents that are uniquely documented in the records you hold. I think you said it would come out in conjunction with the leaders meeting in the final week. Knowing Mary as I do, I'm sure she will be an excellent choice. As usual with an agreement like this, I have explicitly provided that all copyright will be owned by the Commonwealth. I have provided a place in the Schedule for you to insert the details of payments (including instalments if any) that *The Force* will pay Mary for her work. Appropriate respect is given to her moral rights - see clause 8.5.

You will of course need a separate agreement with the publisher you have chosen. Just let me know who it is and what royalties they are going to be paying us, and I'll do an agreement for the same cost as this one. It can provide for you to get a supply of free copies, so you can be handing them out at the launch. PS: I am a personal friend of the Minister and would love to attend.

The letter provided with Algernon's draft (cost \$3,300 plus GST) says:

I refer to your phone call on 21 July and sincerely apologise that you have been inconvenienced by our Office's delay in this matter. Attached is a draft agreement with the publisher, Longshot Books Ltd, which should be suitable. The Recital has a place for you to fill in the date of their initial 'Proposal'. I understand their publication will include a contribution from one of the staff members in *The Force*, Mary Madeangel. I wasn't clear from our very brief discussion whether there were other authors? That raises the question whether we should just leave it to the publisher to deal with the author(s) separately. It is probably easier that way, because all the details about copyright ownership, and recognition of moral rights, will be for them to haggle over with the author(s). I assume *The Force* is to be given some attribution and have provided for

²⁰ You make a note to see her about deleting some expletives you recall having used earlier in this Case Study.

you to specify the form of that. However the agreement makes it plain that Longshot are responsible for risks such as defamation, and I have put in the usual indemnity.

You head down to *The Consultancy* for a double shot coffee.

Scenario 6: Responses

1. *Of the three invoices rendered, which one should we pay?*

- Note that there are 3 stakeholders. The key issue here is which of these parties is the initiator and driver for the publication project. Each lawyer made a different assumption:
 - Phyle assumes Mary Madeangel is the initiator and driver;
 - Raelene assumed it is *The Force*;
 - Algernon assumed it was Longshot Books Ltd
- Note also that each lawyer was pre-occupied with different consequential issues, flowing from their initial assumption.
- If Bruce had said no more than that he wanted a 'publication agreement', then each of those interpretations is at least plausible. But as we know Mary is an 'official historian', it seems most probable that the project emanates from *The Force* (or the Commonwealth).
- We should pay Raelene's bill, even though it's a bit more expensive (and she did rather skate over the competitive selection issue regarding appointment of her friend Mary).

2. *If you were starting from scratch, what would **you** say in drafting instructions for preparation of the publication agreement?*

. . . Refer to IP Principles 11 - 15

- The Force (the Commonwealth) will publish an official history of APEC from its inception as an Australian Initiative in 1987, leading up to APEC 2007 which is being held in Australia. This major publication will be timed for release in conjunction with the APEC leaders meeting. The working title is: *The Road to APEC 2007*.
- We wish to engage Mary Madeangel as official historian to undertake the work. She will be provided with an office, access to all necessary Commonwealth records, and research assistance.
- *The Force* will undertake all necessary permissions for the use of existing photographs and other materials to be incorporated, where a third party owns the copyright.
- The draft publication will of course be vetted. However every effort will be made to resolve any editorial differences with Mary amicably, and of course the publication will contain full attribution as befits her standing as a notable historian.
- Mary's retainer for this work will be \$90,000.
- We have selected a publisher, Longshot Books Ltd. who will finance publication and distribution and will pay us a royalty for each copy sold. We are still negotiating on the amount and also some rather vexed issues re 'remaindering'.
- The publisher is to provide *the Force* with 500 free copies for distribution to APEC delegates, and an option to take a further \$500 at a 50% discount on the retail price. Royalties are not payable on these free and concessional copies.
- Please develop initial drafts of the following:
 - agreement with Mary Madeangel for researching and writing the official history;
 - agreement with the publisher, Longshot Books Ltd;
 - standard permission form for obtaining agreement of third parties to use excerpts and photographs.

3. *Do you have any other thoughts on the sequence of events described in this Scenario?*

- When talking of complex legal relationships, one should avoid making assumptions about what is meant by labels such as 'publication agreement' (or 'co-development' agreement, or 'distribution' agreement, or 'licence' or 'joint venture', etc). Also Need for good communication with (and between) lawyers.
- **It must be time for coffee.**

DENOUEMENT

On the closing date, the tender box for the data mining solution is duly opened. It is found to contain a large number of signed copies of the petition organised by *Peta Plotter* regarding APEC and global warming. You consult *Crunch Chew and Snack*, and after some discussion the petitions are ruled 'non-compliant'. This incident causes a further falling out between *Bruce Bovver* and *Peta*.

The tender put in by *Intelligent Design Inc.* is successful. They seek to recruit *Klaus Krescent* to head up their Canberra Office. To prevent him defecting, Bruce is forced to offer a 'co-development' agreement under which *Klaus Krescent Pty Ltd* retains substantial control of the *Meta Quantum Digital Cryptex*.

Due to the delay with the 'co-development' agreement, the MQDC was late coming to market and that, ladies and gentlemen, was the real reason for the premature release of *Harry Potter and the Deathly Hallows*. If the unfortunate distributor had had the premium model of the QDC none of that would have happened. (This detail was left out of the paper on confidential information delivered earlier today by Adrian Snooks.)

During the APEC leaders meeting, the office of *The Force* is blockaded by indigenous artists outraged by the hanging of the chocolate wrapper collage in the foyer - right next to the dreamtime paintings. The unfolding drama is covered by Channel 9, as part of an item on moral rights. *Peta Plotter* emerges as a skilful (and photogenic) mediator, and is offered a place on a reality TV show. Bruce decides that he should be by her side.

Raelene Chew and *Mary Madeangel* are last seen sipping coffee in The Consultancy. What could they be up to?

And will Bruce and *Peta* stay together?

These details, and more, will be revealed in the next Case Study.

Until then, may *The Force* be with you.

INDEX

IP concept / issue	Where and how it arises
access conventions	In Scenario 6 we learn that Mary Madeangel has been granted special, scholarly access to all cabinet documents and other Commonwealth records to enable her to produce the official history of APEC. This type of access to 'Commonwealth records' which are not yet in the 'open access' period under the <i>Archives Act 1983</i> is governed by so-called 'special access conventions', for which the policy is determined by the Department of the Prime Minister and Cabinet.
accountability for public expenditure	One of the policy considerations examined in Scenario 2. It falls into the group labelled 'Assets, money & contracts' identified there - see entry for 'policy considerations'.
'acts comprised in the copyright'	The things a copyright owner has an exclusive right to do. See also 'IP Rights' which is a more generic term extending to all forms of IP.
Agency Material	A common term used to denote IP subject matter brought to a consultancy agreement by the Agency - see Scenario 3.
Artbank	Artbank is part of the Department of Communications, Information Technology and the Arts. Its mission is to promote Australian culture and 'the enjoyment of living with Australian art' by purchasing contemporary works and making them available for rent. See Bibliography . In Scenario 1 we find that Mary is hanging dreamtime paintings on loan from Artbank.
background material	<p>A common term used to denote IP subject matter brought to a consultancy agreement or joint venture relationship by one of the parties.</p> <p>In a consultancy agreement the service provider typically retains IP in the background material, and the Agency typically receives a licence (only) in relation to any background material included in the Contract Material - see Scenario 3.</p> <p>In Scenario 5 we consider various possible arrangements for allocation of IP Rights in background material (the QDC) and foreground material (the extra layer of innovation generated in developing the meta-QDC).</p>
business plan	Often a pre-cursor to, or a component of a distributorship agreement. Needs to be kept up to date. May incorporate revenue and royalty targets. Although the details are not recorded, you would probably have considered the need for a business plan as part of the arrangements considered at Scenario 5.
CCA	The Commonwealth Copyright Administration, within the Attorney-General's Department. CCA deals with routine requests from the public to reproduce Commonwealth copyright material that has been published in print form or on a website, and gives administrative advice to agencies on copyright management. However CCA would not advise on more complex licensing transactions such as joint ventures, technology exchange agreements, <i>etc.</i> , which would be managed by the 'custodian' agency with their legal advisor.

certification trade mark	A trade mark which certifies the quality or characteristics of goods or services, as opposed to a conventional trade mark which denotes the origin of good or services. The birth mark on Peta Plotter's bottom (mentioned under ' The Players ') was registered as a certification mark for use in connection with clothing (note: not bottoms), although what it certifies exactly is unclear.
character merchandising	The marketing of personalities through endorsements, <i>etc.</i> Not a discrete area of law, but rather based on an amalgam of trade practices law, trade marks, copyright, contract, <i>etc.</i> In the ' Denouement ', Peta Plotter becomes a marketable personality.
collecting society	Two examples are mentioned in the answers to Scenario 4: the Australasian Performing Rights Association (APRA) and the Phonographic Performance Company of Australia (PPCA). A list of collecting societies appears in ' Bibliography '.
Commonwealth	The Force is part of the Department for the Defence of Government Infrastructure and Essential Services (DoDGIES) and therefore is a part of the single legal entity: the Commonwealth. Note that special rules apply to ownership of copyright by the Commonwealth and some CAC Act bodies are treated as the Commonwealth for the above purposes.
CPGs	Commonwealth Procurement Guidelines. See Bibliography . The CPGs hold important implications for 'co-development' or 'commercialisation' arrangements of the sort considered in Scenario 5.
confidential information	Not a proprietary right, but should be considered to be a form of IP for purposes of any IP Policy. In Scenario 3 we consider various approaches to the question of confidentiality of information included in the tenders for the data mining solution. In Scenario 4 we consider giving out a 'prototype rule-set' to tenderers under formal undertakings of confidentiality.
conflict of interest	Often relates to misuse of confidential information. There is some risk of a conflict affecting Klaus Krescent when he is asked to join Intelligent Design Inc. - see Denouement .
Consultancy agreement	A typical form of agreement used within the Commonwealth to engage service providers. In Scenario 4 we are confronted with the limitations of this form of agreement. Exhibit C sets out the typical IP clauses in a consultancy form of agreement, and identifies a range of situations in which the standard form is inappropriate or may need adaptation.
Contract Material	Common term used to denote the IP subject matter created as part of carrying out a contract, principally 'foreground material', but may also include embedded 'background material'. See Scenario 3 and Exhibit C .
co-development agreement	Not a precise term. It could mean a number of things as discussed in answers to Scenario 5.
custodianship	Whilst the Commonwealth is a single legal entity, it is usual for a department or agency within the Commonwealth to exercise IP rights in material created under its direction or control. This is the so-called convention of 'custodianship'. It rests on the reality that there is no other way that things could work in practice. In relation to <i>published copyright</i> material, an agency's 'custodianship' is qualified by the special role of the Commonwealth Copyright

	<p>Administration - see above under 'CCA'.</p> <p>Under the IP Principles (see Bibliography) each department or agency is required to have an IP Policy. In Scenario 2 we explore how the IP Principles 1-10 can be re-framed as propositions about <i>policy considerations</i> applicable to IP <i>transactions/relationships</i> that arise at some <i>stage(s) in the IP life cycle</i>.</p>
data	Assertions of copyright in 'data' can be problematic - see answers to Scenario 2.
distributorship	A form of licence agreement, under which the licensee (distributor) is appointed to commercialise IP material, in return for payment of royalties. This is one of the possibilities we consider at Scenario 5 for the 'co-development' relationship with Klaus Krescent Pty Ltd in relation to the MQDC.
electronic authentication	See 'The quantum digital cryptex' under ' The Players '.
employment (relationship)	The importance of this relationship is that IP in anything created by an employee in the course of that employment is owned by the employer. In Scenario 1 there is a question whether the chocolate wrapper collage was made by Mary Madeangel in the course of her employment - see <u>Exhibit A</u> . From Scenario 6 it appears she is not engaged under a contract of employment at all.
foreground material	Can be roughly equated to 'Contract Material' as used in consultancy agreements. In CRC Centre Agreements may be roughly equated to Centre Material / IP. In Scenario 5 we consider various possible arrangements for allocation of IP Rights in background material (the QDC) and foreground material (the extra layer of innovation generated in developing the meta-QDC).
GITC4	Government Information Technology Conditions, version 4. Covers a range of ITC contracting situations - see Bibliography , and cf. 'Source-IT'.
infringement	In the case of copyright, usually arises when someone performs an 'act comprised in the copyright' without the permission (direct or indirect) of the copyright owner.
[stage(s) in the] IP life cycle.	In Scenario 2 we explore how the IP Principles 1-10 can be re-framed as propositions about <i>policy considerations</i> applicable to IP <i>transactions/relationships</i> that arise at some <i>stage(s) in the IP life cycle</i> .
IP Policy	In Scenario 2 you work with Phyle Crunch to develop an IP Policy for <i>The Force</i> .
IP Regime	A legal form of protection for creative subject matter. In Scenario 1 we are asked to identify the IP subject matters and insert details in column 2 of <u>Exhibit A</u> [<i>The Force - IP Register</i>].
IP Register	In Scenario 1 we consider a possible template for an IP Register and practice using it. The template is reproduced in <u>Exhibit A</u> [<i>The Force - IP Register</i>]. Some suggestions for improvement to the template are given in the answers to Scenario 1.
IP rights	The rights conferred under an IP Regime in relation to relevant subject matter. An IP strategy that one may apply to a given relationship is largely about the choices one makes in allocating (i) rights of ownership and (ii) rights reserved or acquired by way of a licence. In Scenario 1 we are asked to identify the IP rights

	acquired by <i>The Force</i> and insert details in column 3 of <u>Exhibit A</u> [<i>The Force - IP Register</i>]. Note that where <i>The Force</i> is only a licensee we identify in column 3 only the IP Rights licensed to it (not all the IP Rights enjoyed by the owner).
IP subject matter	The subject matter or material in relation to which IP rights arise. In Scenario 1 we are asked to identify the IP subject matters and insert details in column 1 of <u>Exhibit A</u> [<i>The Force - IP Register</i>].
IP transactions / relationships	In Scenario 2 we explore how the IP Principles 1-10 can be re-framed as propositions about <i>policy considerations</i> applicable to IP <i>transactions/relationships</i> that arise at some <i>stage(s) in the IP life cycle</i> .
joint venture	Usually means an unincorporated joint venture. This might be one of the options we consider for the 'co-development' relationship with Klaus Krescent Pty Ltd discussed in Scenario 5.
know how	Corporate knowledge (including technical know how) <i>may</i> constitute a form of 'IP', such as copyright or confidential information. If inventive in nature, it may also form the subject of a patent application. Equally, however, some corporate knowledge does <i>not</i> crystallise as a category of 'IP', and thus 'knowledge management' is a broader term than 'IP management'. Informal know how may be too commonplace or fluid to be captured as IP, so leveraging it depends on <i>The Force's</i> ability to retain its staff. We can identify a group of 'policy considerations' under the label 'knowledge management'.
licence	Authorisation by or on behalf of the owner of the relevant IP rights for a third party to do some act in relation to the protected subject matter that the IP owner has the exclusive right to do. In Scenario 3 we develop clauses for the data mining RFT under which <i>The Force</i> is licensed to use and copy tender documents in order to conduct an efficient and effective tender process. However the licence is blurred with propositions about confidentiality of tenders. One kind of licence is a 'distributorship' - see above.
moral rights	The 'moral rights' recognised under our <i>Copyright Act 1968</i> include: (i) the right of integrity of authorship; (ii) the right of attribution of authorship; and (iii) the right against false attribution of authorship. Moral rights are personal rights of an author of copyright material, and cannot be assigned. In Scenario 5 Mary hangs the 'chocolate wrapper collage' in the foyer. We observe that this might raise issues about the moral rights of the artist(s) responsible for the set of original 'dreamtime' paintings which were installed in Scenario 1.
official historian	Engaged by the Commonwealth to prepare an official history, e.g. of a war. In Scenario 6 we learn that Mary Madeangel has been engaged to write an official history of APEC, and she has been granted wide access to Commonwealth records under the 'access conventions'.
partnering	A vague term which could cover a range of 'co-development' or 'commercialisation' options where a commercial entity is involved.
policy considerations	The policy considerations impacting on IP management may be broken down into 5 groups as follows: — People Management;

	<ul style="list-style-type: none"> — Image Management; — Knowledge Management; — Assets, money and contracts; — Risk Management. <p>In Scenario 2 we explore how the IP Principles 1-10 can be re-framed as propositions about <i>policy considerations</i> applicable to IP <i>transactions/relationships</i> that arise at some <i>stage(s) in the IP life cycle</i>.</p>
probity issues	Probity issues are skated over in the advice from Raelene Chew in Scenario 6 re the proposed publication agreement with her friend, Mary Madeangel. See also entries for 'confidential information' and 'conflict of interest', above.
publication agreement	As we see in Scenario 6, this may be structured in a number of fundamentally different ways - depending on whether the publication is a project initiated and driven by the Commonwealth, the author or the publisher.
royalties	Periodic payments based on the volume of commercial activity under a distributorship or publication agreement or the like.
Source-IT	Suite of standard contract forms for simple ICT transactions - see Bibliography . In Scenario 3 we consider specifying a Source-IT contract template in the RFT for the data mining solution, but conclude that the requirements of that project are relatively complex and thus a contract based on GIT4 may be more appropriate.
sponsorship	In Scenario 4, Eventz Management Pty Ltd offer to create a media facility for APEC delegates in return for 'sponsorship' status. This raises a range of issues including the need to ensure that they do not improperly represent their relationship with APEC or the Commonwealth, and how their trade mark might be used in conjunction with official APEC or Commonwealth insignia, even the Commonwealth Coat of Arms.
statutory licence	A licence given by statute as opposed to an ordinary (voluntary) licence. An example is s.183 of the <i>Copyright Act 1983</i> , which allows the Commonwealth to use third party copyright materials 'for the services of the Commonwealth', subject to notification and fixing of 'terms' which may include payment.
tendering	Various tendering issues arise throughout the Case Study, especially issues relating to confidentiality of tenderer's information which are addressed in Scenario 3, and issues re confidentiality of Commonwealth information which are addressed in Scenario 4.
trade mark	In Scenario 1 you should have considered the possibility of protecting 'The Force' and any associated insignia as trade marks. Trade marks are registered in relation to goods or services in a particular <i>category</i> of the Trade Marks Register, which follows the categorisation set down in the <i>Nice International Classification of Goods and Services</i> . See entry above re 'certification trade mark'.

BIBLIOGRAPHY

Attorney-General's Department (AGD)

Intellectual Property Principles for Australian Government Agencies (the 'Statement of IP Principles'), see:

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

Copyright (general information), see: <http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright>

Commonwealth Copyright Administration (CCA), see:

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

Australian Government Solicitor (AGS)

IP Forum Case Studies:

Case Study 1 - *Dodgy Data and the Mediwise Project* (2004)

Case Study 2 - *NCrypt and the Scamguard Affair* (2005)

Case Study 3 - *Bird Flu and the Da Vinci Code* (2006)

See: <http://www.ags.gov.au/whatweoffer/seminars/IPforumstudies/ipforumstudies.htm>

Department of Finance and Administration (DoFA)

Commonwealth Procurement Guidelines ('CPGs'), see:

http://www.finance.gov.au/procurement/procurement_guidelines.html

Australian Government Cost Recovery Guidelines, see:

http://www.finance.gov.au/FinFramework/cost_recovery.html

Guidance on Confidentiality in Procurement ('FMG 3'), currently in draft form; when completed see: http://www.finance.gov.au/procurement/confidentiality_contractors_info.html

Government Information Technology and Communications (GITC) contracting framework, see:

<http://www.gitc.finance.gov.au/>

SourceIT Model Contracts, see: <http://www.finance.gov.au/SourceIT/>

IP Australia

See: <http://www.ipaustralia.gov.au/>

Department of Communications, Information Technology and the Arts (DoCITA)

Commonwealth IT IP Guidelines, see:

http://archive.dcita.gov.au/2004/09/commonwealth_it_ip_guidelines

Design Guidelines, see:

http://www.dcita.gov.au/search/click.cgi?url=http://www.dcita.gov.au/logo/design_guidelines_dcita.pdf&rank=1&collection=search

The Design Guidelines were developed by the Government Communications Unit in the Department of Prime Minister and Cabinet to help departments and agencies ensure the Australian Government branding design is consistently applied.

Artbank

See: <http://www.artbank.gov.au>

Australian Government Information Management Office (AGIMO)

Web Publishing Guide, see: <http://webpublishing.agimo.gov.au>

SourceIT *Guide to ICT Sourcing for Australian Government Agencies*, see:
http://www.agimo.gov.au/_sourceit/sourceit

Asia-Pacific Economic Cooperation (APEC)

APEC Secretariat, see: <http://www.apec.org/>

APEC Australia 2007, see: <http://www.apec2007.org/>

Australian Copyright Council

See: <http://www.copyright.org.au/>

Collecting societies

Copyright Agency Limited (CAL), see: <http://www.copyright.com.au>

Australasian Performing Right Association (APRA), see: <http://www.apra.com.au/>

Phonographic Performance Company of Australia Ltd (PPCA), see: <http://www.pcca.com.au>

Australasian Mechanical Copyright Owners Society Ltd (AMCOS), see: <http://www.amcos.com.au>

Audio-Visual Copyright Society Limited (AVCS) trading as 'Screenrights', see:
<http://www.screen.org>

Visual Arts Copyright Collecting Agency (VISCOPY), see: <http://www.viscopy.com.au>