

ENABLING A
WORLD CLASS
PUBLIC SERVICE

INTELLECTUAL PROPERTY POLICY

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1. Intellectual Property Policy

1.1. Purpose

The purpose of this Policy is to provide information about and identify the key responsibilities of staff to effectively manage the intellectual property (IP) of the NSW Public Service Commission (PSC).

This Policy should be interpreted in conjunction with the *NSW Government Intellectual Property Management Framework 2020 (IP Framework)*¹, which sets out the New South Wales Government's best practice guidelines for dealing with and managing intellectual property.

The IP Framework is based on a set of guiding principles which reflect and build on practices already implemented by many NSW agencies. The purpose of the IP Framework is to facilitate the efficient, consistent, fair and transparent management of IP to optimise the benefit of these assets for the people of NSW.

The IP Framework is not binding on the PSC, but this Policy has been prepared in order to give effect to the IP Framework and its IP Principles wherever practicable. PSC staff are encouraged to refer to the IP Framework, especially if it deals with matters not covered by this Policy.

1.2. Scope

This Policy applies to all PSC employees (including temporary employees) and to any volunteer, contractor or labour hire staff who work for or are engaged by the PSC.

Volunteers, contractors and labour hire staff are to be informed that they must comply with this policy and, where possible, the terms of a contractor's engagement are to require the contractor to comply.

1.3. Intellectual property

Intellectual property (IP) refers to original ideas that are then put into material form (i.e. written down, drawn, photographed, composed, broadcast, performed, designed, invented). IP rights are protected in a variety of ways: some are

¹ The IP Framework was issued on 16 March 2021 under NSW Department of Premier and Cabinet Circular - see <https://arp.nsw.gov.au/c2021-11-nsw-government-intellectual-property-framework/>.

automatic upon creation, e.g. copyright, and some are registrable, e.g. registered trademarks and patents.

The two main types of IP rights relevant for work at the PSC are:

- **copyright**, which covers works (literary, dramatic, musical and artistic works) as well as other material such as computer software, sound recordings and films. Material on the PSC website and multimedia content will usually be subject to copyright; and
- **registered and unregistered trademarks**, which are signs or symbols used to distinguish the goods and services of an entity from those of others. Signs include letters, words, names, shapes, colours, devices, and any combination of these. For maximum legal protection to attach to a trademark, it must be registered. Unregistered trademarks are recognised under Australian law, but they are more difficult to enforce than registered trademarks.

Moral rights are related to IP rights. These are legal rights of individual creators of copyright works (including computer programs) and films to be attributed (credited), not to have the work falsely attributed, and not to have the work treated in a derogatory way without the creator's consent. Derogatory treatment typically involves altering or dealing with a work in a way that prejudices the creator's honour or reputation. Moral rights are only conferred on individuals. They cannot be transferred but appropriate consents to use may be obtained from creators.

Indigenous Cultural and Intellectual Property (ICIP) refers to the rights that Aboriginal people have or seek in relation to their cultural heritage. ICIP is not separately protected in Australia but is protected to some extent by existing law including the Copyright Act. The use of ICIP is often managed through cultural protocols.

1.4. Policy statement

Principle 1 (Efficient Management)

The PSC will manage its IP assets efficiently, effectively and transparently to ensure the maximum benefit and usage of these assets for the benefit of the government and people of New South Wales.

Principle 2 (Compliance)

The PSC will ensure through this Policy and internal procedures that PSC staff are made aware of and comply with IP laws, and respect the IP and moral rights of others.

Principle 3 (Determining ownership and existing licences)

Before using IP material, PSC staff should check whether the PSC owns that IP, and if not, whether the proposed use of the IP is permitted under an existing licence with a supplier, IP owner/licensor or collecting society.

Principle 4 (Whole of Government arrangements)

Before procuring or acquiring a licence to use IP, PSC staff should also check if whole of government IP licences or other arrangements are in place for that class of IP.

Principle 5 (Defining ownership and rights)

IP ownership and rights should be clearly addressed, where relevant, in PSC agreements and other commercial arrangements with external parties.

Principle 6 (Deciding on ownership)

In general, the PSC should ensure that it either owns, or has a sufficient licence to use, copyright material that it has created itself, or procured, commissioned or funded under a contract. Whether PSC ownership is necessary or preferable over a licence will depend on the relevant facts and circumstances.

Principle 7 (Sharing IP on PSC's websites or with the broader public)

When the PSC freely shares, communicates or publishes copyright material on its websites, the Creative Commons Attribution Licence (CC BY 3.0 AU) should generally be used, unless there are specific reasons for using a different form of licence.

Principle 8 (Restrictions that may apply to sharing IP)

Staff should first consider whether any third party IP rights, personal information, confidentiality, security or sensitive classification or other restrictions apply.

Principle 9 (Licensing of IP)

PSC may license its IP on terms which are consistent with the Commissioner's legal powers, objectives and strategic priorities, and which comply with the Crown Copyright Guidelines and other relevant policies.

Principle 10 (Identification and recording of key IP)

PSC should maintain appropriate internal processes and systems to identify, record and manage key IP (including business-critical or strategically valuable IP) that PSC owns, controls, or uses.

Principle 11 (Protection of key IP)

PSC should take appropriate steps to protect its key IP through appropriate copyright notices and, where relevant, contractual protections and other measures in accordance with applicable policy.

Principle 12 (Branding)

All PSC branding and marketing materials must be approved by PSC Strategic Communications and comply with the New South Wales Government Brand Guidelines as updated from time to time (unless an exemption or approval has been granted).

1.5. Key Responsibilities

All staff have a responsibility to properly identify, preserve and use the IP of the PSC, and respect the IP and moral rights of others.

Identify and record key IP. Key IP for the PSC should be able to be easily identified and accessed, for example through use of an IP register and/or appropriate identification and storage systems for documents that evidence the IP rights held (for example, contracts and in some cases purchase orders, invoices and correspondence).

Take steps to protect IP. IP should be actively protected:

- Where appropriate, IP owned by the PSC should contain a copyright notice identifying the PSC as IP owner in the following format: © State

of New South Wales (Public Service Commission): *[if applicable, year of publication]*

- PSC contracts that involve IP should contain an IP clause dealing with ownership and rights. Where the PSC is procuring IP, the contract should also preferably include an indemnity from the contractor indemnifying the PSC against third party IP infringement claims arising from its use of the procured IP. A confidentiality clause is also often recommended.
- Advice from Legal Services Branch should be sought, as appropriate, to ensure adequate protection in legal documentation for IP of key importance to the PSC.
- Confidential IP should be kept secure and its confidentiality protected.

PSC staff are encouraged to seek advice from the PSC Legal Services Branch to ensure that the PSC's IP rights are adequately protected. This is particularly relevant if:

- an external contractor wishes to vary standard contractual terms in a way that reduces the PSC's IP rights, or
- an external contractor does not agree to the PSC's request that the PSC own IP in a particular case.

Use brands as authorised. Use of PSC branding must comply with the NSW Government's Brand Guidelines (as updated from time to time), unless an appropriate exemption or approval has been granted. The Guidelines also provide guidance on when and how to use the NSW Government logo and NSW State Arms.

Check if IP use is authorised. Before using IP, staff should check if the PSC owns it or otherwise if their proposed use is permitted under an existing IP licence.

Before procuring a licence to use third party IP staff should check if they are already licensed to use the IP under a whole-of-government copyright licence or other arrangement.

Staff should seek advice from PSC's Legal Services Branch if IP ownership cannot be determined.

Respect moral rights. Staff should also consider if it would be reasonable to attribute the creator and/or if the creator's permission should be obtained for any treatment likely to be perceived as prejudicial to the creator's honour or reputation.

Report alleged infringements. Any allegations of infringement or misuse of the PSC's IP, or the IP of a third party, must be reported to the policy owner for action. Any action taken will be in line with the PSC's Complaint Handling Policy and the Code of Conduct (if the allegation concerns a staff member).

1.6. Key Information

1.6.1 PSC staff and the PSC's intellectual property rights

PSC ownership

The PSC owns, controls and manages all IP which is **created by PSC staff** pursuant to the terms of their employment or engagement, or which is created by a person acting under the direction or control of the PSC.

1.6.2 PSC rights under whole-of-government (WoG) IP licences

The NSW Government has various WoG licences with collecting societies to use their members' IP. Department of Communities and Justice (DCJ) Legal Branch manages the WoG licences with The Copyright Agency (for text-based works and images, artworks and photos of their members) and Screenrights (for tv and radio broadcasts and online material of their members).

These agreements cover internal copying and communications for government administrative purposes. They do not permit posting of material online or public distribution. Further details are published on the DCJ website at [WoG copying agreements with collecting societies](#). The PSC Legal Services Branch can advise if the PSC is covered for any proposed use.

DCJ Legal must be notified of any separate PSC agreement with the Copyright Agency or Screenrights.

1.6.3 Role of Attorney General in licensing and assignment of PSC IP

The PSC is a Crown agency and the IP that it owns is Crown copyright (copyright material owned by the State). The Attorney General has overall responsibility for the administration of Crown copyright on behalf of the State.

The PSC is responsible for managing its Crown copyright in accordance with its powers and functions, applicable NSW Government policies (such as the IP Management Framework and Crown Copyright Guidelines) and this IP Policy.

Under the Crown Copyright Guidelines, PSC is expected to manage routine licensing and assignment of its Crown copyright material. However, PSC requires approval from the Attorney General or delegate (General Counsel, DCJ) to licence or assign Crown copyright material if:

- the PSC wishes to exclusively licence or assign the whole or a substantial part of its Crown Copyright material; or
- an unsolicited third party request to exclusively licence or assign the PSC's Crown copyright material for commercial purposes is received.

Further information can be found in the [Crown Copyright Guidelines](#) on DCJ's website.

1.6.4 External consultants, contractors and labour hire staff who create IP for the PSC

This section deals with IP that is created by an external party for the benefit or use of the PSC (e.g. by a consultant, contractor or labour hire staff engaged under contract by the PSC).

Where the PSC engages any external party who creates any IP (including copyright material) as part of that engagement, then there should be a written agreement which clearly sets out the PSC's rights to the IP.

There are various factors to consider in determining whether the PSC should own or license IP it intends to procure, commission or fund.

Situations where PSC ownership of IP is preferable

Ownership of IP ensures that the PSC enjoys the maximum possible rights available under law over that IP. In general, it is preferable that the PSC takes ownership of new IP where, for example:

- The IP is business critical or strategically valuable for the PSC or the New South Wales Government more generally;
- PSC wishes to freely publish the material under a Creative Commons or similar licence;
- PSC wishes to encourage widespread use of a standard document in the public interest;

- PSC wishes to reuse, license or adapt the IP for future projects; or
- PSC wishes to have exclusive use of the IP or control or limit third party licensing.

Situations where a licence may be more appropriate

There may be circumstances in which PSC does not need to take ownership of IP and it is more appropriate that PSC negotiate a broad licence to use externally developed or owned IP. These circumstances include, for example, where:

- the IP is for a limited single purpose use;
- the new IP to be created forms a small part of the Contractor or IP owner's pre-existing or background IP;
- the licence concerns the use of the Contractor's or a third party's pre-existing or background IP;
- the cost of buying ownership of the IP is substantially higher than purchasing a licence and the cost is not justified in the context of the project; or
- not taking ownership supports innovation in a sector or has some other identifiable public benefit.

Where ownership of IP is not possible or not required, the PSC should seek a broad licence that permits the PSC to freely reproduce, adapt, communicate or publish the IP.

Intellectual property belonging to **third parties** (that is, persons who are not party to the PSC's contract with an external party) is not owned by the PSC **or** the external contractor. PSC should require the external contractor to take steps to obtain, from the third party, a licence that permits the PSC to use that material too.

Subcontractors

Any agreement with an external party should also regulate the engagement of sub-contractors and the arrangements regarding IP created by those subcontractors.

Default positions under template contracts or WoG contracts

The standard form contracts used by the PSC (e.g. under NSW Government pre-qualification schemes) generally have template clauses regulating the ownership, use and licensing of IP that is provided or created by external contractors during their engagements.

Template clauses may require that the external contractor “assign” or “vest” (i.e. transfer) to the PSC the ownership of IP that the external contractor creates during its engagement (often called “new material”). However, the external contractor may retain ownership of its “pre-existing” material (that is, material that was created by the external contractor separately from its engagement with the PSC). Typically, the PSC will receive a broad licence to use the pre-existing material for the purposes contemplated by the contract.

However, some template clauses state that the external contractor owns all of the new material as the default position but gives the PSC a licence to use that material. An example of that approach is the Procure IT Framework suite of agreements for procurement of ICT related goods and services.

Examples of when to seek legal advice on IP rights and ownership

In many cases, it will be appropriate to use the default contract clauses regarding intellectual property in their original form, as described above.

However, there may be situations in which the intellectual property owned or created by an external contractor has special characteristics that require varying the default position, or other bespoke arrangements for the benefit of the PSC.

Staff should be aware that IP clauses in some WoG contracts or schemes may not be able to be varied without prior Procurement Board or Department of Customer Service approval.

Advice should be sought from Legal Services Branch in relation to ownership and rights in IP for high cost, high value, sensitive, business critical or strategically valuable projects or where joint ownership is proposed or where a departure from the default position in standard government contracts is being considered. Legal Services Branch can prepare appropriate contract text to provide any clarity and protections that the PSC require in its contracts, manage any approval processes, and assist with any negotiations with external parties.

1.6.5 Sharing IP

Before sharing IP outside the PSC, staff must consider whether there are any constraints on that sharing, for example where the IP contains third party IP, personal information, confidential or otherwise sensitive information.

Sharing IP with other agencies

NSW Government policy as outlined in the IP Framework is to encourage agencies to share their IP with other agencies where efficient and appropriate and with counterpart agencies in other governments where this is likely to be of reciprocal benefit. Staff should seek advice from Legal Services Branch on how to document these sharing arrangements.

Sharing IP under Creative Commons licences

As required in the NSW Government Open Data Policy, all material published by the PSC for circulation to the general public must be published under the Creative Commons Attribution Licence (CC BY 3.0 AU) unless there is a particular reason not to do so in a specific case.

Creative Commons licences are a set of IP licences available at <https://creativecommons.org/licenses/by/3.0/> .which are widely used around the world to facilitate the sharing of online content with the public. The Creative Commons Attribution Licence (CC BY 3.0 AU) is the most permissive and open-ended Creative Commons licence. The Attribution Licence allows users a very broad right to:

- (a) share (ie copy and redistribute the IP in any medium or format), and
- (b) adapt (ie remix, transform, and build upon the IP) for any purpose, even commercially.

The only restrictions are that a user must properly attribute the original author of the IP, and not imply that the original author endorses any adaptation of the IP. A full copy of the Attribution Licence can be found at: <https://creativecommons.org/licenses/by/3.0/>.

When the PSC wants the Creative Commons Attribution Licence to apply to a document that it publishes, the following statement should be included in the document:

“Creative Commons

The owner of this copyright work is the State of New South Wales (Public Service Commission). This work is licensed under a Creative Commons Australia Attribution 3.0 (CC BY 3.0 AU) licence.”

When Creative Commons is not appropriate

Some reasons for not using the Creative Commons Attribution Licence (CC BY 3.0 AU) in a particular case may include:

- inclusion of third party material, where the copyright owner has not authorised release under a CC-BY licence;
- inclusion of personal information, confidential information or otherwise sensitive information; or
- the material contains documents that must only be reproduced unaltered for particular reasons.

In those situations, a more restrictive kind of licence may be appropriate, for example, to ensure that adaptation, or commercial use, of the material is forbidden. The Creative Commons system includes different kinds of licences with different levels of restrictions. More details are available at: <https://creativecommons.org/licenses/>.

In general, the Creative Commons Attribution Licence would be appropriate for most kinds of materials that the PSC publishes for public viewing and consumption. Legal Services Branch can give advice if a more restrictive approach to licensing is needed in a particular case.

1.6.6 Commercialisation

NSW Government policy permits agencies to commercialise their IP where consistent with the agency's legal powers, purpose and strategic priorities and in accordance with all relevant policies on dealing with State assets.

It is not anticipated that the PSC would generally seek to commercialise its IP. Any commercialisation proposal should be referred to Legal Services Branch for advice.

1.7. Further information and assistance

PSC staff are encouraged to contact the PSC Legal Services Branch to discuss any questions in relation to the application of this Policy or to seek legal advice in relation to a matter involving intellectual property.

1.8. Legislative context

- Copyright Act 1968 (Cth)
- Trade Marks Act 1995 (Cth)

1.9. Related resources

NSW Government Intellectual Property Framework 2020 (IP Framework)

<https://arp.nsw.gov.au/c2021-11-nsw-government-intellectual-property-framework/>

NSW Attorney General's Crown Copyright Guidelines

<https://www.justice.nsw.gov.au/lrb/Pages/crown-copyright-information/nsw-agencies-licensing-copyright.aspx>

NSW Government Branding Framework and Guidelines

<https://www.nsw.gov.au/nsw-government-communications/branding>.

Australia Council for the Arts Protocols for Working with Indigenous Artists

<https://www.australiacouncil.gov.au/programs-and-resources/Protocols-for-using-First-Nations-Cultural-and-Intellectual-Property-in-the-Arts/>

Australian Copyright Council

<https://www.copyright.org.au/>

1.10. Key responsibilities

It is the responsibility of the **Policy owner** (named in the Policy Authorisation section of this document) to regularly review this Policy to ensure that it remains current.

The Policy owner also has the responsibility to develop and maintain any procedures and documentation necessary to ensure PSC compliance with the policy is practicable as well as to provide reporting and assurance on the Policy and its implementation.

Updates to this policy must be announced to all staff via the Intranet upon endorsement and training sessions on this policy should be provided when necessary.

1.11. Document information

Policy owner	PSC Legal Services Branch
This version endorsed by	PSC Management Board
Date endorsed	13 July 2021
Date effective	20 July 2021
Due for review	July 2023

Version no.	Endorsed date	Description of change
1.0	15 August 2017	Document created
2.0	February 2018	Document reviewed, Updated section 1.3 and 1.6 – removed CC-BY-4.0 and replaced with CC-BY-3.0 AU
3.0	17 December 2018	Further review
4.0	July 2021	Document reviewed and updated to align with NSW Government Intellectual Property Framework 2020, reflect other legislative and policy changes and new NSW PSC policy template.