

**SUBMISSION BY COMMERCIAL RADIO AUSTRALIA**

**REMAKING OF THE *COPYRIGHT REGULATIONS 1969* AND THE *COPYRIGHT TRIBUNAL (PROCEDURE) REGULATIONS 1969***

**October 2017**

Commercial Radio Australia (**CRA**) is the peak industry body representing the interests of commercial radio broadcasters throughout Australia. CRA has 260 member stations, comprising 99% of the Australian commercial radio industry.

CRA welcomes this opportunity to respond to the Department's Consultation Paper and Exposure Draft of the *Copyright Regulations 2017 (Draft Regulations)*.

CRA limits its comments to part 11 of the Draft Regulations. At this stage, CRA makes no comment regarding the remainder of the Draft Regulations nor the *Copyright Legislation Amendment (Technological Protection Measures) Regulations 2017*.

**Key Submissions**

- CRA supports the simplified language used in the Draft Regulations.
- CRA cautions against the assumption that a less prescriptive framework will automatically result in a more efficient process.
- Extensive Tribunal discretion, without detailed guidance regarding the way in which such discretion should be exercised, may increase uncertainty and inefficiency within the Tribunal. This is evident in the conduct of recent Copyright Tribunal cases.
- Without further guidance regarding an alternative process, the Copyright Tribunal and parties are likely simply to continue to use established Federal Court processes, contrary to the legislators' intention.
- Further detail, particularly regarding the Copyright Tribunal's treatment of evidence, should be set out in a detailed Practice Note to accompany the Draft Regulations.
- A Practice Note will enable parties to understand what is expected during proceedings. It will also equip the Tribunal to make decisions that are procedurally justified and less susceptible to being reopened by an appellate body
- The Draft Regulations should not be finalised until a draft Practice Note is available for comment.

## **1. The operation of the Copyright Tribunal must be streamlined**

CRA supports the streamlining of the language in the Draft Regulations, compared with the *Copyright Tribunal (Procedure) Regulations 1969 (1969 Regulations)*. This makes the Draft Regulations easier to understand than was previously the case.

However, CRA notes an absence of substantive change in the Draft Regulations when compared with the 1969 Regulations. CRA's concern is that the Draft Regulations will not result in a significantly different approach to Copyright Tribunal cases.

CRA has recently been a party to proceedings in the Copyright Tribunal.<sup>1</sup> These proceedings lasted for over 2.5 years, required numerous Tribunal hearings and voluminous evidence, incorporated both an interim and a final decision and were extremely costly and time consuming for the parties.

This appears not to reflect the intention behind section 164 of the Copyright Act 1969 (**Act**), which provides that:

*proceedings shall be conducted with as little formality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit.*

CRA strongly urges the Department to give further attention to mechanisms for making the Copyright Tribunal a more user friendly, expeditious and cost-effective forum for setting appropriate copyright rates.

CRA notes the Department's intention to operate the Copyright Tribunal with as little formality as possible, in accordance with section 164 of the Act. CRA agrees that an unnecessarily prescriptive regime may result in increased cost and lengthier proceedings.

However, CRA cautions against the assumption that less formality automatically results in a more user-friendly process.

The existence of clear procedural rules – rather than extensive Tribunal discretion – can lead to a more predictable, streamlined and certain process, to the benefit of all parties. Parties understand what is expected – particularly in relation to evidence that may be admitted – and the Tribunal is able to ensure that its decisions may be readily justified and are less susceptible to being reopened by an appellate body.

There appears to be little disagreement over the need for a more streamlined, speedy and inexpensive means of resolving matters referable to the Copyright Tribunal. The more challenging question is the best means of establishing and operating such a mechanism.

## **2. Need for a holistic approach including a detailed Practice Note**

The balance between flexibility and certainty of process is a delicate one, which requires further careful consideration.

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<sup>1</sup> Phonographic Performance Company of Australia Limited under s 154(1) of the Copyright Act 1968 (Cth) (No 2) [2017] ACopyT 1

CRA submits that part 11 of the Draft Regulation should not be finalised without an accompanying Practice Note.

The Practice Note must be sufficiently detailed and flexible to accommodate the broad range of matters referable to the Copyright Tribunal. This includes relatively minor matters, as well as those that are extremely complex.

It should set out processes that may be adapted to suit the varying matters that present to the Copyright Tribunal. However, in all cases, the process should be as quick and inexpensive as possible.

Section 164 of the Act provides that:

*In proceedings before the Tribunal:*

*(a) the procedure of the Tribunal is, subject to this Act and the regulations, within the discretion of the Tribunal;*

*(b) the Tribunal is not bound by the rules of evidence; and*

*(c) the proceedings shall be conducted with as little formality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit.*

It appears from section 164 that the intention of the legislators was to create a quick, straight forward process, in which the Tribunal could circumvent established rules of evidence in order to expedite the process. Unfortunately, the reality has proved to be quite different.

Recent cases in the Copyright Tribunal, particularly those involving the valuation of sound recordings, have involved copious amounts of evidence. The absence of guidance on the conduct of proceedings in the Tribunal does not appear to have created an efficient process.

CRA submits that the Practice Note should:

- set out expectations in terms of permissible evidence;
- set out expectations that evidence will be limited where possible and confirm the Tribunal's power in this respect;
- confirm the Tribunal's power to strike out or limit evidence that is not relevant, not core to the matter or produced at unreasonably short notice;
- set out expectations in terms of time extensions granted under section 116 of the Draft Regulations; and
- confirm the Tribunal's power to expedite proceedings through its treatment of evidence and time extensions.

We note that the Copyright Tribunal User Group started to work on some principles for a Practice Note for alternative procedures.<sup>2</sup> It is encouraging that a start has been made but the work appears to have stalled.

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<sup>2</sup> <http://www.copyrighttribunal.gov.au/practice-direction>

We suggest that the Draft Regulations and the Practice Note should be reviewed concurrently, as each will inform the other.

We urge the Department to take a holistic view of the Copyright Tribunal process by reviewing the Draft Regulations in conjunction with a detailed Practice Note, aimed at addressing the known defects in the current Copyright Tribunal process.

Please contact Joan Warner, on 02 9281 6577, for clarification on any aspect of this submission.