

# Australian Copyright Council

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## **Submission to Copyright Law Review Committee on the Issues Paper, “Jurisdiction and Procedures of the Copyright Tribunal”**

Thank you for providing us with an opportunity to make a submission on this issues paper.

### **Australian Copyright Council**

1. The Australian Copyright Council is a non profit company, largely funded by the Australia Council, the Federal Government’s arts funding and advisory body. The Copyright Council’s functions include giving information and free legal advice about copyright, research, and seeking changes to copyright law and practice which will benefit creators and other copyright owners. Further information about the Council is available on the Council’s web site.
2. A number of organisations affiliated with the Australian Copyright Council have made separate submissions to the Committee.

### **Jurisdiction of the Copyright Tribunal**

#### **Licence schemes**

3. We support the expansion of the jurisdiction of the Copyright Tribunal to cover additional voluntary licence schemes, where the licensor has referred the scheme to the Tribunal, thereby submitting the scheme to the Tribunal’s jurisdiction. Thus, the Tribunal’s jurisdiction would apply at the licensor’s election, rather than automatically.
4. We submit that such an expansion may benefit both the licensor and the licensees under the scheme; recourse to an official, experienced arbiter may encourage the use of the licence scheme, thus providing legal access to copyright material by the licensee and income to the licensor.
5. Our proposal could be implemented by the following amendments:
  - An amendment to the definition of “licence”, so that the definition covers the licence of any subject matter for any purpose. The definition of “licence” should be drafted so as to cover new rights such as the right of communication to the public to be introduced by the Digital Agenda Bill.
  - An amendment to section 154 so that it allows a licensor to refer an existing licence scheme, as well as a proposed licence scheme.
  - An amendment to section 155 so that where there is a dispute about the terms of a licence scheme, the scheme may be referred to the Tribunal by a prospective licensee (ie persons referred to in section 155(1)(a) and (b)) only

where the licensor has previously referred the scheme to the Tribunal or where the licensor consents to the reference.

6. We think that these amendments should apply to all licence schemes, including those over which the Tribunal already has jurisdiction.
7. We submit that s157(3) and (4) should not have any expanded application, as they have a similar effect in practice to a statutory licence. In addition, we think it is arguable that these subsections are not consistent with Australia's international treaty obligations, as they may not comply with the three-step test.<sup>1</sup> We also note APRA's submission in this regard. We ask the Committee to review these subsections for compliance with the treaty obligations.

### **Statutory licences**

8. We support Screenrights' submission that the Tribunal should have jurisdiction to determine the terms of a record keeping arrangement, as it currently has in respect of sampling systems under section 153B.

### **Members of collecting societies**

9. We submit that the Tribunal should not have jurisdiction in relation to issues which can be properly dealt with by other means, particularly given the Tribunal's limited resources. Given the variety of other avenues for dealing with issues relating to membership of a collecting society, we doubt that expanding the Tribunal's jurisdiction to deal with a collecting society's relationship with its members is justified. The avenues include the society's constitution, the society's own dispute resolution procedures, the Corporations Law, and the declaration and revocation procedures.
10. We note that, in relation to use of copyright material by governments, the Tribunal effectively has jurisdiction in relation to members' issues as a result of its power to declare an organisation to be a collecting society for the purpose of government copying, and to revoke such a declaration. A member of a declared collecting society may make an application to the Tribunal for revocation of a declaration of a collecting society if the company:
  - (a) is not functioning adequately as the collecting society; or
  - (b) is not acting in accordance with its rules or in the best interests of its members who own copyright in copyright material or who are agents of the copyright owners; or
  - (c) has altered its rules so that they no longer comply with any one or more of paragraphs 153F(6)(b) to (f); or
  - (d) has contravened section 183D or 183E (dealing with reporting and accounting, and alteration of rules).<sup>2</sup>
11. We note that – in addition to a declared collecting society, a member of a declared collecting society, and a government – a person with sufficient

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<sup>1</sup> Article 13 of the TRIPS agreement requires any exceptions or limitations to exclusive rights to only apply in certain special cases, not conflict with a normal exploitation of the work, and not unreasonably prejudice the legitimate interests of the rights owner. A similar test appears in Article 9(2) of the Berne Convention in relation to the reproduction right.

<sup>2</sup> Section 153G

interest in the declaration, or revocation of declaration, of a collecting society may be a party to proceedings before the Tribunal relating to revocation of a collecting society for government copying.<sup>3</sup>

12. We submit it would be appropriate for the Tribunal to have the power, currently exercised by the Attorney-General, to declare an organisation as a collecting society for the purpose of educational copying and copying for people with disabilities under Part VA and VB of the Act, and to revoke such a declaration.

### **Resources for the Tribunal**

13. Resources for the Tribunal is the responsibility of the State.

### **Exercise of the Copyright Tribunal's powers by another body**

14. We do not think that the powers of the Copyright Tribunal would appropriately be exercised by another body.

## **Structure, Constitution, Rules and Practices of the Copyright Tribunal**

### **Engagement of members from non-legal backgrounds**

15. We think that the current section 140 is sufficiently broad to allow the engagement of members with non-legal backgrounds where this is appropriate.

### **Single member Tribunal**

16. Generally, proceedings before the Tribunal should be conducted before a judicial member. Non-contentious directions hearings could be dealt with by a non-judicial member or the Secretary of the Tribunal.

### **Less intimidating environment to potential users**

17. We think that the current section 164 is sufficiently broad to allow the Tribunal to vary or develop procedures to create a less intimidating environment in cases where this is deemed necessary or appropriate.

### **People with standing to apply to the Tribunal**

18. The amendments we have recommended would result in additional people having standing before the Tribunal (for example, members of a company declared as a collecting society for Part VB). We do not think any additional expansion of the types of people with standing would be necessary.

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<sup>3</sup> Section 153G(3)

### **Alternative Dispute Resolution Mechanisms**

19. We think that there may be a place for an alternative dispute resolution mechanism procedure. We support APRA's submission that the Federal Court mediation service could be extended to Tribunal matters, but that the mediation should not be compulsory. As with any other area in which the Tribunal's jurisdiction is expanded, the Tribunal's costs should be met by the State.

### **Accessibility and promotion of the Tribunal to Potential Users**

20. We agree with all the suggestions listed in the Discussion Paper regarding improving accessibility and promotion of the Tribunal. In our experience, there is considerable confusion among members of the general public about the role of the Copyright Tribunal.

### **Other issues**

21. We note our submission to the CLRC, in relation to its previous reference on simplification of the Copyright Act, in support of jurisdiction for the Tribunal to grant licences for the use of copyright material where the owner of the copyright is untraceable. We ask the Committee to reconsider that submission.

Libby Baulch and Virginia Morrison  
23 August 1999