

## Copyright Tribunal (Procedure) Amendment Regulations 2004 (No. 1) 2004 No. 363

### EXPLANATORY STATEMENT

Statutory Rules 2004 No. 363

Issued by the authority of the Attorney-General

*Copyright Act 1968*

*Copyright Tribunal (Procedure) Amendment Regulations 2004 (No. 1)*

The *Copyright Act 1968* (the Act) grants and determines the scope of copyright in Australia.

Section 249 of the Act provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that are required or permitted by the Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 166 of the Act authorises the making of regulations for or in relation to the procedure in connection with the making of references and applications to the Copyright Tribunal and the regulation of proceedings before the Tribunal. The Copyright Tribunal is constituted by the Act and is given a range of functions including the determination of remuneration for the use of copyright material under statutory licences.

The *US Free Trade Agreement Implementation Act 2004* (the USFTA Act) contains 10 schedules that amend the relevant Australian legislation to fulfil Australia's obligations under the Australia-United States Free Trade Agreement (AUSFTA). The USFTA Act received Royal Assent on 16 August 2004. Schedule 9 to the USFTA Act amends the Act to fulfil obligations under Chapter 17 of the AUSFTA, which deals with Intellectual Property Rights. Article 17.4.1 of the AUSFTA requires Australia to accede to the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT). Article 9 of the WCT requires contracting parties to align the term of protection of photographs with that of other artistic works. Part 5 of Schedule 9 to the USFTA Act makes amendments to the Copyright Act to fulfil this obligation.

Article 17.4.4 of the AUSFTA requires Australia to extend the term of protection of works (including photographs) by 20 years to the life of the author plus 70 years and that of films and sound recordings also by 20 years to 70 years after publication. Part 6 of Schedule 9 to the USFTA Act makes amendments to the Copyright Act to fulfil this obligation.

The USFTA Act enables a person to obtain reasonable compensation from a copyright owner where the extension of the term of protection under Part 5 or Part 6 to Schedule 9 frustrates an agreement made before 16 August 2004 (the date of Royal Assent of that Act). Where reasonable compensation cannot be agreed between the owner of copyright and the user of the material, either party may apply to the Copyright Tribunal for the determination of reasonable compensation payable.

The purpose of the Regulations is to prescribe the contents of applications to the Copyright Tribunal for determination of reasonable compensation payable with respect to the exercise of copyright in works, including photographs, films and sound recordings that are the subject of agreements made before the USFTA Act received Royal Assent.

The Regulations insert new provisions into the *Copyright Tribunal (Procedure) Regulations 1969* (the Principal Regulations). Item 119 in Part 5 and item 133 in Part 6 of Schedule 9 to the USFTA Act give rise to the need for new regulations that relate to the procedure by which the Copyright Tribunal will exercise new functions under items 118 and 132. Items 118 and 119 deal with applications to the Tribunal for determination of reasonable compensation payable with respect to the exercise of copyright in photographs that are the subject of agreements made before the USFTA Act received Royal Assent; items 132 and 133 likewise deal with applications to the

Tribunal for determination of reasonable compensation in respect of works, films and sound recordings. The Regulations specify that they are made for the purposes of applications under items 118 and 132 of Schedule 9 to the USFTA Act.

Details of the Regulations are provided in the Attachment.

Item 118 of Schedule 9 to the USFTA Act will commence on 1 January 2005. Item 132 of Schedule 9 to the USFTA Act will commence on the later of 1 January 2005 or the date of entry into force of the AUSFTA.

Accordingly Regulations 1 to 3 and Schedule 1, dealing with copyright in photographs, commence on 1 January 2005. Schedule 2 to the Regulations, concerning applications relating to works, films and sound recordings commence on the later of 1 January 2005 or the entry into force of the AUSFTA.

Subsections 4(1) and 4(2A) of the *Acts Interpretation Act 1901* read together provide that regulations may be made between the passing and the commencement of legislation upon which they rely for their authority, as long as such regulations are not expressed to commence before that legislation.

## **ATTACHMENT**

Details of the *Copyright Tribunal (Procedure) Amendment Regulations 2004 (No. 1)*

**Regulation 1** provides that the regulations are the *Copyright Tribunal (Procedure) Amendment Regulations 2004 (No. 1)*

**Regulation 2** provides that regulations 1, 2 and 3 and Schedule 1 outlined below commence on 1 January 2005, and that Schedule 2 outlined below commences on the date specified in item 2 of the table in subsection 2(1) of the *US Free Trade Agreement Implementation Act 2004* (the USFTA Act), which is 1 January 2005 or, if later, the entry into force of the Australia-United States Free Trade Agreement.

**Regulation 3** provides that Schedules 1 and 2 to the regulations amend the *Copyright Tribunal (Procedure) Regulations 1969*.

**Schedule 1, item 1** inserts new regulation 33D, after regulation 33C, to prescribe the matters for inclusion in or attachment to an application to the Copyright Tribunal under item 118 of Schedule 9 to the USFTA Act. These matters are listed in new subregulation 33D(2) as:

- identification of the photograph to which the application relates;
- the names of the parties to the application, being the owner of copyright in the photograph and the intending user under an agreement referred to in paragraph (1)(b) of item 118;
- the circumstances or events giving rise to the application;
- the agreement or a copy of the agreement referred to in paragraph (1)(b) of item 118 concerning the intended use of the photograph or, if the applicant does not have access to the agreement, a statement saying so;
- the precise or approximate date of expiration of copyright in the photograph;
- a copy of any notice of objection to the use given by the owner to the intending user;
- the amount of compensation offered by the owner to the intending user for exercising the copyright in the photograph against the latter's intended use of it, and the date of the offer; and

- a request to the Tribunal to determine the amount of reasonable compensation payable to the intending user by the copyright owner for exercising the copyright in the photograph against the intended use of it.

New subregulation 33D(3) requires the Tribunal to specify a date by which the copyright owner would have to pay any reasonable compensation that it determines.

New subregulation 33D(4) defines 'USFTAIA' as used in regulation 33D as the *US Free Trade Agreement Implementation Act 2004*. It also defines 'owner' as used in regulation 33D as having the same meaning as in the definition in sub item 118(8) of that Act, where it is defined to include an exclusive licensee of the relevant copyright at the relevant time.

**Schedule 2, item 1** inserts new regulation 33E, before regulation 34, to prescribe the matters for inclusion in or attachment to an application to the Copyright Tribunal under item 132 of Schedule 9 to the Act. These matters are listed in new subregulation 33E(2) as:

- identification of the work or other subject matter to which the application relates;
- the names of the parties to the application, being the owner of copyright in the work or other subject matter and the intending user under an agreement referred to in paragraph (1)(b) of item 132;
- the circumstances or events giving rise to the application;
- the agreement or a copy of the agreement referred to in paragraph (1)(b) of item 132 concerning the intended use of work or other subject matter or, if the applicant does not have access to the agreement, a statement saying so;
- the precise or approximate date of expiration of copyright in the work or other subject matter;
- a copy of any notice of objection to the use given by the owner to the intending user;
- the amount of compensation offered by the owner to the intending user for exercising the copyright in the work or other subject matter against the latter's intended use of it, and the date of the offer; and
- a request to the Tribunal to determine the amount of reasonable compensation payable to the intending user by the copyright owner for exercising the copyright in the work or other subject matter against the intended use of it.

New subregulation 33E(3) requires the Tribunal to specify a date by which the copyright owner would have to pay any reasonable compensation that it determines.

New subregulation 33E(4) defines 'USFTAIA' as used in regulation 33E as the *US Free Trade Agreement Implementation Act 2004*. It also defines 'owner' as used in regulation 33E as having the same meaning as in the definition in sub item 132(8) of that Act, where it is defined to include an exclusive licensee of the relevant copyright at the relevant time.