



**Australian Government**  
**Department of Employment and  
Workplace Relations**

**National Office**

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Louise Gell  
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Attorney-General's Department  
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National Circuit  
BARTON ACT 2600

Dear Ms Gell

Please find attached this Department's response to the discussion paper issued by the Committee for the consultation form of 27 July 2004. I appreciate you allowing us to provide this to the Committee outside of the deadline.

The submission notes that we have recently obtained legal advice about the operation of the *Copyright Act 1969* in relation to certified agreements made under the *Workplace Relations Act 1996*. This advice address the operation of section 177 of the Copyright Act in the workplace relations context. We are happy to provide this advice to the Committee on a confidential basis if it would assist the Committee in its consideration of this issue.

Yours sincerely

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## **Introduction**

1. The Department of Employment and Workplace Relations ('the department') makes this response as a member of the executive arm of the Government. The department's response to the discussion paper issued by the Copyright Law Review Committee ('the Committee') focuses on the public policy reasons for Crown copyright and ss.176-178 of the *Copyright Act 1969* (the Copyright Act). The department does not wish to make any response to the other issues identified by the Committee.
2. This response comments on the issue of the scope of material to be covered by Crown copyright. This issue is addressed in dealing with the provisions of the Copyright Act.

## **Issue One – Public Policy**

### *Policy basis for Government ownership of copyright*

3. To assist the department in formulating its views about the policy basis on which the Government asserts ownership of copyright, the department has consulted with tribunals which fall within our portfolio. These bodies are:
  - a. the Australian Industrial Relations Commission ('the Commission');
  - b. the Remuneration Tribunal; and
  - c. the Defence Force Remuneration Tribunal ('the DFRT').
4. Each of these bodies is established under a different statute.<sup>1</sup> The Commission deals with 'industrial disputes' which arise under the *Workplace Relations Act 1996* (the WR Act); performs various functions in relation to agreements which are made under the WR Act; deals with unfair dismissals and performs other conciliatory and determinative functions. The Commission is made up of members who are appointed by the Governor-General.
5. The functions of the Remuneration Tribunal and the DFRT are more focussed. These bodies are constituted by part-time members who are also appointed by the Governor-General. The role of these tribunals is to determine and provide advice on the remuneration (including allowances and entitlements) of various public servants and military personnel.
6. These bodies are quasi-judicial in nature. They are all responsible for the publication of decisions and determinations, and, in case of the Commission, other materials unique to the WR Act.
7. The decisions, orders and determinations made by these bodies are made available to the public via internet sites. In the case of AIRC decisions, these are also available for sale in the usual way, in printed version. The public is able to download, print and reproduce the material from the websites for non-commercial use. There is no attempt to restrict access to materials made available from the internet nor to profit from them.
8. So, in a practical sense the subsistence of copyright in these documents does not prevent them being accessed and used by the public. If it was thought to be appropriate, the restrictions that are imposed via the disclaimers could be further relaxed without the Commonwealth relinquishing copyright.
9. The Remuneration Tribunal secretariat noted that, in light of the broad access to its Determinations, Reports and Statements it already provides to the public, it would be unlikely that removing copyright would give any greater access to law in relation to these documents. The secretariat noted that if copyright were removed, the Tribunal may have concerns about potential misrepresentation or misuse of the documents that are explored more fully below.

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<sup>1</sup> The Australian Industrial Relations Commission under the *Workplace Relations Act 1996*; the Remuneration Tribunal under the *Remuneration Tribunal Act 1973*; and the Defence Force Remuneration Tribunal under the *Defence Act 1903*.

10. Justice Giudice, the President of the Commission has indicated that he does not have any general objection to the removal of copyright in its decisions. The President's view is generally in agreement with the views expressed in the submission provided to the Committee by Black CJ of the Federal Court.
11. The DFRT has indicated that it considers its decisions and determinations to be 'public documents'. For this reason, the DFRT readily provides printed copies of these material to interested parties.

#### *Protection of the integrity of material*

12. The department acknowledges that Crown copyright can be used to protect the integrity of materials produced by the Commission, Remuneration Tribunal and the DFRT. If copyright were to be removed in these documents, the department considers it important to create some alternative method of protecting the integrity of the material. The Remuneration Tribunal secretariat in particular noted there may be concerns about misuse of the material that could lead to embarrassment for the Tribunal, office holders or Government, or to loss of reputation or integrity for the Tribunal or its determinations. For example, selective quoting or misquoting of Tribunal documents.
13. The department notes that some submissions to the Committee have suggested various measures to address this issue and the department encourages the Committee to consider these options. At a minimum, the department considers that adequate protection requires acknowledgement of the source of a work when it is used, and prohibiting false representations about the material.
14. The DFRT has indicated that it would be in favour of introducing legislative provisions to achieve this purpose.

#### *Use of Crown copyright to restrict access to documents*

15. The department does not support the use of copyright law to deny persons access to material that they would otherwise be entitled to under the *Freedom of Information Act 1982* (the 'FOI Act'). This department only refuses to provide documents requested under the FOI Act on the basis of the exemptions set out in Part IV that Act.

### **Issue Four – Sections 176–178 & 35(6) of the Copyright Act 1969**

#### *The First Publication Principle*

16. The department would not support the removal of s.177 of the *Copyright Act 1969*.
17. The department relies on this provision as a basis for making agreements certified under the WR Act freely and readily available for use by the public via the internet. This is consistent with the objects of the WR Act.
18. Were the provision to be removed, the department would want to ensure that the that some other legislative measure was introduced to enable the Commonwealth to publish and make these documents available to others to copy, download and use. Further details about this are set out below.

#### Certified agreements (CAs) made under the WR Act

19. CAs are collective agreements made between an employers and either employees or a union. Such agreements can be made under Part VIB of the WR Act. These documents, once made and certified by the AIRC, regulate the terms and conditions of employees within a particular enterprise. They are enforceable under the WR Act. As such, they are of a quasi-legislative nature.
20. The making of a CA is the result of a collective and iterative process. A CA may contain clauses which are copied from earlier agreements between the parties, taken from agreements

between other parties and/or from awards. Awards are instruments made by the Commission in settlement of an industrial dispute which regulate terms and conditions of employment. An awards itself is often based on a 'log of claim' – a document that parties serve on one another to invoke Commission's arbitral jurisdiction.

21. A CA will often duplicate earlier agreements whilst incorporating changes made by the negotiating parties. These changes may be major or minor involving, for example, the removal or replacement of whole clauses or the redrafting of a sentence within a clause.
22. The agreement making process involves a number of stakeholders. The process of arriving at the final form of an agreement may involve employees, unions, consultants, employers and the Commission. Each party may produce or contribute to various preliminary drafts of a CA at various stages. Consultants who offer services in agreement making may draft some or all of an agreement for a client, or draft a template for clients to use as a starting point for an agreement.
23. The WR Act requires that employers provide employees with a copy of the proposed agreement to be certified, or with ready access to it. Only if a valid majority of employees approve the agreement will the agreement have been 'made'.
24. Once an agreement is made, the parties who propose to be bound to the agreement then make an application to certify the CA under the rules of the Commission. They are required to provide statutory declarations and several copies of the agreement to the Commission when applying for certification.
25. The Commission may remove clauses of the agreement that do not conform with certain mandatory requirements of the WR Act. On some occasions, a Commissioner will suggest the amendment of the wording of a clause or clauses in the agreement to facilitate meeting these requirements. The final agreement may therefore be significantly modified between the draft, approval and certification stages.
26. Once it is certified, the Registrar of the Commission must make copies of the agreement available for inspection by any person at the Registry. There is no express legislative requirement to publish agreements.<sup>2</sup>

#### Publishing agreements on the internet

27. The department publishes CAs on the WageNet website ([www.wagenet.gov.au](http://www.wagenet.gov.au)). Users of the website, which is hosted and operated by the department, are allowed to download, display, print and reproduce in unaltered form for non-commercial use the material displayed on the site. There are approximately 14, 000 agreements currently on WageNet.
28. There is significant public interest in the Commonwealth making all agreements certified under the WR Act publicly available on the WageNet website. The quasi-legislative nature of agreements clearly supports making them broadly and easily available, in the same way that legislation and other forms of regulation should be available those who are bound to comply with the obligations created by those instruments.
29. Availability via the website ensures fast and free of charge access to the terms and conditions of workers' employment for employees, employers, unions, industrial agents and legal practitioners, Wageline advisers and industrial inspectors.
30. This access, in turn, supports compliance with the obligations that arise under agreements – it means that everyone is aware of what terms and conditions operate and must be complied with at a workplace. This is central to one of the principal objects of the Act, which is to provide a

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<sup>2</sup> See subparagraph 143(3)(b)(ii) of the WR Act.

framework of rights and responsibilities for employers and employees and their organisations and ensures that they abide by awards and agreements applying to them.<sup>3</sup>

31. Making agreements broadly available also supports fair and effective agreement making, which is also a principal object of the Act. It does this by allowing employees (including their union representatives) and employers to see how other companies have structured their employment relationships and use or adapt those ideas within their own organisations. Other parties are then able to copy clauses or parts of agreements and use them for their own agreement. This facilitates effective and innovative agreement making, which in turn supports another of the principal objects of the WR Act – encouraging the pursuit of international competitiveness through higher productivity and a flexible and fair labour market.
32. It is also quite common for parties to copy and use parts of certified agreements in other forms of written agreement (for example, individual agreements).
33. Merely publishing agreements is not sufficient to achieve these objects – allowing parties to download and utilise agreements or parts of agreements is also necessary.

#### Basis for publishing agreements

34. Section 177 of the Copyright Act provides the Commonwealth with a basis for asserting copyright in agreements, publishing those agreements and allowing others to use them for the purposes outlined above. Without s. 177, or some other mechanism giving the Commonwealth the power to deal with agreements in this way, the viability of this service could be jeopardised. The Commonwealth would need to negotiate with authors before it could publish agreements. Because of the way in which agreements are created, identifying and locating authors would be extremely difficult. Dozens of people may be in a position to assert ownership in any individual certified agreement. As noted above, there are thousands of agreements.
35. We have recently obtained legal advice about this matter which we are happy to provide to the Committee on a confidential basis if it would assist the Committee in its consideration of this issue.

#### Conclusion

36. If s. 177 of the Copyright Act was removed, parties other than the Commonwealth may assert ‘ownership’ in the copyright of agreements. The position of these parties would be enhanced if s. 177 of the Copyright Act was removed. The department does not anticipate that many of the thousands of individuals who have contributed to the text of agreements would want to assert copyright in those agreements. However, consultants who draft some or all of an agreement for a client, or draft a templates for use in agreement making, may assert rights which would deny the public the ability to use agreements in the manner outlined above.
37. The vesting of ownership of copyright in certified agreements in the Crown rather than the authors (which in itself is a ‘loose’ concept in this context) allows the department to make these materials widely and freely available to the public. As ownership of copyright is vested in the Crown, the department can ensure free access to this information regardless of commercial considerations, which would be the primary interest of the agreement authors.
38. If this were not the case, parties would be uncertain about how they may use material in certified agreements. They may have to invest resources in identifying and contacting authors of an agreement they wish to access or use. They may have to negotiate terms of use or pay licence fees to these authors, or, if they do not, be exposed to liability for breaching copyright. The department does not consider that this would serve the public interest, and that it would be contrary to the objects of the WR Act.

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<sup>3</sup> See section 3 of the *Workplace Relations Act 1996*.

39. In a sense, the same arguments in favour of relinquishing copyright in judgements, Acts and Bills can be relied upon to support Commonwealth ownership of copyright in certified agreements – the desired object is to ensure that access to and use of these documents is not restricted.
40. It may follow therefore that the public interest is better served through Commonwealth ownership in the copyright, to prevent inappropriate restrictions on the public's access to agreements.

*Suggested 'in the Course of Employment' Amendment*

41. The Committee has invited comment on the suggested amendment of the s.176 and 178 of the Copyright Act. The suggested amendment envisages replacing the phrase '...under the direction or control of, the Commonwealth' with '...in the course of employment with, the Commonwealth' in both sections. The department would not support an amendment along these lines.
42. The department's primary concern with the suggested amendment is that it would increase the complexity associated with determining whether the Crown owns copyright in the works it produces or authorises to be produced. The amendment would introduce into these sections the workplace relations concept of 'employment' in place of the current 'direct or control test'. While this change may appear to simplify these sections, in reality it is likely to have the opposite effect. Determining the nature of the relationship between a worker and work provider can be difficult question. For example, characterising a relationship as one of employment or independent contracting involves the weighing of numerous detailed considerations (see the decision of the High Court in *Hollis v Vabu* (2001) 207 CLR 21). Also, even if it is established that a person is in an employment relationship, questions can arise about the identity of the employer, particularly in labour hire arrangements. In our view, the suggested amendment makes the operation of these sections more ambiguous and difficult and may make them more limited.
43. The department's second concern is based on the potential for the amended Copyright Act to reduce the flexibility available to Commonwealth entities in their engagement of workers. If this suggested amendment were to become law, it may influence the workplace arrangements under which the Commonwealth engages people, encouraging employment rather than other forms of relationships, to ensure that the Crown obtains copyright in its employees' work. This has the potential to reduce a Commonwealth entity's ability to rely on more flexible employment practices (such as labour hire) based on concerns about copyright.
44. If a Commonwealth entity wanted to continue to use more flexible employment options they would need to ensure that appropriately drafted copyright clauses are included in the terms of engagement of the worker. This could increase the administrative burden on that entity and may add complexity to labour hire arrangements where the Commonwealth will be unlikely to have a direct contract with the person engaged. Generally, in these circumstances the contract will be with the labour hire entity, not with the person who is engaged.
45. In the department's view, the current 'direct or control test' offers greater certainty and coverage and is less complex than the suggested amendment. In the absence of strong policy concerns about the operation of the current test, the department considers it should be retained.