

COMMONWEALTH OF AUSTRALIA

Copyright Act 1968



**IN THE COPYRIGHT TRIBUNAL OF AUSTRALIA
FILE NO. CT 2 OF 2022**

FREE TV AUSTRALIA LIMITED (ACN 101 842 184)
Applicant

**PHONOGRAPHIC PERFORMANCE COMPANY OF
AUSTRALIA LIMITED (ACN 000 680 704)**
Respondent

ORDER

TRIBUNAL: THAWLEY J (Deputy President)

DATE: 28 MARCH 2023

WHERE MADE: SYDNEY

BY CONSENT, THE TRIBUNAL ORDERS THAT:

Matters arising from proceedings CT 2 of 2007

- 1 The following orders apply to the Agreed Regime as defined in the Tribunal's orders made on 5 November 2008 in CT 2 of 2007. The Agreed Regime is attached to these orders and marked "A".
- 2 The Agreed Regime be varied to permit Confidential Documents and Information (as defined in the Agreed Regime) to be used for the purpose of this proceeding (CT 2 of 2022) and any appeal or review, and otherwise the Agreed Regime continues to apply as originally ordered, subject to order 3 of these orders.
- 3 To the extent any party seeks to rely on or put into evidence in this proceeding any document from CT 2 of 2007 that is subject to the Agreed Regime, that document is to be classified Confidential or Restricted Access under the confidentiality regime in these proceedings, and the confidentiality regime in these proceedings will apply to the document in lieu of the Agreed Regime. If the document was produced by a third party,

the party seeking to rely on the document will liaise with the third party to obtain any necessary consents or orders from the Tribunal to enable this to occur.

- 4 Any undertakings previously given in CT 2 of 2007 pursuant to the Agreed Regime be varied in accordance with order 2 of these orders.
- 5 To the extent necessary for the purposes of this proceeding and any appeal from, or review of, this proceeding, the parties and their legal representatives be released from any obligations of the kind referred to in *Hearne v Street* (2008) 235 CLR 125 in respect of:
 - (a) the Confidential Documents and Information referred to in order 2 of these orders;
and
 - (b) the affidavits filed and served in CT 2 of 2007.

Confidentiality regime

- 6 Subject to any further order, the following confidentiality regime apply in this proceeding.
- 7 There be two classes of confidential documents filed or produced in the proceeding, being “Restricted Access” and “Confidential” documents.
- 8 Publication or any other form of disclosure of “Restricted Access” and “Confidential” documents and their contents be prohibited other than to the Tribunal or otherwise in accordance with these orders.

Confidential documents

- 9 Documents that are agreed by the parties or ordered by the Tribunal to be Confidential may be made available to, and may be copied for use by, the parties’ external solicitors, counsel, engaged experts, the Chief Executive Officer and up to five other instructing representatives from each party and each Free TV Member Network (as set out in the list attached to these orders and marked “B”), and consultants engaged by the parties who are nominated and agreed by the parties as requiring such access, with agreement not to be unreasonably denied, subject to service on the confidentiality claimant of a

signed undertaking in the form attached to these orders and marked “C” (other than for counsel who will not be required to provide an undertaking).

Restricted Access documents

- 10 Documents that are agreed by the parties or ordered by the Tribunal to be Restricted Access may be made available to, and may be copied for use by, the parties’ external solicitors, counsel, engaged experts, and consultants engaged by the parties who are nominated and agreed by the parties as requiring such access, with agreement not to be unreasonably denied, subject to service on the confidentiality claimant of a signed undertaking in the form attached to these orders and marked “D” (other than for counsel who will not be required to provide an undertaking).

General rules applicable to confidentiality regime

- 11 Where any party considers that a document filed or produced in the proceedings should be treated as Confidential or Restricted Access, such a document should be clearly marked Confidential or Restricted Access on the front page before that document is filed or produced.
- 12 Where a document has been filed or produced and marked Confidential or Restricted Access, and that classification is not contested, then that document will be treated as Confidential or Restricted Access (as applicable) under these orders.
- 13 If a party wishes to contest the classification of any document as Confidential or Restricted Access, that party must first notify the other party, and seek to agree on the classification by negotiation. If agreement is not reached, each party retains the right to seek an order from the Tribunal as to the classification of the document in question.
- 14 Any third party that is required to produce a document in the proceeding shall be permitted to seek an order from the Tribunal that such a document be classified as Confidential or Restricted Access. Each party to the proceeding retains the right to contest the classification of any such document by seeking an order from the Tribunal as to the classification of the document in question.
- 15 A party or any third party seeking an order varying the classification of a document which a party has marked Confidential or Restricted Access, will in the first instance

provide a short written submission to the Tribunal, with any party opposing that variation of the classification to have the opportunity to provide a short written submission in answer. The matter will be determined by the Tribunal on the papers unless the Tribunal considers an oral hearing appropriate or one of the parties requests the opportunity to provide short oral submissions.

- 16 The parties will provide a list of Restricted Access and Confidential materials on the Tribunal record for the purpose of the making of confidentiality orders prior to the conclusion of any final hearing in this proceeding or otherwise as requested by the Tribunal.
- 17 Persons entitled to access Confidential and Restricted Access documents under this confidentiality regime may arrange for those documents to be copied or accessed by direct administrative support, provided that they otherwise comply with the terms of the relevant undertaking.
- 18 Confidential and Restricted Access documents filed or produced by a confidentiality claimant in the proceeding, that contain only the confidential information of that confidentiality claimant, can be disclosed to representatives of that confidentiality claimant without those representatives having signed the relevant undertaking contemplated by orders 9 and 10.

Summonses

- 19 Subject to any further order, the following regime applies to the issuing of summonses and production of documents in this proceeding.
- 20 Any party seeking document production from the other party is to provide proposed categories to the other party and seek to agree on the categories by negotiation, including a timetable for production and the classification of the documents for confidentiality purposes within the confidentiality regime in this proceeding. Where all aspects of production are agreed, the parties will produce those documents to each other informally.
- 21 If there is a dispute relating to a party's proposed categories for production or timing for production, or a summons is otherwise required to enable production:

- (a) the party seeking production is to provide a draft summons containing the categories to the Associate to Justice Thawley, together with a short written submission as to why the Tribunal should exercise its power to issue the summons under s 167 of the *Copyright Act 1968* (Cth);
- (b) the party resisting production as proposed will have the opportunity to provide a short written submission in answer; and
- (c) the matter will be determined by the Tribunal on the papers unless the Tribunal considers an oral hearing appropriate or one of the parties requests the opportunity to provide short oral submissions.

22 If a party seeks production of documents from a third party:

- (a) production can proceed on an informal basis if agreed;
- (b) that party may provide a draft summons to the Tribunal, together with a short written submission as to why the Tribunal should exercise its power to issue the summons under s 167 of the *Copyright Act 1968* (Cth);
- (c) if the other party opposes the issue of the summons in whole or in part, that party will have the opportunity to provide a short written submission in answer; and
- (d) if the third party resists production under any summons in whole or in part, that third party will have the opportunity to make submissions in a form directed by the Tribunal.

Date that entry is stamped: 28 March 2023



The Hon Justice Thawley, Deputy President

ATTACHMENT A

COMMONWEALTH OF AUSTRALIA

COPYRIGHT ACT 1968

IN THE COPYRIGHT TRIBUNAL OF AUSTRALIA

FILE NO. CT 2 OF 2007

REFERENCE UNDER SECTION 154(1) OF THE COPYRIGHT ACT 1968

REFERENCE BY: PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA LIMITED (ACN 000 680 704) UNDER SECTION 154 OF THE *COPYRIGHT ACT 1968*

ORDER

PRESIDENT, THE HON JUSTICE EMMETT

5 NOVEMBER 2008

THE TRIBUNAL:

- 1 Notes that the parties have agreed upon a regime for the production of documents as set out in Annexure A to these orders (the **Agreed Regime**).
- 2 Directs that documents to be disclosed by a party pursuant to the Agreed Regime be produced by that party to the Tribunal (the time and place for production to be fixed by arrangement with the Registrar or pursuant to the liberty to apply in order 6 below) and immediately returned to the producing party.
- 3 Directs that the time by which the parties provide access to each other's documents in any agreed categories be extended to 7 November 2008.
- 4 Directs that each party's access to documents produced by the other party be subject to the terms of the Agreed Regime.
- 5 Lists the matter for the hearing and determination of any outstanding issues in relation to categories of documents for production on 3 December 2008.
- 6 Grants liberty to the parties to apply on three days' notice.

ANNEXURE A

COPYRIGHT TRIBUNAL FILE NO. 2 OF 2007

**REFERENCE BY PPCA: COMMERCIAL TELEVISION LICENCE
SCHEME**

CONFIDENTIALITY REGIME

Classification of documents

1. Documents will be identified by the disclosing party as falling into one of three categories:

Category 1 - highly confidential documents.

Category 2 - other confidential documents.

Category 3 - non-confidential documents.

2. Disclosure in each category will be:

	Usual implied undertaking applies	Available to Australian external legal advisers to all parties	Available to expert witnesses	Available to relevant employees of parties and employees of parties' members
Category 1 (Highly Confidential) documents.	✓	✓	To named individuals or as agreed by disclosing party	X
Category 2 (Other Confidential) documents.	✓	✓	✓	✓
Category 3 (non-confidential) documents.	✓	✓	✓	✓

3. Access to documents in category 1 and 2 will only be granted to a person who has served a copy of a Confidentiality Undertaking, in the form annexed hereto and marked "A1", on the other parties.
4. Each party will supply a list of named experts along with that expert's curriculum vitae to be included in inspecting category 1 documents. Such a list can be added to at any time by written notice to each disclosing party and serving a copy of an executed Confidentiality Undertaking.
5. No category 1 document will be provided to an expert included in such a list:
 - (a) if a party has notified an objection in respect of that person pursuant to paragraph 12 – until the resolution of that objection (including by any order of the Tribunal); or
 - (b) otherwise – until 7 business days after the notification of the inclusion of that person in the list, unless the disclosing party has consented in writing to that person being given that document sooner.
6. Each party will assign a grading, "1", "2" or "3" to each document in its disclosure list.
7. When making documents available for inspection or providing copies of documents to another party, documents in each category will be supplied separately and documents in categories 1 or 2 will be clearly marked.
8. Without limiting the Confidentiality Undertaking, a party that receives or makes copies of documents in categories 1 or 2 or creates documents which contain information from documents in categories 1 and 2 will:
 - (a) store them separately from any non-confidential documents;
 - (b) mark them as confidential or retain the confidentiality markings already upon them;
 - (c) inform each person to whom they are provided of the terms of this confidentiality regime.

Disagreement as to classification or access

9. Where after inspection of a document by the external legal advisors for any party that party wishes to argue that the document should be assigned a lower grading or that the inspection regime should be varied in some other way in respect of the document (for example, by allowing access to particular person(s) or limited use of the document beyond that which would otherwise have applied), that party will seek to negotiate the reclassification or variation of the inspection regime directly with the disclosing party.
10. If a disclosing party agrees to reclassify any document, the disclosing party will notify all other parties of the change and the change will apply to all parties.

11. If a disclosing party refuses to reclassify a document but agrees to vary the inspection regime in some other way, the disclosing party will notify each other party of the variation that has been agreed.
12. Where after notification of the inclusion of an expert in a list of the kind referred to in paragraph 4, any party wishes to object to the inclusion of that person in the list, that party will notify the other parties of the objection. That party and the disclosing party will seek to resolve the objection by negotiation and will notify the other parties of any such resolution.
13. No party will apply to the Tribunal for orders permitting or preventing inspection or use of any document unless they have first complied with paragraph 9 or 12 (as applicable).

Status of this agreement

14. Once agreed by the parties, this regime will be presented to the Tribunal so that it and undertakings annexed hereto can be noted.

"A1"

COPYRIGHT TRIBUNAL FILE NO. 2 OF 2007

**REFERENCE BY PPCA: COMMERCIAL TELEVISION LICENCE
SCHEME**

CONFIDENTIALITY UNDERTAKING

I, _____ of _____, as a
condition of obtaining access to Category 1 or Category 2 documents under the confidentiality regime
(**Confidential Documents**) and the information contained within those documents (**Information**)
undertake to the Copyright Tribunal of Australia (**Tribunal**) and to ■■■[insert party claiming
confidentiality] that unless the Tribunal otherwise orders:

2. I will keep the Confidential Documents and the Information confidential at all times.
3. I will store any copies of the Confidential Documents or any part thereof, together with any documents that records Information, that are in my possession, custody or control securely at the premises of my firm, chambers or office (as the case may be) in such a way that they cannot be seen by a person other than as permitted by these undertakings.
4. Other than disclosures to members or staff of the Tribunal or which are compelled by law, I will not disclose the Confidential Documents or Information to any person other than:
 - (a) a person who is permitted to receive them under the confidentiality regime that applies in this proceeding; or
 - (b) a person to whom such disclosure is made with the prior written consent of ■■■[party
claiming confidentiality], whose consent can be withheld in its absolute discretion,

who has given an undertaking in identical terms to this undertaking and served a copy of that undertaking on the other parties to this proceeding.
5. I will not use the Confidential Documents or Information for any purpose except as required for the purpose of this proceeding or any appeal therefrom.
6. Notwithstanding anything in paragraph 3 above, I may disclose such part of the Confidential Documents:
 - (a) as required by law;
 - (b) as ordered by the Tribunal;

- (c) that is in the public domain other than as a result of any breach of an obligation of confidence or other duty, a breach of this confidentiality undertaking or a breach of any other confidentiality undertaking given in this proceeding or any implied undertaking.

7. I will, upon the conclusion of the Proceedings or any appeal therefrom, ensure that:

- (a) all Confidential Documents and copies of any Confidential Documents within my possession, custody or control are returned to **[insert party claiming confidentiality]** or destroyed; and
- (b) any document prepared by me or given to me recording any Information from a Category 1 document within my possession, custody or control is destroyed subject to the retention of a copy of such a document where the Information from a Category 1 document has been permanently masked,

within 21 days. Alternatively:

- (c) in the case of counsel, I deliver all documents described in sub-paragraphs (a) and (b) above (other than any documents permitted to be retained pursuant to sub-paragraph (b)) to my instructing solicitors within 14 days.

Signature

Capacity

Date

ATTACHMENT B

FREE TV MEMBER NETWORKS

Free TV Member Network	Free TV Members
Seven Network	Channel Seven Sydney Pty Limited Channel Seven Melbourne Pty Limited Channel Seven Brisbane Pty Limited Channel Seven Adelaide Pty Limited Channel Seven Perth Pty Limited Channel Seven Queensland Pty Limited Golden West Network P/L, Geraldton Telecasters P/L, Mid Western Television P/L, Golden West Satellite Communications P/L Prime Television (Victoria) Pty Limited Prime Television (Southern) Pty Limited Prime Television (Northern) Pty Limited
Nine Network	TCN Channel Nine Pty Limited General Television Corporation Pty Limited Queensland Television Limited Swan Television & Radio Broadcasters Pty Limited Channel 9 South Australia Pty Limited Territory Television Pty Limited NBN Pty Limited
Ten Network	Network TEN (Sydney) Pty Limited Network TEN (Melbourne) Pty Limited Network TEN (Brisbane) Pty Limited Network TEN (Adelaide) Pty Limited Network TEN (Perth) Pty Limited
Southern Cross	Regional Television Pty Limited Regional Television Pty Limited Regional Television Pty Limited Telecasters Australia Pty Limited Australian Capital Television Pty Limited Southern Cross Television (TNT9) Pty Limited Victoria Broadcasting Network (1983) Pty Limited Broken Hill Television Limited Spencer Gulf Telecasters Limited

WIN Television	WIN Television Griffith Pty Limited Network Investments Pty Limited WIN Television SA Pty Limited WIN Television SA Pty Limited WIN Television WA Pty Limited WIN Television NSW Pty Limited WIN Television Tas Pty Limited WIN Television Mildura Pty Limited WIN Television Vic Pty Limited WIN Television QLD Pty Limited
Independents	Imparja Television Pty Limited

ATTACHMENT C

COPYRIGHT TRIBUNAL FILE NO. CT 2 OF 2022

APPLICATION BY FREE TV AUSTRALIA UNDER S 157(4) OF THE COPYRIGHT ACT 1968 (CTH)

CONFIDENTIALITY UNDERTAKING

I, **[INSERT NAME]**, **[INSERT CAPACITY]**, of **[INSERT ADDRESS]**, as a condition of obtaining access to Confidential documents under the Confidentiality Regime (**Confidential Documents**) and to the confidential information contained within those documents (**Information**) in the proceedings in the Copyright Tribunal CT 2 of 2022 (the **Proceedings**) undertake to the Copyright Tribunal of Australia (**Tribunal**) and to the entity claiming confidentiality (**Claimant**) that unless the Tribunal otherwise orders:

1. I will keep the Confidential Documents and the Information confidential at all times in accordance with the terms of this undertaking.
2. I will use the Confidential Documents and the Information only for the purposes of the Proceedings and any appeals or judicial reviews therefrom.
3. I will keep the Confidential Documents, Information or any notes, records, memoranda or other documents (including by not limited to any electronic versions thereof) created by me incorporating or referring to, or derived directly or indirectly from, the Confidential Documents or Information, in a manner which will preserve the confidentiality of the Confidential Documents and Information at all times.
4. I will not disclose the Confidential Documents or Information to any person:
 - (a) unless that person is authorised to access 'Confidential' documents under the confidentiality regime ordered by the Tribunal in the Proceedings and (other than for counsel or as contemplated by order 18) has first signed and provided to the solicitors of the Claimant an undertaking in the same form as this undertaking, or by that person to their direct administrative support;
 - (b) other than to the Tribunal, any Court hearing any appeal or review, or to counsel acting in this proceeding or any appeal or review;
 - (c) other than as required by law; or
 - (d) other than in accordance with the prior written consent of the Claimant.

5. If I am required to disclose the Confidential Documents or Information pursuant to paragraph 4 above, I will take all reasonable steps to preserve the confidentiality of the Documents or Information disclosed.
6. Upon completion of the Proceedings, including any appeals or reviews, I shall at my election destroy or deliver up to the solicitors of the Claimant any notes, records, memoranda or other documents (including but not limited to any electronic versions thereof) created by me incorporating or referring to, or derived directly or indirectly from, the Confidential Documents or the Information, provided that, subject to contrary order, this paragraph shall not extend to briefs to experts, expert reports, evidence read or tendered, affidavits or transcripts or other documents securely stored on the IT system of, and only accessible by, a party's external legal representatives in the Proceedings and their direct administrative support.
7. I will promptly notify the solicitors for the Claimant if I become aware of any unauthorised use or disclosure of the Confidential Documents or the Information or any notes, records, memoranda or other documents (including but not limited to any electronic versions thereof) created by me or any other person incorporating or referring to, or derived directly or indirectly from, the Confidential Documents or the Information.
8. This undertaking does not prevent me from disclosing material which is in the public domain or comes into the public domain, unless the material comes into the public domain because of a breach of this undertaking or any other obligation of confidentiality owed by any person to the Claimant.
9. I may vary this undertaking with the written consent of the Claimant.

Signature

Capacity

Date

ATTACHMENT D

COPYRIGHT TRIBUNAL FILE NO. CT 2 OF 2022

APPLICATION BY FREE TV AUSTRALIA UNDER S 157(4) OF THE COPYRIGHT ACT 1968 (CTH)

CONFIDENTIALITY UNDERTAKING

RESTRICTED ACCESS DOCUMENTS

I, **[INSERT NAME]**, **[INSERT CAPACITY]**, of **[INSERT ADDRESS]**, as a condition of obtaining access to Restricted Access documents under the confidentiality regime (**Restricted Access Documents**) and the confidential information contained within those documents (**Information**) in the proceedings in the Copyright Tribunal CT 2 of 2022 (the **Proceedings**) undertake to the Copyright Tribunal of Australia (**Tribunal**) and to the entity claiming confidentiality (**Claimant**) that unless the Tribunal otherwise orders:

1. I will keep the Restricted Access Documents and the Information confidential at all times in accordance with the terms of this undertaking.
2. I will use the Restricted Access Documents and the Information only for the purposes of the Proceedings and any appeals or judicial reviews therefrom.
3. I will keep the Restricted Access Documents, Information or any notes, records, memoranda or other documents (including by not limited to any electronic versions thereof) created by me incorporating or referring to, or derived directly or indirectly from, the Restricted Access Documents or Information, in a manner which will preserve the confidentiality of the Restricted Access Documents and Information at all times.
4. I will not disclose the Restricted Access Documents or Information to any person:
 - (a) unless that person is authorised to access 'Restricted Access' documents under the confidentiality regime ordered by the Tribunal in the Proceedings and (other than for counsel or as contemplated by order 18) has first signed and provided to the Claimant an undertaking in the same form as this undertaking, or by that person to their direct administrative support;
 - (b) other than to the Tribunal, any Court hearing any appeal or review, or to counsel acting in this proceeding or any appeal or review;
 - (c) other than as required by law; or

- (d) other than in accordance with the prior written consent the Claimant.
5. If I am required to disclose the Restricted Access Documents or Information pursuant to paragraph 3 above, I will take all reasonable steps to preserve the confidentiality of the Information.
 6. Upon completion of the Proceedings, including any appeals or reviews, I shall at my election destroy or deliver up to the solicitors of the Claimant any notes, records, memoranda or other documents (including but not limited to any electronic versions thereof) created by me incorporating or referring to, or derived directly or indirectly from, the Restricted Access Documents or Information, provided that, subject to contrary order, this paragraph shall not extend to briefs to experts, expert reports, evidence read or tendered, affidavits or transcripts or other documents securely stored on the IT system of, and only accessible by, a party's external legal representatives in the Proceedings and their direct administrative support..
 7. I will promptly notify the solicitors of the Claimant if I become aware of any unauthorised use or disclosure of the Restricted Access Documents, Information, or any notes, records, memoranda or other documents (including but not limited to any electronic versions thereof) created by me or any other person, incorporating or referring to, or derived directly or indirectly from, the Confidential Documents or Information.
 8. This undertaking does not prevent me from disclosing material which is in the public domain or comes into the public domain, unless the material comes into the public domain because of a breach of this undertaking or any other obligation of confidentiality owed by any person to the Claimant.
 9. I may vary this undertaking with the written consent of the Claimant.

Signature

Capacity

Date