Chapter 4

Whether licences take sufficient account of the number of listeners

Introduction

4.1 This chapter outlines the royalty licence schemes for the use of background music – the licences most relevant to small businesses. The problem was not so much one of cost. The fees, which are outlined below, are not excessive. The issue was more one of principle – paying a licence fee was considered to be an unfair imposition because of the perceived 'non commercial' way in which music was being used and in light of the small numbers of people actually hearing the music. The chapter reviews a number of arguments put to the Committee by business representatives for various forms of exemption from paying licence fees.

Licence fees

APRA's fee structure

4.2 APRA's existing licence scheme for the use of background music consists of a blanket licence in return for an annual fee. A blanket licence enables the licensee to play any music that is within APRA's repertoire. In the case of recorded background music, the annual fee is $55.59 with an additional 92c per extra speaker. For the use of a radio or television receiver, the fee is $37.09 per year with an additional 92c per extra

speaker. The scheme was first established in 1978 and the fees have been adjusted each year in line with the CPI.[1] The licence is automatically renewed at the end of the twelve month period unless notice of termination has been provided to APRA by the licensee.[2]

PPCA

4.3 The PPCA has a number of different tariff categories which are relevant to the playing of background music which are 'designed to reflect the varied use made of sound recordings and the particular requirements of individual licensees'.[3] The relevant tariffs are:

Tariff I – factories, industrial premises and associated offices

This tariff is for the use of sound recordings for employees during working hours in factory and office facilities. The fee is 39c per employee with a minimum annual fee of $47.18.

Tariff M – commercial or professional premises

This tariff covers the use of sound recordings as a general amenity or as background music in commercial or professional premises, including retail stores, hotels, reception areas, hairdressers, health / medical offices, dentists etc.

1 Mr Cottle, APRA, *Transcript*, p. 50.

2 APRA, *Submissions*, pp. S454–S457.

3 PPCA, *Submissions*, p. S351.

There are four different fees which vary according to the size of the facility. The lowest fee is $45.62 for premises of up to 140 sq m, and the highest being $105.40 for premises of over 930 sq m

Tariff R – restaurants, cafes, coffee lounges, road houses, reception houses, bistros, guest houses, bed and breakfasts.

There are four different fees which vary according to the seating capacity of the premises. The lowest fee is $45.62 for a seating capacity of up to 60 persons, and the highest fee is $105.40 for seating capacity of over 200 persons.

Taking account of audience size

4.4 The PPCA's licence fees vary according to the potential capacity of the premises. The rationale seems to be that the larger the capacity or size of the premises, the larger the potential audience and the more the business should be required to pay. The fees vary according to these factors from about $45 to about $105.

4.5 APRA's flat annual fee does not take into account the size of the venue or the number of people likely to hear the music. The fee increases slightly according to additional speakers. It is arguable that the number of speakers located on the premises may reflect the number of people who will hear the music.[4] However, this is not necessarily the case. The Australian Hotels Association (AHA) gave some examples which show that this mechanism is not always appropriate. One example was a

4 Mr Woodward, Musicians Union of Australia, *Transcript*, p. 29.

restaurant which added additional speakers to lower the maximum volume so that the music would be more discrete. The number of patrons the restaurant accommodated had not changed, yet the licence fee had increased. Another example was a TAB which provided 25 television sets for patrons to watch racing. APRA's licence scheme required an extra 92c for each television. The operator believed that this system was unjust because there was no music being played on any of the televisions.[5]

4.6 Some people suggested that APRA's licences should take into account the size of the business and/or potential audience.[6] In its submission to the inquiry, APRA explained why its licences are not based on these sorts of factors:

> The fees do not take account of floor space, the particular kind of performance in public (for example, whether the performance occurs in a retail or office environment), or the number of people who actually hear the performances. Given the level of fees involved, APRA has always considered that it would be needlessly complex, and often factually difficult, to factor in such differences, and almost impossible to gain meaningful and widespread compliance in provision of the information.[7]

In addressing the issue again at the inquiry's final public hearing, Mr Cottle told the Committee that:

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5 Australian Hotels Association (AHA), *Submissions*, pp. S655–S656.

6 Elizabeth P Fisher, *Submissions*, p. S3; WASBEA, *Submissions*, p. S53; Mullumbimby Chamber of Commerce, *Submissions*, p. S226.

7 APRA, *Submissions*, p. S456, see also comments made by Mr Cottle, APRA, *Transcript*, p. 49.

> we have always felt that if we were to ... require more information of businesses playing music we would be open to the criticism of imposing greater administrative burdens.[8]

4.7 Both business organisations and composers argued against any proposition that APRA's licences take account of factors such as the number of employees or the size of the premises. They expressed concern that such a move would make the process more complex and time consuming for the licensees, as well as increasing the administrative burden on APRA.[9] There was some criticism that the PPCA's licence fees, which are based on these factors, were too complicated.[10] One small business organisation argued that basing the fee on the number of customers or employees would 'create confusion, uncertainty and complexity in administration'.[11]

Conclusion

4.8 The Committee understands that APRA's flat rate annual licence fee for background music may lead to some anomalies, with particular types of venues and uses of music not being taken into account. The Committee also notes that the PPCA takes a variety of factors into

8 Mr Cottle, APRA, *Transcript*, p. 756.

9 Mr Paul Sarcich, *Submissions*, p. S 45; Musicians' Guild of Western Australia, *Submissions*, p. S155; SBDC (WA), *Submissions*, p. S483; South Australian Minister for Industry, Trade and Tourism, *Submissions*, p. S804.

10 Mr Slattery, Cairns Chamber of Commerce, *Transcript*, pp. 163–164.

11 SBDC (WA), *Submissions*, p. S483.

account when issuing a licence, such as floor space or, in the case of cafes and restaurants, seating capacity.

4.9 However, the Committee does not recommend that APRA should take into account the number of employees or the size of the premises into account when determining the appropriate licence fee. The Committee believes that this would make APRA'S licensing system more complicated and could increase the administrative burden on small business.

The purpose of the music

4.10 Many business people considered that the purpose for which the music was being used was as important an issue as the potential audience size. There was a perception amongst many business operators that their use of music was not generating any profits or creating any commercial advantage – that the playing of music was incidental to their business.[12] Most of those arguing this point were playing music (usually the radio) for the benefit of staff. In these cases the intended audience was so small and the benefit so minimal that a fee should not be required. [13]

12 Those who argued this point include: Mullumbimby Chamber of Commerce, *Submissions*, p. S226; Ms Sheryl Murray, *Submissions*, p. S239; Mr Brett Walsh, *Submissions*, p. S286; COSBOA, *Submissions*, pp. S304–S305; Ballina Chamber of Commerce and Industry, *Submissions*, p. S312; Australian Small Business Association (ASBA), *Submissions*, p. S333; Mr Rutherford, Retail Traders Association of Tasmania , *Transcript*, p. 82.

13 Those who argued this point include: Motor Trades Association of Australia (MTAA); *Submissions*, p. S403; Food Retailers' Association of Australia (FRAA

Music played for the benefit of staff

4.11 It was accepted by many such representatives that it was not unreasonable that a licence be required to play music where its purpose is to create a certain type of ambience or mood, or to make a business appeal to a certain type of customer. Examples of this included a restaurant playing music in its eating area to create atmosphere for its patrons, or a jeans shop blasting loud rock music to attract customers of a certain age group. The commercial nature for which the music is being used in these sorts of situations was generally acknowledged.

4.12 However, it was argued that using music in this manner was distinct from the situation where music is used to entertain staff. In this latter case, the link between the music and the profit making activities of the business was seen as being tenuous. In the case of smaller businesses, music played for the benefit of a single operator or a very small group of employees was not considered to be a 'public' activity.

4.13 Examples that were discussed included people listening to music (usually the radio) in the following situations:

- a mechanic working on a car in a workshop;[14]
- a person running a business in his or her own home;[15]

(NSW)), *Submissions*, p. S411; RCIAA; *Submissions*, p. S433; Pharmacy Guild of Australia, *Submissions*, p. S577; Northern Territory Chamber of Commerce and Industry, *Submissions*, p. S746.

14 VACC, *Submissions*, p. S275.

15 COSBOA, *Submissions*, p. 304; Mr Stafford, HMAA, Victoria, *Transcript*, p. 472.

- a small family-run retail outlet with a radio on the counter;[16] and
- a pharmacist in a dispensary.[17]

In most of these cases, a single employee was listening to the music which was being played in an area not accessible to customers. It was argued that any overhearing of the music by a customer was unlikely, momentary and/or unintentional. Many business people challenged the proposition that using music in this manner constituted a 'public performance'. In some cases, employees had brought their own radio into the business, so the music was not being provided by the business itself. It was questioned whether an employer should be required to have a licence for simply allowing an employee to bring his or her own radio to work.[18]

Composers views

4.14 Composers disagreed with these arguments. They felt that they should receive a royalty irrespective of the number of people hearing their music, or the fact that the music was for the benefit of staff rather than customers.[19] It was pointed out that the licence fees were quite

16 Retail Confectionery and Mixed Business Association (RCMBA), *Submissions*, pp. S79–S80; LSA (Vic), *Submissions*, p. S83; Mr Baldock, QRTSA, *Transcript*, p. 551.

17 Ms Phillips, Pharmacy Guild of Australia, *Transcript*, p. 243.

18 Mr Russell, VACC, *Transcript*, p. 420; Mrs Kennedy, AMA (Vic), *Transcript*, pp. 448–449.

19 Music Council of Australia, *Submissions*, p. S492; Mr Woodward, Musicians Union of Australia, *Transcript*, p. 30.

low.[20] Some witnesses argued that music which is played for the benefit of staff does have a commercial value in that it can increase staff's productivity and morale.[21]

4.15 It was suggested that business people made a conscious decision to listen to music. If the music did not have any value to them, they would simply stop listening to it.[22] As one witness said:

> ...I submit that the playing of music is worth something to the business involved. Whether it be by virtue of staff amenity or morale or that it makes people buy more ...T he fact of the matter is that, if it was not worth something, it would not be played ... It is just unjust and not feasible to say that they should obtain the benefit of that to the detriment of the person who owns the right to publicly perform that music.[23]

Conclusion

4.16 The Committee notes that many businesses believes that licences should distinguish between music which is played for the purpose of entertaining customers and that which is being used for staff. The

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20 APRA, *Submissions*, p. S465; Mr Nagy, West Australian Music Industry Association (WAMIA), *Transcript*, p. 32; Mr Alan James, *Transcript*, p. 399; Ms Heysen, South Australian Music Industry Association (SAMIA), *Transcript*, p. 625; Ms Cindy Shelton, South Australian Council for Country Music, *Transcript*, p. 647.

21 Society of Australian Songwriters, *Submissions*, p. S229; WAMIA, *Submissions*, p. S284, ACC, *Submissions*, p. S293; ALRC, *Submissions*, pp. S391–S392;The Australian Guild of Screen Composers, *Submissions*, p. S393; Mr Turner, *Transcript*, p. 216; Ms Gillard, Ausmusic, *Transcript*, pp. 492–493; Ms Heysen, SAMIA, *Transcript*, p. 627.

22 Dorothy Dodd, *Submissions*, p. S318.

23 Mr Hall, Arts Law Centre of Queensland, *Transcript*, pp. 556–557.

Committee understands the argument that music used for staff has a less direct commercial value to a business than music which is for the benefit of customers. However, determining the purpose for which music is being played is a highly subjective process. The Committee believes that to base a licence scheme exclusively on such a subjective factor would increase uncertainty and confusion amongst the business community and would be cumbersome to manage. This would place an unreasonably high administrative burden on APRA. However, the Committee has made recommendations in Chapter 5 with regard to the radio being played for the benefit of staff.

A commonsense approach?

4.17 The courts have held that the size and nature of the audience is not a relevant factor in determining whether or not a public performance has taken place. The Committee notes the recent Commonwealth Bank case[24], in which it was held that music played to a group of eleven employees in a training video had been publicly performed. The Committee notes the English case where a public performance was found to have occurred when music was piped through a factory to curb boredom and raise the productivity of employees.[25]

24 *APRA v Commonwealth Bank* (1992) 111 ALR 671. This case was discussed in Chapter 2.

25 *Ernest Turner Electrical Instruments Limited v Performing Right Society Limited* [1943] Ch 167.

4.18 Despite this legal authority, both collecting societies have exercised discretion in cases where the music is played solely for the benefit of small groups of employees. Representatives of APRA told the Committee that there were situations where APRA would not, 'as a matter of commonsense', seek a licence from individuals listening to music even though it believed the situation was technically a public performance. An example of the sort of case where APRA would not demand a fee was 'a single mechanic working on a car in a workshop ... listening to the radio.'[26] Another example was the use of a radio by a person working in the preparation area of a cafe.[27]

4.19 Representatives of the PPCA told the Committee that only nine out of its 23, 000 licences were in the category which specifically applied to sound recordings used for the benefit of employees (tariff I). Mr Emmanuel Candi, PPCA's Executive Officer, told the Committee that if a prospective licensee was a 'one person business', or if there was only one person who 'can actually hear the music', PPCA's licensing staff are instructed to say 'We'll give you a holdover licence, gratis, and you tell us when your business grows'.[28]

26 Mr Cottle, APRA, *Transcript*, p. 68.

27 Mr Cottle, APRA, *Transcript*, p. 72.

28 Mr Candi, PPCA, *Transcript*, p. 289.

Other exemptions

4.20 In late 1997, APRA introduced a policy of granting complimentary licences where music was used solely during the course of one on one health treatments. The 'therapeutic exemption' was granted on the basis that music was being used as part of an holistic approach to health management. It appears that part of the rationale for this exemption was that the music was being used in 'non public' areas of the business. The use of music in public areas, such as waiting rooms, continued to require a licence.[29]

4.21 It seems that this 'therapeutic exemption' initially applied to alternative therapists and beauticians. Over time, and after receiving representations from other industry associations, the policy was extended to groups such as dentists, doctors and physiotherapists.

4.22 Once the policy was adopted by APRA, it was communicated to the relevant professional associations. APRA also issued refunds to businesses that had previously paid for an APRA licence and which were using music for therapeutic purposes.[30]

Inconsistent granting of exemptions

4.23 Representatives from the industries which received exemptions from paying APRA's licence fees were obviously happy to have been able to successfully negotiate concessions for their members. However,

29 APRA, *Submissions*, p. S912.

30 APRA, *Submissions*, p. S912.

evidence suggested that the granting of exemptions by collecting societies did not always occur in a consistent manner.

4.24 An example of this was given by the Victorian Automobile Chamber of Commerce (VACC). VACC had come to an understanding with APRA that a licence was not required by mechanical workshops into which the public was not permitted. Despite this, many invoices continued to be sent to these types of workshops. This caused confusion amongst VACC's members, who had been advised that they did not require a licence.[31]

4.25 The Australian Physiotherapy Association (APA) had similar concerns. An exemption had not been granted by APRA to physiotherapists by November 1997 when a representative gave evidence to the Committee at a public hearing. At that time, the APA was seeking an exemption from APRA, for physiotherapists using music for therapeutic purposes. The APA argued that they should be granted an exemption because the music is used to reduce patient anxiety levels by assisting in muscle relaxation.[32] In August 1997, the Australian Dental Association had also sought an exemption from paying APRA's licence fees for dentists using music for therapeutic purposes, but had not received a response.[33]

31 VACC, *Submissions*, p. S275.

32 APA, *Submissions*, p. S242.

33 ADA, *Submissions*, pp. S47–S48.

4.26 While the APA had been unable to receive an exemption for the physiotherapy industry, a member of the APA had received an individual exemption on the basis that the music was being used for therapeutic purposes. Mr Quittner of Healsville Physiotherapy finally received an exemption following a long series of correspondence and telephone conversations.[34]

> As his campaign became more aggressive, and probably more burdensome upon the staff of APRA and their legal services department, they eventually gave up on it and provided an exemption.[35]

4.27 Mr Quittner's use of music and the concerns he expressed to APRA in seeking his exemption were consistent with those of physiotherapists generally. However, APRA had not, at that stage, agreed to provide a general exemption to the industry.

4.28 Concern was expressed about the inconsistency of this situation. It was seen as being highly inequitable that the collecting societies granted exemptions to some groups or individuals and not others.[36] As Mr Bourke from the APA said:

> ... that is a bit of a worry, if APRA is having one set of rules in terms of when an exemption might be provided, however only

34 Mr Bourke, Australian Physiotherapy Association (APA), *Transcript*, pp. 430–431; (Exhibit No 20) - Correspondence from APRA to Mr Mark Quittner of Healsville Physiotherapy.

35 Mr Bourke, APA, *Transcript*, p. 431.

36 RCIAA, *Submissions*, p. S435.

> providing it in the case where someone really gives them a hard time ... [37]

Conclusion

4.29 The Committee is concerned about the discretionary nature of and inconsistency in granting exemptions. Most exemptions were granted after businesses had received correspondence demanding a licence fee. It has been noted that there is no mention of exemptions in the literature that the collecting societies sent to licensees. The material strongly implies that the collecting society will demand a licence fee from anyone using music in any circumstances.

4.30 It seems to the Committee that the only people who were accessing these 'exemptions' were those who contacted the collecting society to challenge their obligation to pay a fee. It was only at this stage that a member of the collecting society's licensing staff, knowing the full details of the circumstances, may have decided to waive the licence fee. This appears to have led to inconsistencies. Some 'mechanics under the car' would take out a licence without asking questions, while others would make complaints or inquiries and be told they do not require a licence.

4.31 The Committee believes that such inconsistencies are undesirable and create confusion. The Committee recognises that many of APRA's policies to exempt particular types of music users from

37 Mr Bourke, APA, *Transcript*, p. 431. See similar comments made by the ADA in its submission, *Submissions*, p. S48.

having to pay a fee evolved after its national compliance campaign had begun. In fact, it appears that the exemptions were granted as a response to the strong reaction by businesses to the campaign. The Committee is pleased that APRA was willing to negotiate these exemptions. However, it is unfortunate that the exemptions were granted after such a strong telemarketing campaign which generated widespread confusion amongst the business community. It is unfortunate that some misunderstandings occurred as to the eligibility of some businesses to gain exemptions.

4.32 The Committee believes that policies which exempt certain uses of music from licensing requirements should be made clear to all potential licensees. The Committee hopes that APRA will endeavour to ensure that the information it sends to businesses clearly spells out the exemptions which exist and the eligibility requirements for the exemptions. The Committee has considered this factor in making its recommendation in Chapter 5 with regard to the radio being played for the benefit of staff.

Administrative burdens

4.33 Many business people were concerned that licence fees for the playing of music were 'yet another charge' on top of a number of existing charges, fees and taxes. The feeling was that this was adding

more paperwork and compliance burdens to the already significant body of 'red tape' with which small business must grapple.[38]

4.34 In responding to these claims about extra paperwork, APRA and many musicians argued that the licence applications were not overly complicated or time consuming to complete. It was seen to be unfair that licences for the use of music should be specifically targeted to reduce fees and paperwork for small business as distinct from the many other licences, taxes and fees imposed on small business.

4.35 Mr Cottle referred to this complaint as the 'camel's back' complaint:

> What we have heard from a number of witnesses is that it is not the APRA fee which is the bone of contention but the fact that the APRA fee comes on top of everything else that a small business person has to deal with. We respectfully submit that the frustrations experienced by small business in having to deal with three tiers of government in this country ought not be visited on APRA or copyright owners.[39]

An exemption for small business?

4.36 Many business representatives believed that they should not be required to pay a fee at all. Many argued this position on the grounds

38 Business Enterprise Centre, *Submissions*, p. S21; West Australian Small Business and Enterprise Association; *Submissions*, p. S52; Queensland Minister for Tourism, Small Business and Industry, *Submissions*, p. S98; NMA (Vic), *Submissions*, p. S109; Mrs Frost, Northern Territory Chamber of Commerce, *Transcript*, p. 377; Mr Bourke, APA, *Transcript*, p. 433; Mr Tonkin, ASBA, *Transcript*, p. 617.

39 Mr Cottle, APRA, *Transcript*, p. 756.

that all small businesses should be exempt from having to pay a licence fee for listening to background music.[40] Others based their arguments on the grounds that there were specific reasons as to why their particular industry should not have to pay licence fees for the use of background music.[41] Some contended that exemptions should apply for small businesses which were using music for the benefit of staff only.[42]

4.37 There are significant legal barriers to exempting small businesses from paying royalty fees for their use of music. It is highly likely that Australia would be in breach of its obligations under TRIPS and the Berne Convention if the Copyright Act was amended to provide an exemption for small business.[43] Such an exemption would not fall within any of the exceptions contemplated by the treaties.[44] This would leave Australia open to the enforcement measures of the WTO.

Conclusion

4.38 While the Committee sympathises with some of the arguments presented by business people, the Committee does not believe that small

40 NMA, *Submissions*, p. S420.

41 Australian Dental Association (ADA), *Submissions*, p. S49; AMA (Vic), *Submissions*, p. S253; FRA (NSW), *Submissions*, p. S411; Pharmacy Guild of Australia, *Submissions*, p. S580.

42 These arguments are outlined earlier in the chapter under the heading of '**The purpose of the music'.**

43 See chapter 2 for explanation of these obligations.

44 These exceptions were outlined in Chapter 2. See Dr Warwick Rothnie and Professor James Lahore, *Submissions*, p. S145.

businesses should be made exempt from paying copyright royalty fees for public performances of music.

4.39 In some cases, the use of music in a small business is only intended to be heard by one member of staff. There is a strong case in favour of exempting these businesses from paying licence fees. However in many small businesses, the music is used to attract, entertain and create ambience for customers. A blanket exemption for small businesses would mean that those businesses using music in a manifestly commercial manner would be exempt from paying licence fees. The Committee believes that such an exemption would place Australia at risk of being in breach of international trade agreements. The Committee believes that this would not be an equitable outcome.

4.40 For these reasons, the Committee is not recommending that all small businesses be exempt from paying royalties for the public performance of music. The Committee is confident that its recommendation in Chapter 5 in relation to the use of radio will address some of the concerns of small business people with respect to their use of music for the benefit of small numbers of staff.