Summary and recommendations

Chapter 1 – Introduction

1. This chapter outlines the background to the inquiry, the matters the Committee has taken into account and the scope of the report.

2. The inquiry into copyright, music and small business was referred to the Committee by the Attorney-General on 30 July 1997.

3. The inquiry focuses on the 'public performance' right. In most cases, a person wanting to play music in public in Australia must first obtain permission from the owner of the copyright in the music. This includes the right to play music on a CD or cassette player, or to play the radio as background music.

4. These rights are generally administered by copyright collecting societies which act on behalf of copyright owners. The way in which copyright collecting societies went about collecting licence fees from small businesses caused widespread confusion and complaint in the business community.

Chapter 2 – The public performance right

5. This chapter explains the source, nature and scope of the public performance right in the context of the copyright framework as a whole. It outlines the relevant legislative, judicial and international law. It also provides background about the copyright collecting societies which license the public performance right.

6. Relevant to the inquiry is the right to perform a literary or musical work (or cause a sound recording to be heard) in public. These are separate rights which are set out in the *Copyright Act 1968*. Case law has established that music played in the presence of more than one person, other than in private or domestic circumstances, will generally amount to a public performance.

7. This interpretation of public performance is consistent with the international obligations which arise out of Australia's membership

of *The Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention), *The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (the Rome Convention) and *Agreement on Trade-related Aspects of Intellectual Property Rights* (TRIPS).

8. In Australia, the public performance right is administered by two separate collecting societies – the Australasian Performing Right Association (APRA) and the Phonographic Performance Company of Australia (PPCA). These collecting societies are non-profit organisations which collect royalties on behalf of their members, the copyright owners.

9. APRA administers rights which exist in *musical and literary works*. Its members are composers and publishers. It collects royalties for the use of recorded music played directly (eg music played on a CD or cassette player) as well as for the indirect playing of music (eg music played on a radio or television).

10. The PPCA administers the copyright which exists in *sound recordings*. The right which is exists in sound recordings is additional to that which exists in musical and literary works. It collects royalties for the use of directly played recorded music (eg music played on a CD or cassette player). It does not collect royalties for the playing of music on a radio or television. This is because a provision in the Copyright Act exempts the playing of a sound recording via a broadcast in public from infringing copyright.

Chapter 3 – Information provided to small business by copyright collecting societies

11. This chapter examines the information provided to small businesses by copyright collecting societies. The evidence showed that copyright collecting societies dedicate a significant amount of time, effort and money towards contacting and attempting to secure licence agreements with those businesses they believe to be using music. The most common form of contact for both APRA and the PPCA was through printed material received by mail. This was complemented by information provided by licensing staff, usually

over the telephone. An analysis of the nature of the material shows that there were notable differences in the style and intensity of the collecting societies' campaigns to increase the number of licensees.

12. APRA conducted a national compliance campaign throughout late 1996 and 1997. This campaign involved sending standard correspondence to small businesses. If the small business did not respond by either taking out a licence with APRA or completing an exemption form, APRA sent a second, and then a third set of correspondence to the business. Business operators and representative groups described the correspondence as threatening, intimidating, confusing and overly legalistic. Many businesses which received the information had not heard of APRA before and thought that the demands for payment were a hoax or scam.

13. The PPCA also sent a standard information package to businesses. However, the PPCA also ran communication programs which involved publishing advertisements and articles in trade magazines. The evidence showed that the PPCA's campaign was less intense. The intention was to build a relationship with businesses and to explain the nature of the legal obligations before demanding fees from them. The PPCA's correspondence was not as legalistic as APRA's, focusing more on education than on emphasising legal obligations.

14. Many witnesses and submissions called for an information campaign to educate small businesses about copyright and copyright collecting societies.

15. The Committee concludes that there is a high level of confusion and misunderstanding about the nature of the public performance right and the collecting societies which administer the right.

16. Information sent to small businesses:

- in the case of APRA, did not have a customer focus or take a business friendly approach;
- in some cases, failed to clearly explain the nature of copyright and of the obligations of small businesses to pay copyright royalties;

- in the case of APRA, failed to acknowledge that small businesses may be required to obtain licences from more than one collecting society;

- in the case of APRA, was highly legalistic and focused on compliance rather than explanation. The material seemed to be based on an underlying presumption that the business was using music, demanding that either a licence or exemption form be completed immediately, rather than making an initial inquiry about whether music was being used at all.

17. Many small business operators had been playing music for years without a licence and without the knowledge that a licence was required. A large proportion of these people had little or no knowledge of copyright before receiving correspondence demanding either the payment of money or the completion and return of an exemption form. In these circumstances, it is not surprising that many of those receiving the information thought that the licences were a hoax, or construed it to be threatening. A prudent organisation may have considered placing a greater emphasis on preliminary education and communication with industry bodies prior to sending out such demanding and compliance based correspondence.

18. The Committee welcomes the changes that APRA has made to its licensing program during the course of the inquiry. The Committee hopes that the feedback provided during the inquiry about APRA's written correspondence will assist APRA when it designs new material for the purposes of contacting potential licensees.

Recommendation 1

The Committee recommends that the Australasian Performing Right Association and the Phonographic Performance Company of Australia, in consultation with the Council of Small Business Organisations of Australia and other relevant peak industry organisations develop an information campaign designed to educate the small business community about the law in relation to public performance of music and the obligations of those people who play music in public.

Chapter 4 – Whether licences take sufficient account of the number of listeners

19. 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, were not excessive. The issue was more one of principle. The fees were 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.

20. APRA issues a blanket licence in return for an annual fee. This enables the licensee to play any music that is within APRA's repertoire. The annual fee for playing recorded music, 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.

21. The PPCA also issues an annual licence. There are different tariffs for different types of premises. The fees are based on factors such as the size and seating capacity of the premises. The fees vary between about $45.00 and $105.00.

22. The Committee understands that APRA's flat rate annual licence fee for background music may lead to some anomalies, with different 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 account when issuing a licence, such as floor space or, in the case of cafes and restaurants, seating capacity.

23. 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 the licensing system more complicated and could increase the administrative burden on small business.

24. For many business people, 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. 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 benefit so minimal that a fee should not be required.

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

26. Both collecting societies have exercised discretion in cases where the music is played solely for the benefit of small groups of employees. There were cases where APRA and the PPCA waived the requirement to pay a fee on being told that the music was being used in certain ways. For example, if it was being used as part of health treatments, or if it was being listened to by a single employee. If the collecting societies were told that a single employee was listening to the music which could not be heard by customers, the collecting societies would waive the licensing requirements.

27. Evidence suggested that the granting of exemptions by collecting societies did not always occur in a consistent manner. 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. The Committee notes 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.

28. It seems to the Committee that the only people who were accessing these 'exemptions' were those who contacted the collecting society and challenged 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.

29. 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 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.

30. 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.

31. Some business representatives argued that small businesses should be exempt from having to pay a licence fee. While the Committee sympathises with some of the arguments presented by business people, the Committee does not believe that small businesses should be made exempt from paying copyright royalty fees for public performances of music.

32. 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.

33. 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.

Chapter 5 – Distinguishing between direct and indirect playing of music

34. One of the main issues during the inquiry was the perception amongst those who use music of a difference in the commercial value of using recorded music compared with music heard via radio or television broadcasts. Copyright owners believed that they should be paid for the public performance of their work, regardless of the means through which the music was heard. During the course of the inquiry, a number of options were put to the Committee about ways to limit the licensing of small businesses playing a radio for the benefit of employees. The three main options are examined in this chapter. These options can be distinguished from the general exemptions sought by some businesses which were explored in the previous chapter.

35. The principal focus of the concern and anger of small businesses was on having to pay a fee in order to listen to the radio. For a number of reasons, business people believed that music played on the radio was far less likely to make a commercial contribution to their businesses than using recorded music. It was put to the Committee that many businesses tune into talkback, news and sporting programs which have little or no music content. The radio was said to be a vital source of information to small businesses, particularly in times of emergency. Many business people were

aware that musicians received royalties from radio stations. There was a firm belief that to require that an additional fee from businesses listening to a 'free to air broadcast' was 'double dipping'.

36. On the other hand, copyright owners believe they should continue to receive royalties for the public performance of their work via radio and television. Attributing a lower value to the music because it was being played on the radio rather than a CD or tape was considered to be inconsistent with the principle of copyright and unjust to composers.

37. The Committee believes that there are compelling practical and philosophical arguments in favour of relaxing the licensing requirements for those listening to radio. The Committee considers that businesses playing a radio for the benefit of small groups of employees should be exempt from having to pay a licence fee. This is consistent with the APRA's informal policy of not licensing certain common sense cases as discussed above. The Committee recognises the difficulties in making a subjective assessment of whether the music is being played for the benefit of staff or for the benefit of customers. However, the Committee believes that there are many situations where it would be clear that the radio was being used exclusively for the benefit of staff.

38. During the course of the inquiry, a number of different mechanisms for restricting APRA's licensing activities with respect to radio were put to the Committee. The main options discussed were that:

    (a) broadcasters pay public performance fees;

    (b) public performance be defined in the Copyright Act in a way which exempts from licensing requirements the use of a radio in certain situations; and

    (c) APRA implement a system where complimentary licences are issued to those listening to the radio in certain situations.

39. The Committee examined the potential legal, practical and philosophical aspects of each of these options.

40. While the option of the broadcasters paying seems to provide a simple solution at first glance, there are significant legal, practical and philosophical barriers to its implementation which would be difficult to overcome. The Committee concurs with the views expressed on this matter in the Spicer Report of 1959 – if anyone is to be paying licence fees for public performance, it should be the person who is causing the public performance, rather than a third party.

41. The Committee believes that both the remaining options would lead to an appropriate result.

42. The Committee is of the view that a voluntary policy of issuing complimentary licences has many advantages over a legislative option. It allows flexibility, does not risk breaching international conventions and can be implemented sooner than any legislative scheme. The Committee believes that this scheme will ensure that common sense prevails in the licensing of the public performance of music by small business.

43. The Committee therefore believes that the third option should be implemented by APRA as soon as possible. The implementation and operation of the system should be monitored by the Department of Communication and the Arts. The Department should review the system after it has been operating for 12 months and report its findings to Parliament. If the policy has not been implemented or has not been successful, the Committee believes that the legislative option should be reconsidered.

44. APRA provided the Committee with a number of examples of where APRA would grant a complimentary licence:

- A family run milk bar or corner store which has a radio or television behind the counter or in the back room of a composite shop / dwelling. The volume is such that customers may hear some music in the public access areas but the intention is to entertain staff during quiet trading periods.

- A chemist employing five staff with a radio located in the secure dispensing area for the benefit of the pharmacist. Some sound may be audible to customers.

- A service station with 12 employees playing the radio in a workshop and/or with a television behind the counter near the cash register. Customers fuelling cars, leaving vehicles for repair or paying for purchases may overhear music.
- A small hairdresser with a radio in the backroom of the salon which may at times be overheard by clients. The location of the radio shows that this is unintentional.
- A real estate agent where the receptionist has a radio on the desk. While the performance is audible to customers, the radio is for the receptionist's own enjoyment.
- The café playing a radio in the staff-only food preparation areas. The location of the radio and the volume indicate that, while music may sometimes be overheard by customers, it is not played for their benefit.
- A small hardware store with three employees where a radio is located in the storage/supply area behind the counter for the benefit of employees.
- A laundromat with five staff playing a radio in an open work area behind the counter. There are no additional speakers and the performance is intended for the benefit of employees.
- An owner/operator tailor with a television in the working area behind the counter. Performance is for the benefit of the owner.
- A doctor's surgery. The receptionist plays a radio at low volume. Music is not clearly audible to patients in the waiting room.

Recommendation 2

The Committee recommends that the Australasian Performing Right Association implement as soon as practicable after the release of this report a policy under which complimentary licences will be issued to small businesses causing public performances of copyright music in the following circumstances:

- the means of performance is by the use of a radio or television set; and
- the business employs fewer than 20 people; and
- the music is not intended to be heard by customers of the business or by the general public. That is, neither the radio or television set nor any speakers are located in an area that is accessible to customers or the general public and any performance inadvertently heard by customers or the general public is manifestly unintentional.

Chapter 6 – Co-operation between APRA and PPCA in the collection of royalties

45. This chapter examines the option of cooperative licensing activities between APRA and the PPCA. Business people found it difficult to understand why they had to acquire two separate licences for what is essentially one activity – playing a CD or tape.

46. While the idea of APRA and the PPCA combining their efforts seemed logical to most small business licensees, such a move may not be practical or in the best interests of the members of these collecting societies.

47. The Committee recognises that the different membership groups of APRA and the PPCA have divergent interests, priorities and methodologies. The Committee appreciates that it may not be in the best interests of the members of the collecting societies for them to merge.

48. The Committee acknowledges that licensees would benefit from having only one set of paperwork and one contact point. However the Committee also understands that the collecting societies have different tariffs which are based on different factors. They also have very different styles and priorities in their licensing activities. For these reasons, the Committee does not think it appropriate to recommend the establishment of a joint licensing system.

49. The Committee believes that it is important that both APRA and the PPCA are aware of each other activities. It would also be helpful if the societies explained to their licensees that both collecting societies are legitimate organisations, and outlined the reasons for the existence of two separate licensing systems for the playing of music.

50. The Committee believes that license agreements between peak industry bodies and collecting societies are likely to be in the best interests of individual business operators as well as the collecting societies and their members. The Committee urges these parties to consider such arrangements.

Recommendation 3

The Committee recommends that:

- the Australasian Performing Right Association and the Phonographic Performance Company of Australia continue to operate separate licensing systems;
- the Australasian Performing Right Association and the Phonographic Performance Company of Australia explain in material sent to potential licensees the reasons for the existence of two separate licensing schemes for the playing of music; and
- where it is appropriate, the Australasian Performing Right Association, the Phonographic Performance Company of Australia and peak industry bodies negotiate licensing arrangements which cover sectors of business.

Chapter 7 – The Copyright Tribunal as an avenue for review to small businesses

51. This chapter reviews the purpose of the Copyright Tribunal and its role in offsetting the power of collecting societies arising from their monopoly status. It examines the accessibility of the Copyright Tribunal to small businesses seeking review of licensing arrangements. The chapter also explores options for ensuring that small businesses have adequate avenues of review and for restricting collecting societies' ability to abuse their monopoly position when dealing with licensees.

52. APRA and PPCA exercise rights in relation to almost all music which is subject to copyright. Collecting societies enable parties which would ordinarily be competitors to jointly determine the price of a licence. Music users do not have a choice of suppliers from which to acquire a licence. The only option available to a person who does not want to take out a licence with PPCA and/or APRA is to not use to music at all.

53. The evidence indicated that small business operators did believe that the Copyright Tribunal was an effective avenue of review of the copyright royalty licensing schemes. The Committee was told that small business did not have the knowledge, time or financial resources to pursue issues in the Tribunal, particularly in light of the amount of the licence fees.

54. The evidence clearly demonstrated a need to ensure that in their efforts to act on behalf of their members, copyright collecting societies do not become overzealous in their licensing activities. In the case of small users of music, the Copyright Tribunal may not be achieving this outcome as successfully as it could. The Committee believes that improvements can be made to existing avenues of appeal, and that new mechanisms can be introduced to ensure that the rights of collecting societies and the rights of small music users are fairly balanced.

55. The Committee believes that the Copyright Tribunal's jurisdiction should be as broad as possible to ensure that those who have genuine disputes with copyright collecting societies have access to some form of review. The Committee agrees with the

recommendations made in the Simpson Report with respect to the jurisdiction of the Copyright Tribunal.

> Recommendation 4
>
> The Committee recommends that the Copyright Tribunal should have as wide a jurisdiction as possible in respect of licences and licence tariffs including the variation, approval and interpretation of all licensing schemes.

56. Most witnesses supported the idea of establishing some form of independent dispute resolution process. The Committee agrees that an informal dispute resolution process carried out by the Copyright Tribunal would be more accessible to small businesses than formal proceedings before the Tribunal. The Committee also believes that licensees should be informed by collecting societies about options for review of licensing schemes, including review and / or mediation by the Copyright Tribunal.

> Recommendation 5
>
> The Committee recommends that mediation between parties in dispute over a licensing scheme be available through the Copyright Tribunal.

57. The Committee believes that the implementation a code of conduct for copyright collecting societies would be an effective way of outlining acceptable licensing practices and activities. The Committee agrees that the code should be voluntary. However, if collecting societies do not comply with the voluntary code, the Committee believes that the code should be made enforceable under legislation.

Recommendation 6

The Committee recommends that a voluntary code of conduct for copyright collecting societies be developed in consultation with the collecting societies, relevant Commonwealth Government departments, user groups and other interested parties. The code of conduct should outline standards of acceptable licensing practices and activities.

Chapter 8 – Future technological developments

58. The terms of reference require the Committee to examine likely future technological developments in the playing of music in public and the methods used to license such playing. Very few of the submissions received by the Committee commented on this term of reference Those which did address this issue indicated that while new technology was an issue for some rights, such as reproduction and diffusion, it is not something which is currently a priority in relation to public performance.