
# HOUSE OF REPRESENTATIVES

## STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

**Reference: Copyright, music and small business**

**CANBERRA**

**Thursday, 25 September 1997**

**OFFICIAL HANSARD REPORT**

**CANBERRA**

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Members

Mr Andrews (Chair)

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| Mr Andrew | Mr Mutch |
| Mr Barresi | Mr Randall |
| Mrs Elizabeth Grace | Mr Sinclair |
| Mr Hatton | Dr Southcott |
| Mr Kerr | Mr Tony Smith |
| Mr McClelland | Mr Kelvin Thomson |
| Mr Melham | |

Matter referred to the committee for inquiry into and report on:

1. The Committee is to inquire into and report on the collection of copyright royalties for licensing the playing of music in public by small businesses, in particular:

(a) the information provided to them by the organisations collecting those royalties on the law under which those organisations seek the royalties;

(b) whether the licences offered and the amounts of the royalties sought take sufficient account of the likely limit on the number of employees or customers of the small businesses who are able to enjoy or hear the playing of the music which is the subject of the licence and royalty collection;

(c) the desirability of amending the law to provide for a means to assess the difference in value to the copyright owners, if any, between the direct playing of recorded music in public (e.g. by compact disc or cassette player) and the indirect playing of recorded music in public by radio or TV broadcasts;

(d) whether it is desirable or practical to require that the collection of all royalties for the playing of music in public be done by one organisation on behalf of other organisations, where royalties are payable to more than one organisation representing different copyright owners;

(e) whether the present structure and constitution of the Copyright Tribunal is the most effective avenue for small businesses to seek review of the amount of the royalties being sought;

(f) the likely future technological or other developments in

(i) the playing of music in public; and

(ii) the methods to be employed by organisations collecting royalties for licensing such playing.

(2) In undertaking the inquiry and framing its recommendations, the Committee shall have regard to:

(a) Australia's membership of international treaties and agreements, including, in particular, its obligations under:

(i) the Berne Convention for the Protection of Literary and Artistic Works;

(ii) the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations;

(iii) the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights;

(b) the possibility that Australia will accede to the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty concluded in Geneva in 1996;

(c) the reference to the Copyright Law Review Committee so far on simplification of the Copyright Act;

(d) the purpose of the Copyright Act and Australia's membership of international treaties in fostering the creation and performance of musical works and the enrichment of Australia's cultural heritage;

(e) the fact that some composers and performers of music and producers of musical sound recordings are also operators of small businesses;

(f) the relevant findings and recommendations contained in the *Review of Australian Copyright Collecting Societies* by Shane Simpson; and

(g) any dispute resolution mechanisms established in relation to the licensing of the public performance right.

## WITNESSES

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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CANBERRA

Thursday, 25 September 1997

Present

Mr Andrews (Chair)

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| Mr Barresi | Mr Mutch |
| Mrs Elizabeth Grace | Mr Kelvin Thomson |
| Mr McClelland | |

The committee met at 9.56 a.m.

Mr Andrews took the chair.

**COTTLE, Mr Brett, Chief Executive, Australasian Performing Right Association, 6-12 Atchison Street, St Leonards, New South Wales 2065**

**FAULKNER, Ms Stephanie, General Counsel, Australasian Performing Right Association, 6-12 Atchison Street, St Leonards, New South Wales 2065**

**HARDERS, Ms Julie, Communications and Public Affairs Manager, Australasian Performing Right Association, 6-12 Atchison Street, St Leonards, New South Wales 2065**

**CHAIR**—I declare open the committee's inquiry into the licensing of copyright for the playing of music in public by small businesses, and welcome those who are attending this meeting of the committee today. The committee has invited representatives of the copyright collecting society APRA, the Australasian Performing Right Association, to appear before it today. As one of the main players in this inquiry, APRA's evidence will be significant in determining issues which are the subject of the inquiry.

I understand that representatives of one of the other copyright collecting societies, the Phonographic Performance Company of Australia, are observing the proceedings today. I welcome their attendance, and we look forward to hearing their evidence in Sydney on 31 October. This is only the second public hearing of the committee's inquiry. We took evidence from two panels, one of small business representatives and one of musicians, in Perth two weeks ago. To date, we have received over 150 submissions from interested persons.

I welcome representatives of APRA. Although the committee does not require you to give evidence under oath, I should advise you that the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee has received your submission to the inquiry, which was authorised for publication at our meeting this morning. Mr Cottle, would you or one of your colleagues care to make some opening comments?

**Mr Cottle**—We have filed a fairly detailed submission in recent days, and we had rather expected today to take the committee to the main points in that submission. If that is all right with the committee, that is what we propose to do. I would like to make some preliminary comments in this way.

Firstly, although the focus of the committee's inquiry concerns the collection agencies, and in particular APRA, the real substance of the inquiry concerns the rights and to some degree the livelihoods of authors and others who contribute to the making of music. So what we have sought to do in the submission is not only to give as detailed an exposition of APRA's activities as we can but also, to some degree, to give the committee a feel for the position and circumstances of authors and composers and the extent to which they rely on these kinds of rights.

The second initial point we would make is that intellectual property rights, and in particular copyright, have always been highly international rights. We would certainly urge against a parochial consideration of the issues involved in this reference. It is impossible to consider the position of authors and composers and, indeed, users of copyright material, without a sense of the international context.

I will go further than that and say that copyright is probably the most international of property because it is so vulnerable to transfer; it can be transferred—and has always been able to be transferred—across borders in such an easy manner. If anything, with the advent of on-line services and direct to home satellite transmissions that is more so now than it ever has been in the past, so the importance to those who rely on international standards for their livelihood in the creation of property is a key issue in our submission.

Finally, I would just say that APRA is absolutely aware of the number of complaints and the issues that have given rise to this particular inquiry. We come to the committee not only in a spirit of seeking to give you whatever information we possibly can, but also of seeking to find solutions and if necessary to change procedures and processes to alleviate, if not eliminate, some of the problems.

Beyond that, Mr Chairman, we would go to the submission.

**CHAIR**—If there are no other comments that anyone wants to make, we will go to questions. Mr Cottle, this may sound a bit blunt, but I will put it bluntly. If what we are told in submissions by a lot of small business people and what was said in the panel at Perth a couple of weeks ago has any semblance of truthfulness about it, then if I could draw an analogy, if you were doctors your bedside manner would be somewhat lacking.

**Mr Cottle**—That criticism has been made. We would prefer to deal with that accusation by going to the detail of the way in which we have approached licensees. Also, I hope to give the committee a sense of the context in which the correspondence has been sent to small businesses. That issue is dealt with in some detail in the submission. Indeed, we have annexed for the committee details of all of the correspondence that has been sent to licensees. We are very happy to go to that initially, if you would like to, or perhaps you would prefer me to explain about APRA.

**CHAIR**—There is a fairly detailed explanation of APRA in your submission, and the purpose of the public hearing is to try and tease out issues. We still rely on the submission, and simply because the matter is not raised in the public hearing does not mean we are ignoring it. It is just that there is a limited amount of time, so it might be better—

**Mr Cottle**—If we go straight to that issue. Sure. That issue is dealt with in section 12 of the submission. It begins on page 20; but just before going to that section I would like to bring you to section 11.6 of the submission, which gives you the details of what licenses are in place and what those licenses are.

APRA grants licences according to license schemes. A licence scheme is defined in the Copyright Act to be the set of circumstances relevant to a particular class of copyright user, and those circumstances then define the terms and conditions of a license, including charges.

There are two relevant licence schemes that we think have given rise to the committee's inquiry. The first is our license scheme relating to performance of background music by the use of CD players or recorded background systems. The fee in that case is $55 per annum, and that is a fee which is payable for the right to play virtually the world's repertoire of music at that particular venue by that means.

The second relevant license scheme is for a license to play whatever music it might be by the use of a radio or television receiver. The annual fee there is $37.09 per annum, and there are some additional cents per speaker.

**CHAIR**—As you mentioned, I was going to come to this. Let us go back to paragraphs 10.6 and 10.7. There you state:

The different fees charged under each licence scheme are intended to reflect the different value to the performer of the music.

. . . . . .

Wherever possible APRA seeks to value the use of music by reference to the revenue referable to it, or, in the absence of such revenue, to some other objective criterion such as the costs associated with a performance. This philosophy has been the subject of considerable scrutiny by independent tribunals both in Australia and overseas.

Can you elaborate on that? In particular, what do you mean by an 'objective criterion such as the costs associated with a performance'?

**Mr Cottle**—The measurement of the value of the performance of music is always a difficult task. What APRA seeks to do is to find guideposts to that value, which are objectively ascertainable. For example, in the traditional method of valuing copyright property, the use of copyright property is by reference to the revenue produced from the use of that property, so that a playwright, for example, would normally grant a licence to a theatre for a percentage of the box office. The author of a book is paid on sales of the book by reference to a percentage of the selling price.

The Copyright Act itself expressly recognises that method of payment in the statutory licence for the reproduction of music on sound recordings, where the statutory royalty is 6¼ per cent of the selling price of the record. Applying that analogy to the performance of music context, APRA, for example, charges radio stations and TV stations a percentage of their revenue—their advertising revenue in the case of commercial stations and their grant in aid in the case of the ABC.

In the public performance area, that translates to, for example, a concert promoter who would normally pay a percentage of the box office in return for the right to authorise the performance of musical works. There is not always a box office present in any particular circumstance relating to the usage of music. For example, the profit or commercial element in a performance of music may not constitute an admission price. It may constitute money paid through the bar at a hotel, for example, or money paid for meals at a restaurant.

We have always considered that it would be inappropriate to seek a percentage of that kind of revenue, because it is not directly referable to the performance of the music. So other criteria are sought. For example, if a restaurant hires live performers to play music, we look at the restaurant's expenditure on those live artists and seek a percentage of that expenditure. In that particular case, it is two per cent of expenditure. The actuality is that the author's contribution is worth one-fiftieth of the contribution of the performer.

But in circumstances where the usage of music is small—for example, in the case of a background

music system or a radio or television set playing in a retail shop—there are no such objective criteria that one can hang one's coat onto. So you are really left with a system of having to choose or come up with an annual fee, or a fee which is equitable in all the circumstances. And you are really left with a lump sum type of fee.

There are different theories about how you might calculate that lump sum. For example, you could look at the size of the venue; you could attempt to see how many customers come to the venue; you could look at the numbers of staff working in the venue. But all of those are factors which require ongoing supervision in the administration of licences, and what we have sought to do is to trade off the need for simplicity and ease from the point of view of the licensee against a swings and roundabouts fee system. Hence, the $55 flat fee for background recorded music and the $37 flat fee for radio and TV sets, but that is really what is meant there.

In terms of scrutiny of the box office principle by tribunals, there are many decisions not only of the Copyright Tribunal in Australia but also of similar bodies around the world, particularly the Performing Right Tribunal, now the Copyright Tribunal in UK. And there are court decisions in the US and throughout Europe which have, as I say, scrutinised that principle and have confirmed it.

**CHAIR**—So what would be your response to 1(c) of our terms of reference? It says:

the desirability of amending the law to provide for a means to assess the difference in value to the copyright owners, if any, between the direct playing of recorded music in public (e.g., by compact disc or cassette player) and the indirect playing of recorded music in public by radio or TV broadcasts.

**Mr Cottle**—Firstly, we would say that difference exists anyway in our licence schemes—the difference between the $55 and the $37. Secondly, the parliament has expressly conferred jurisdiction on the Copyright Tribunal to deal with issues of reasonableness and equity in licence schemes. As we go on to point out, it is open to any party at any time to bring a case before the Copyright Tribunal if the terms of licence schemes including charges are perceived or believed to be inequitable. For example, if the Australian Hotels Association felt that the licence fees referrable to radio and TV sets did not adequately reflect non-musical content compared to background music systems, they could make an application to the tribunal, air the evidence and the facts, and have a quasi-judicial decision made. But I would emphasise that, on that particular point, the difference is recognised in the licence schemes themselves.

**CHAIR**—We are just coming to that. How were the annual fees established? What was the criteria for establishing those fees? When were they established? How were they increased? Is that a CPI increase per year? To pick up your last point, has the Copyright Tribunal had any impact or any say, if I can use that expression, in the way in which they have been set in those schemes?

**Mr Cottle**—Yes. We have sought to go back through all of the archival information at APRA to try to find out when those fees were set and according to what criteria. Frankly, we cannot find that information. We know that the fees in 1978 were established or were then $15 for a background music system and $10 for a radio or TV. Since that time, CPI increases only have applied to those licence schemes. There have not been any other increases and at no time has any party made an application to the Copyright Tribunal. APRA itself has not made an application to the Copyright Tribunal. It can only do so if it proposes to bring into

operation a new licence scheme, which, of course, it has not in this situation or, secondly, if there is a dispute between parties to the licence scheme, it can then go to the tribunal. But neither of those circumstances has applied. Certainly, no user group has ever made an application to the tribunal in relation to those schemes.

**CHAIR**—Just so I have got that clear, there has not been an application to the tribunal by a user group in relation to the quantum of the fees.

**Mr Cottle**—Ever.

**CHAIR**—In paragraph 11.3.3, where you make reference to the fees not being calculated by account of floor space, particular kind of performance in public, the actual number of people who would hear the performance et cetera, you state:

Moreover, it has simply never been suggested to APRA by licensees that they would wish to see such differences factored into the schemes.

If that is the case, I would be interested in your comment on terms of reference 1(b), which states:

whether the licences offered and the amounts of royalties sought to take sufficient account of the likely limit on the number of employees or customers of the small businesses who are able to enjoy or hear the playing of music which is the subject of the licence and royalty collection;

I know you have touched on that, but have there been any discussions about that and, if so, why? Is it simply a matter of convenience of the simplicity versus supervision balance that you were talking about earlier?

**Mr Cottle**—I think it is that and it is that from licensees as well as from APRA's point of view. We have had many discussions with many industry associations and representative groups. It has often been said to us by those groups that their members perceive problems with licence schemes and that they would like to talk about those problems and to see whether different licence schemes should be brought into operation. I think I am right in saying that we have never actually received a single proposal for a change to these licence schemes, with all of the industry associations that we have dealt with.

There have, of course, been other licence schemes which have been the subject of vigorous Copyright Tribunal proceedings. An example would be the licence scheme for the use of music with aerobic and fitness classes in gyms, the licence scheme relating to dance clubs and, indeed, licence schemes relating to broadcasters. But we have never, to my knowledge, received a concrete proposal for an actual change in the licence scheme. The complaint usually is that people do not want pay, full stop.

**CHAIR**—What is the relationship? Not having known anything about this basically until this inquiry landed on the desk of this committee—so it is all green fields to me, if I can use that cliche—the impression we get is one of a frosty relationship, if I can put it that way, between APRA and various business groups. What level of discussion does occur? Are there ongoing discussions? Are there regular meetings with various representative groups of the various industries, et cetera?

**Mr Cottle**—Annexure M to our submission sets out a list of the associations with whom discussions

have been held. Attached to that is a very detailed schedule of the people involved in those discussions. You will see from that that we have in fact had discussions with many organisations. They are, of course, ongoing. If I may give you one example: we are currently in discussions with the Australian Medical Association office in Western Australia, under which APRA and the AMA are jointly considering a youth suicide fund under which as much as 40 per cent of licence fees would be contributed, based on a level of cooperation from doctors who are using music, not those who are not—an initial contribution of those fees, in a joint project which is close to the hearts of the AMA in that state, and obviously close to the hearts of the music industry as well.

That is the kind of project we are discussing with industry associations around Australia. I must say that that is an initiative which has come from the AMA. But, for us, it has opened up further possibilities of cooperation with industry associations.

**CHAIR**—I do not know whether you have read the transcript of the Perth hearings, but why do you think there is—how can I put it? I do not want to overstate it—a degree of antagonism from business associations? I am not saying that that is the case necessarily for all of them, but—for some anyway—why do you think that is the case? Are there particular ones? What is it?

**Mr Cottle**—It is certainly in particular areas and it has at least something to do with particular personalities in particular industries and industry associations. But it also has to be said that, for many of these industry associations and their members, the contact from APRA over the past two years has been their first contact. It has meant that people have had to confront an issue which is difficult for them to understand, and which does require a large sense of both legal and international context and a fair degree of empathy for the position of those who create artistic and musical works.

Maybe it says something about the nation's value of culture. But it probably says something about the complexity of the subject and the fact that, for many people, it has been the first time they have had to deal with it. That is an issue which has been extremely difficult for us, and we recognise that it is present.

**CHAIR**—I will come back to what happens in the approach to small business. I want to mention a couple of other things before that. In relation to fees, you say in your submission, at paragraph 14.6.9:

> They are certainly amongst the lowest payable anywhere in the world.

Do you have comparisons that we are able to look at in relation to those fees?

**Mr Cottle**—We are in the process of assembling a detailed table for the committee. We hope to have that to the committee within the next 10 days. We are relying on communications from societies in many countries around the world, but the information we have to date is that our fees are very much at the bottom end of the scale.

**CHAIR**—We look forward to receiving that. Can I now pick up what happens in terms of an approach to small business. What is your general modus operandi in the approach to small business?

**Mr Cottle**—The modus operandi has changed in the past few years. It was always the case that APRA would rely on its field licensing representatives to personally contact those who are using music or might be using music to alert them to the legal obligations involved and to encourage them to take up licences. What we found was that, in the case of licence schemes where the fees are as low as these two licence schemes are, our licensing field officers simply never had the opportunity or the priority to visit or speak with such people.

The result was that we conducted a compliance test a couple of years ago to see what proportion of small retail businesses using music in fact had licences. We were completely shocked by the findings of that test. We found that fewer than three per cent of small businesses playing music in public had licences.

At this point, I would like to make reference to another point in the submission. Because APRA is substantially in a position of trust in relation to the rights that have been given to it by its members, it considers that it has a fiduciary duty to those members to administer their rights in an efficient way and to ensure that the licensing activity is carried out diligently.

We were, as I say, shocked by the low compliance and as a result of that we endeavoured to look at different means of communicating with small businesses—means which we hoped would result in a cost-efficient high level of compliance and take-up of licences. The result was that we embarked upon what was essentially a telemarketing campaign.

The telemarketing campaign involved the sending of standard correspondence to small businesses in categories where we felt it was likely that music would be played. That standard correspondence was accompanied by background information material: brochures about APRA, brochures about how APRA's royalties are distributed to authors and composers and other explanatory material as well as what we called an exemption form which we hoped that people would simply tick and send back to us if they were not playing music or they were playing non-copyright music or whatever. That was followed by further proforma correspondence and we sought to phone at least once during that process each recipient from whom we had not heard. The relevant correspondence and kits are set out in here.

**CHAIR**—In terms of putting that material together, were discussions held with the various industry groups as to what was appropriate to put in the kits?

**Mr Cottle**—Not in terms of the content. We endeavoured to alert as many industry associations as we could before the letters were sent out, but as to the devising of the content, we took advice from obviously our legal advisers and also marketing advisers. We test marketed a number of different kinds of letters. We did find that the softer and more friendly in tone the letter the less likely it was that we would obtain any response at all from the business concerned. I think that has been a real catch-22 for us because the more that we have pointed out to people that there were legal rights and obligations involved, the higher the level of compliance we have obtained but also the higher the level of complaint and unhappiness we have received. Believe me, we are well and truly aware of the trade-off and there have been many times when we have felt, 'Frankly, is it worth the trouble to create such disharmony in relation to the rights?'

As to deciding on content, user groups were not, certainly initially, consulted. As the campaign went

on and we did speak more and more to industry associations, we did take on board their comments and feedback.

**Mr McCLELLAND**—That is small business associations and chambers of commerce and so forth, is it?

**Mr Cottle**—And particular industry representatives, for example the pharmaceutical industry, the AMA and bodies like that to whom it was felt that the correspondence was really too general and not tailored to the particular usage that might be occurring. During that campaign we also spoke to other interested parties. We sought to more closely examine how music was being used by many of the people that we had written to.

We discovered that, in the case of dentists and doctors, music was being used not only in waiting rooms and public areas, where we felt it was completely reasonable that a fee be paid, but also as part of the process of administering health care. In other words, music is sometimes played while you are in the dentist's chair or while you are having health care administered in the doctor's surgery. So we agreed, in light of that discovery, that it was appropriate that complementary licences be granted in that area. That was the kind of process of understanding in education that we went through with industry associations.

**Mr McCLELLAND**—Has there been a meeting of the minds or at least some commonality, or do you remain poles apart?

**Mr Cottle**—As I have indicated in the submission, we have met with and have a perfectly good relationship with many industry associations throughout Australia. We have sought to have meetings with wider representative bodies for small business. I must say that we have been rebuffed in that area. We would love to sit down around a table with as many small business representatives as we possibly could to try to sort out the rules of the game and to come up with codes of fair practice and things like that. But to date we have not been met with a positive response in that regard.

**CHAIR**—In terms of the material which goes to small business, there are annexures H, I, J, K and L. Earlier you talked about telemarketing. Is the initial course of action a package of material followed by a phone call, or is it the other way round?

**Mr Cottle**—Yes, there is a standard letter. I must say that I am missing a couple of the standard letters. This is a standard letter and it is accompanied by—

**CHAIR**—So annexure K is the first that a business proprietor knows about it.

**Mr Cottle**—That is correct. It is what is called the courtesy notice. That includes a number of materials, including a form—and I think it is marked as annexure H—which sets out all of the licence schemes. The form marked I and J is the licence application and the licence agreement. Annexure K is the actual letter that is sent out, and annexure L is the kit of materials.

**CHAIR**—I noted that the set fees are $55.59 and $37.09. Is that a product of CPI increases, and is

that why it is not rounded up to $55.60 or whatever?

**Mr Cottle**—Yes, that is right.

**CHAIR**—How long has this form of letter been sent out? Was it a recent draft?

**Mr Cottle**—It was a form of letter that has been sent out over the past two years. In fact, since the inquiry process has begun, we have not sent out any further letters. Frankly, we wanted to await the outcome of the inquiry process to obtain some guidance, so we have not sent out any of those letters for the past few months. But there was a period of about 18 months, commencing two years ago, when that letter was used.

**CHAIR**—Can I take it from what you said earlier that you decided some time ago—perhaps a couple of years ago—that a more strictly legalistic approach brought better results in terms of compliance than the friendly approach?

**Mr Cottle**—In fact, this form of letter that has been provided to the committee is the one that we found achieved the highest rate of compliance. Other approaches have been taken in the past. We tried softer, more friendly approaches, which did not work at all. In years gone by, we had a much longer, more detailed and more legalistic letter than this one. That was the letter that was traditionally used. That was the context in which we had an incredibly low rate of compliance nationally.

**CHAIR**—In the licence agreement there are terms like 'annual licence fee' and 'initial period' which do not seem to be defined. Is there any reason for that?

**Mr Cottle**—As far as the duration of a licence is concerned, that is covered in clause 3 of the terms at the back. I might ask our general counsel, Stephanie Faulkner, to comment on those issues.

**Ms Faulkner**—I think that it is an attempt to use language which people can understand. You will see on the front page in the application a note says, 'annual rates are subject to yearly increase in accordance with the consumer price index.' That is the first reference to an annual rate under the licence scheme.

I must say that this is a licence scheme that has not been reviewed or changed in any material particular in the whole duration of my time at APRA. It is a licence scheme which has been handed down in this form since the mid-1980s. It is the intention to try to maintain consistent terms of operation so that all licensees operate under the same terms and conditions.

You are quite right that there is no reference to a definition of 'initial annual period.' However, I would have thought the fact that the licence scheme is calculated on the basis of an annual fee and the use of the words 'initial prior to annual rate' indicate that that is the annual rate to apply for the first year of the licence. What was the second question?

**CHAIR**—The second one was in relation to the annual licence fee. That was not defined either.

**Ms Faulkner**—You will see the annual licence fee on the front page of the application. A column

which says, 'initial annual rate', sets out the annual rates. One of the difficulties in a licence scheme which is intended not to discriminate between users in the same class is that it is essential to maintain parity in the rate. It would be disaster if the annual rates became corrupted. In order to maintain a consistent rate throughout an annual period, you must use the initial annual rate as your base rate and then apply the CPI factor.

**Mr Cottle**—I just add some information for the committee in this connection. It used to be the case that a user of music in this context would be sent a licence application form. The application form was completed and sent back to APRA. The details from that form were then put into a licence agreement, which was then sent back to the music user for execution in return. So it was a two-stage process.

One of the difficulties with the two-stage process was that almost all who signed the initial form applying for the licence and sent it back to APIA felt that that was the end of the process. They had done what was required. Often the form was accompanied by a cheque. What more should they be required to do? But they were then required to execute a licence agreement, setting out the terms and conditions upon which the licence was granted. Because such a high proportion of those people never executed the licence agreement and never, I am sure, paid any attention to the terms and conditions, it was decided some years ago to try and combine the two-step process and combine the application and the licence.

Of course, it is important from an applicant's point of view that they are aware of the terms and conditions of the licence they are actually applying for. There may be some drafting issues, but no user has ever said to us, 'We are uncertain as to what the initial annual period is', or, 'We are uncertain as to what the initial annual fee is', because when this document is sent back to APRA they are then sent an invoice setting out what the initial annual fee is and what the period of the licence is for.

As to the duration of the licence, you will see there is an automatic rollover for successive annual periods in relation to the licence in the absence of notice of termination.

**CHAIR**—You said earlier, Mr Cottle, something in relation to business being able to say that it was exempt in the sense that it did not play music.

**Mr Cottle**—Yes.

**CHAIR**—Where does a business proprietor indicate an exemption?

**Mr Cottle**—There is this yellow form saying, 'Are you exempt?'. What we sought to do here was to try to identify the principal areas where music may be being used by a licensee, but a licence is not required because of the fact that the music was being provided by an external music supplier who may hold a licence at source with APRA. Those suppliers always advise the client that they have a licence with APRA and therefore there is no liability on the proprietor at the venue.

Also, at the urging of the ACCC, we put in a section in relation to the possibility that people are only playing non-copyright music. There are great technical difficulties with that because although copyright is a limited monopoly right—it only lasts for the life of the author plus 50 years—if you are playing music you

have to be in a position to know when the authors of all the material died.

Overlaying that is the fact that there is a great deal of music which is prima facie out of copyright but which is the subject of arrangements or adaptations which themselves are under copyright. It is one thing to advise people that if they play classical music they do not have a liability, but it is another thing to not give them the full story and inadvertently lead them to infringing the right. You will see that section on the second side dealing with music in the public domain.

We have also had to try to elicit a workable and user friendly definition of what 'in public' means. We have been through the cases, and I think the High Court's recent decision in the Telstra case is a great help in identifying what 'in public' does mean. However, we have sought to explain that as well.

I should emphasise that included with every piece of correspondence that has gone to small business has been a reply paid envelope. We have sought to that extent to encourage people to let us know if they are not using music or if they are entitled to some exemption.

**Mr MUTCH**—Could I just ask you about these forms—Annexure H, Annexure I and Annexure J. On the flip side of Annexure H it says, 'GFAC: Fitness and Aerobic Classes'. There is a certain period mentioned there and then it says:

72 cents per aerobic class and 36 cents per circuit class. This scheme applies to both Fitness Centres and Fitness Teachers.

Do you have to pay that on this form?

**Mr Cottle**—No.

**Mr MUTCH**—What form do you pay that on?

**Mr Cottle**—That is a separate form and we can provide you—

**Mr MUTCH**—Where is that form?

**Mr Cottle**—We have not provided copies of all of those forms, but we are very happy to do so.

**Mr MUTCH**—I would be very interested. One of the things the government is keen on is getting rid of red tape for small businesses. Can you not just charge an annual licence fee? Seventy-two cents, how would you fill out a form with that sort of detail?

**Mr Cottle**—The annual fee is supposed to reflect the value to the user of the use of the music. It therefore has a much greater value than does music played by CDs in a hairdressing salon, for example. And we say that that has to be reflected in the fees that are payable by different businesses, and I would say that most businesses would accept that.

**Mr MUTCH**—If you run a health place, you have got to fill out a form noting every class at 72c. What is the difference between an aerobics class and a circuit class? Why would you charge 36c for a circuit class?

**Ms Faulkner**—Perhaps I should explain. We had a Copyright Tribunal reference in the aerobics case some years ago in which very lengthy discussions were conducted with a number of parties who participated in the proceedings, all being representative industry groups from the aerobics centres around Australia. We had participation in the Copyright Tribunal proceedings throughout Queensland, Victoria and so on. In the course of the negotiations, we had a different proposal for the way in which the fees should be calculated for fitness classes. And what was actually negotiated was something that the industry agreed with. In fact, at the conclusion of those Copyright Tribunal proceedings, the industry groups issued a joint press release in which they acknowledged that the licence scheme as prepared was fair and reasonable, and that they accepted that it was the kind of licence scheme with which the industry could work.

And you also have to bear in mind that fitness clubs invariably publish their programs for their members. And it is on the basis of those published schedules of classes, which include circuit classes as well as their various kinds of aerobics classes, that they are able to complete the forms. And it is a simple procedure to complete a reassessment form, because they have the information out in the public domain for the purposes of their business. It is not a case of having to go through every week and check off exactly how many classes. It is something that they accepted.

**Mr MUTCH**—If your classes vary from week to week, of course you would have to. I could not think of a more complicated way of charging a licence fee. We would like copies of those different forms because I thought there was only one form. With this other group that goes around collecting licences, do they collect them from the same people you do?

**Mr Cottle**—They do in case of businesses playing CDs or tapes but not in the case of businesses playing radios or TVs, and that has to do with different convention requirements, as between authors' rights on the one hand, and the rights of producers of phonograms and performing artists on the other hand.

**Mr MUTCH**—So I could be a business person running one of those businesses, and you could come to me one day and then I could get someone else the next day possibly asking me for another fee? I would have to figure out who was legitimate, because I would be highly suspect about that.

**Mr Cottle**—That is true.

**Mr MUTCH**—So there are two lots of you.

**Mr Cottle**—Because there are two copyrights involved.

**Mr MUTCH**—I would immediately think one of you must be a fraud. Have you encountered problems with that?

**Mr Cottle**—Before addressing that point, I will just come back to that issue about the aerobics

classes? It used to be the case, just to add to what Ms Faulkner has said, it used to be the case that APRA's licence scheme for the playing of music in aerobics classes was a fixed fee per day on which the classes were given. The problem with that was that it drew no distinction between an aerobics instructor operating in a small hall in a country town, having one class a day, and a major city gym providing 25 classes a day. They both paid the same fee. So there was a clear inequity in the licence scheme and that was what was recognised in the proceedings before the Copyright Tribunal. It was felt that the fairest method of valuing the use of the property was to look at the usage of the property, and the best evidence of usage was the number of classes conducted. So that is some more background information on that scheme.

**Mr MUTCH**—What about of the number of people in each class?

**Mr Cottle**—We initially looked at incorporating that but it was felt to be too difficult from an administrative point of view.

**Mr MUTCH**—So the bigger the class is, the less you pay?

**Mr Cottle**—We would have thought that the bigger the class the more you should pay because—

**Mr MUTCH**—No, the less you pay though under this scheme.

**Mr Cottle**—Per person attending, that is true.

**Mr MUTCH**—So that is the truth. I just want to know how many complaints you had about that.

**Mr Cottle**—We constantly have licensees who have been approached by APRA on one hand, and PPCA on the other saying to us, 'How many more of you are there? I thought I paid you. Why do I have to pay them?' Or they say, 'I thought I paid them. Why do I have to pay you?' That is not a situation over which we have any control. We are administering rights on behalf of authors and composers who have a different property right under the Copyright Act. The PPCA is administering rights on behalf of record producers and their artists—a quite separate right under the act. We both have a public performance right because there are international conventions that require that right to be recognised.

**Mr MUTCH**—Can't you get together and be one organisation? Wouldn't that simplify the whole thing?

**Mr Cottle**—It is difficult for me to answer that question. I think that it would give rise to, firstly, trade practices' issues because there are separate licence fees involved, and the idea of combining them may have problems from the point of view of the ACCC. I think, also, that we have quite separate constituencies and different views about how licence fees should be structured and licence schemes set up. I think that I would prefer to have both organisations here to comment on that, rather than me comment by myself.

**Mr MUTCH**—I am having trouble trying to work out what the difference is myself.

**Mr BARRESI**—Let me just go back to the basics. What is the objective of APRA—the absolute

bottom line objective?

**Mr Cottle**—The objective of APRA is to ensure that those who write music, the authors and composers of the music, are paid for the exercise of their statutory right of public performance and are thus encouraged to continue in the act of songwriting and composition.

**Mr BARRESI**—If that is the case, can I just ask you to comment about the concept of double-dipping? I understand about CDs and tapes, but when it comes to radio—and I see it written in a number of places in your submission—you talk about where the person has derived a benefit, he or she will have to pay a fee.

**Mr Cottle**—Yes.

**Mr BARRESI**—Therefore, is the interpretation not so much on the composer and the songwriter, but more in terms of the organisation which is deriving the benefit? You are moving from one aim to another and that causes your double-dipping to take place.

**Mr Cottle**—I am not quite sure whether I entirely understand, but I think the first point I would say is that there is no doubt that APRA is not perceived amongst most licensees as an agent for composers and songwriters. I believe that in many instances it is perceived as a principal, as an organisation which in some way is taxing the use of music, and that is a major public relations problem for us. APRA is nothing more than the sum total of large numbers of composers and songwriters.

**Mr BARRESI**—But you have got your radio station who has paid a fee to broadcast, and I can see that you are protecting the interests of the composers and songwriters, the originators of the music in that context. But then you have got your hairdresser who turns on the radio and is playing the music, or your corporation turns on the radio, and because they are deriving a benefit from playing that music, they now have to pay.

**Mr Cottle**—Yes.

**Mr BARRESI**—It seems to me that your aim or objective is wider than the one that you presented to me just a moment ago.

**Mr Cottle**—No. The aims and the objectives in every instance are where someone derives a commercial benefit from a public performance or a broadcast of music to ensure that the composer receives fair payment in respect of that benefit. The particular situation in which music is performed by means of the use of radios or TVs flows from the fact that, under the relevant international convention and, therefore, domestic law, there is recognition that there are two levels of benefit. The radio station is gaining a benefit from broadcasting into people's homes. If someone at the point of reception chooses to gain a second commercial benefit by playing the music through the use of reception, then that is something that should attract some return for the author or composer. That has been a well established recognition since early this century—really, from the year when broadcasting first came into play.

**Mrs ELIZABETH GRACE**—Why did it take you until two years ago to start licensing?

**Mr Cottle**—APRA has been licensing these rights since 1926.

**Mrs ELIZABETH GRACE**—No, but it had not come in the public domain and caused the angst that it has now caused until two years ago, so why did it take until two years ago?

**Mr Cottle**—Firstly, when I say that APRA has been licensing since 1926, APRA has always had thousands of licensees throughout Australia. Thousands of businesses throughout Australia have for decades held licences to play music, either in the small business context, or the large business context.

What we found, as I mentioned earlier, when we conducted a compliance survey a couple of years ago, was that our methods had been very unsuccessful in the small business area so we had to employ new methods to try and apprise people of the obligations.

**Mrs ELIZABETH GRACE**—And you managed to turn off heaps of radios and upset a huge constituency.

**Mr Cottle**—We do understand that—

**Mrs ELIZABETH GRACE**—And I go back to your double dipping. I am sorry, but you have not convinced me. If the radio stations have paid their licences and you can turn your radio on in your own home and gain benefit from it, why does someone who is running a one-man or two-man show who turns on the radio to stop himself getting bored out of his brain because he is doing basic work have to pay a fee for it? It is no different from me playing it at home to stop me from getting bored out of my brain because I am working around doing housework. You are doing it on commercial premises and not doing it in your private home—sorry, I cannot rationalise that. I find that totally irrational and something that is being taken way out of anybody else's comprehension.

**Mr BARRESI**—Do not hold back, Elizabeth.

**Mrs ELIZABETH GRACE**—I really do find that just extraordinary and I just cannot comprehend it. I am sorry—it just does not mean anything to me. I find it very difficult.

**Mr Cottle**—The distinction arises from the fact that it is only a right of performance in public which is granted to authors. It is not a right of private performance which is granted to authors. So the law has drawn a distinction between performance which occurs in public and that which is not in public. The rationale for that is that there is some kind of commercial usage being made in a shop or commercial premises and it is only appropriate that it should deliver a return to those who provided that raw material. For a performance in a private home—

**Mr BARRESI**—But that is the reason that I asked you the original question about the aim of APRA, and your answer to that had nothing to do with deriving a benefit. Does that mean that your charter and objectives are therefore incomplete because you are now moving away from your original aim and including

another criteria of benefit?

I think that you probably answered as much as you can there, but let me go back to the question the chairman asked right at the beginning about the relationship between yourselves and the small business operators and about why that is occurring. It picks up from what Elizabeth was saying, as well, and it came out in a submission in Perth about the right of entry.

My ALP friends and colleagues on this committee would attest that there has been a lot of discussion by union representatives on premises over the years about right of entry, and limiting that to a notification. Yet you seem to be one of the few organisations that has escaped that. You have this ability to simply walk in. So, if you are looking for a reason for the angst—and I am sure there is an element of blame on both sides—rather than simply looking at the retailers' prejudices against APRA, maybe, it is also the modus of operation of your own officials. What are you doing in that regard in terms of creating a code of conduct for those agents when they enter premises?

**Mr Cottle**—Firstly, agents and field representatives almost never visit small businesses inclined to have only background music systems, or radios and TVs. Secondly, I believe that I have referred in some detail to that particular provision of the licence agreement at 11.5.3 of the submission. We have acknowledged that there are two aspects of the licence agreement which are quite inappropriate for small business performances. One concerns that right of entry, and the other concerns the obligation to provide details of music performed under the licence.

Those are both standard provisions which are drawn from licence agreements for bigger music users. We readily concede they have no place in this licence agreement and are prepared to delete them from the licence agreement itself. I might add that APRA has never on any single occasion sought to exercise or enforce either of those rights under the licence agreement. They are there. We acknowledge that they are the cause of some anxiety and we are very happy to take them out. They should be deleted.

**CHAIR**—If that is the case, can you explain a sign observed quite accidentally in a premises in Claremont or Fremantle which was to the affect that 'this radio is being played for my personal enjoyment and APRA spies are everywhere'?

**Mr Cottle**—I cannot make any comment about that.

**CHAIR**—I just commented.

**Mr MUTCH**—How many agents do you have? I take it they are unarmed. From the answer we have, you would wonder.

**Mr Cottle**—We have 11 people who are licensing officers nationally. They spend most of their time on the telephone, very rarely actually visiting places. Obviously, they do visit the major music users. It is probably the smallest licensing team per capita of any copyright collecting society—at least in the performing right area—in the world.

There is obviously for us a huge cost problem in having personal visits to music users because of the sheer size of the country and the logistics in getting to distant locations. That is one of the problems in the response we have had from regional Australia. While businesses in capital cities in the past may have known about this and been visited by APRA representatives, in regional Australia more often than not they have never been visited in regional Australia or have never known about it until the past two years. That is a problem we readily acknowledge.

We have had many anonymous claims about the conduct of licensing officers. Our licensing officers are thoroughly trained. They understand particularly well that the creation of a feeling of animosity on the part of music users is absolutely counterproductive to obtaining a licence. They also understand that the minute any threat or untoward approach is made to a licensee they will be instantly dismissed.

**Mr MUTCH**—Have you had any instances of people posing as your agents?

**Mr Cottle**—We believe we have.

**Mr MUTCH**—I just wonder frankly. There are so many reports of them being out in the field it makes you wonder.

**Mr Cottle**—We have seen newspaper stories about a so-called APRA representative being in town and going around harassing businesses.

**Mr MUTCH**—And collecting moneys presumably.

**Mr Cottle**—We know it is not one of our people. We have sent people to the particular location to try and find out what happened, but we have never actually been able to catch anyone doing it. I am sure it has happened.

**CHAIR**—I just come back to the exemption form, Mr Cottle. Can you explain to me why, for example, Puccini's *Nessun dorma* is not out of copyright?

**Ms Faulkner**—It is because the lyric is still in copyright.

**CHAIR**—It is within 50 years of his death.

**Ms Faulkner**—Yes. Puccini did not write the lyric; the lyric was written by another composer.

**CHAIR**—I see, thank you. And that is the same reason, I presume, with Strauss's *Space Odyssey*.

**Ms Faulkner**—In fact, that is an arrangement of a work that is out of copyright, as the script tries to explain.

**CHAIR**—So if it has been rearranged in a way other than in which the original composer wrote it?

**Mr Cottle**—That takes copyright.

**Ms Faulkner**—Certainly, that is right. There has to be a level of independent creation and musical originality at the time.

**CHAIR**—Would many classical works that have been rearranged still be subject to licence?

**Mr Cottle**—Indeed.

**Ms Faulkner**—That is exactly right.

**Mr MUTCH**—Just with respect to our interpretation of the Berne convention, do all the other countries that are signatories have two groups running around collecting licences as we do? Is that something that has come from Berne?

**Mr Cottle**—Let me firstly say that the Berne convention deals with the rights of authors and artists. Songwriters and authors derive their rights from the Berne convention. The record producers and performing artists derive their rights from other conventions, principally the Rome convention.

**Mr MUTCH**—Are we a signatory to that?

**Mr Cottle**—Are we signatories to the Rome convention?

**Ms Faulkner**—Yes, we are.

**Mr Cottle**—I would have to check that. I think we are.

**Mr MUTCH**—Probably the same 100 countries would be a signatory to both.

**Mr Cottle**—Yes. Initially, we were signatories to the Geneva convention and I believe we are a signatory to the Rome convention.

**CHAIR**—We are signatories to Berne, Rome and the World Trade Organisation agreement on trade-related aspects of intellectual property rights.

**Mr Cottle**—Yes.

**Ms Faulkner**—There are very few countries that are signatories to the Rome convention. There is nowhere near the same degree of adherence to the Rome convention as to the Berne convention. That would explain why many countries in the world would not necessarily have an equivalent PPCA type organisation.

**Mr BARRESI**—The United States is a great commercial originator of a lot of music. What are their practices in regard to licensing fees? Do they have two separate organisations? Is it one? Do you use them as a benchmark in the sense of how you operate?

**Mr Cottle**—That question takes up a number of issues. Firstly, in so far as the Berne convention

rights are concerned, the United States is a member of the Berne convention. It joined the Berne convention exactly 100 years late. It joined the Berne convention in 1986, rather than 1886. It was never a member during the formative era of the Berne convention. It is now a member of the Berne convention. There are a number of APRA equivalents in America because of the anti-trust background and because of the size of the market. There are in fact three APRA equivalents. If you are small business operating in the United States, you are going to get three approaches from an APRA organisation. For example, Broadcast Music Incorporated, BMI, may represent the works of Billy Joel, whereas ASCAP, the American Society of Composers, Authors and Publishers, may represent the works of Paul McCartney, and CISAC may represent the works of Bob Dylan, so you have got three authors' performing rights societies.

On the other side, the phonographic side, there is no equivalent to PPCA because the United States does not recognise a performing right in sound recordings. US recordings do not attract a performing right under Australian law because of the reciprocal nature of protection.

In so far as the Berne convention rights are concerned, there is an exception under US law which is currently the subject of an investigation by the WTO. It is dealt with in some detail both in our submission and in the legal advice we have obtained from Professor James Lahore. I hope that answers your question.

**Mr MUTCH**—Can I just follow up then on the administrative regime of all this? It seems to me that you charge fees based on legal interpretations. For instance, you could go into a factory, presumably, because it is a commercial activity and charge the owner to pay because the workers are listening to something.

**Mr Cottle**—Yes.

**Mr MUTCH**—Is it possible then to charge the owner of a paint company whose blokes are out in the field and they bring their own radios along? Presumably, it might be possible. If you pursued that, you could then apply a licence fee to them, depending on what the legal interpretation was.

**Mr Cottle**—But the issue is always whether there is a performance in public.

**Mr MUTCH**—Would it not be easier just to come to a sensible arrangement and give the minister a list of what you think is a fair thing? You could have a few negotiations and regulate so that you do not have this sort of potential attraction of a licence fee, but have a little bit of certainty instead. Would that not be a much simpler arrangement for this whole field?

**Mr Cottle**—It might be a more complicated arrangement. It might be much better to leave—

**Mr MUTCH**—How could it be more complicated?

**Mr Cottle**—It might be more complicated because community standards do change. If you lock in particular sectors which might, for example, be exempt from the right, you might find that you have a regime which is unfair, inequitable, and unnecessarily restrictive.

**Mr MUTCH**—But from time to time you could just amend the list. Surely, you could publish a

scheduled list of those things that do attract it. You could go off and collect the licences and then, from time to time, you could advise the minister and he could amend the list. Wouldn't that be a much simpler thing than having to go to a court to try to determine who has to pay? It seems to me that we are keeping the courts in a good line of business here.

**Mr Cottle**—There have not been that many court cases; there have been over the years, but there are not a large number of cases before the courts at the moment.

**Ms Faulkner**—On the question of legal proceedings, there has not been a single legal action launched in relation to a person who has received the correspondence through this telemarketing campaign since its inception—not one. I have not even written a letter of demand to any business. The level of complaint somewhat amuses me—I think there is an expectation that some kind of legal action will follow. But none has actually occurred.

I am the person who is ultimately responsible for all of the legal actions that are conducted for infringements of copyright. I can tell you that in Western Australia, for instance, over the last five years there have been less than six legal actions in the Federal Court or any other court for infringement of copyright in that state. Over the last five years there would have been less than 100 actions around the country. These are largely cases that have been launched in relation to large music users, not small businesses at all. It is a perception in the minds of users that, at the drop of a hat, we run off to court. As a matter of fact—and the record speaks for itself—we turn every stone trying to inform people of their obligations. It is only a matter of last resort that we institute proceedings for copyright infringement.

**Mr Cottle**—May I respond to your question in this way: it is true that there are circumstances where, technically, a performance in public is occurring where APRA would, as a matter of commonsense, not seek to obtain a licence. A good example might be a single mechanic working on a car in a workshop, for an employer, listening to the radio. We would not seek payment of a licence fee in those circumstances. We would, however, oppose some form of regulatory or legislative intervention which would enshrine a derogation from the rights guaranteed by international convention in that area. What we would be very happy to do, in cooperation with user groups and the government, would be to come up with a code of fair practice which would be available to the world at large and would be an indicative statement of where licence fees would be required to be paid and where they would not be required to be paid.

**Mr MUTCH**—That would be sensible, I would imagine.

**Mr Cottle**—We would be very happy to do that.

**Mr McCLELLAND**—Could you go a step further and perhaps have some sort of informal complaints tribunal, which might have APRA representatives and small business representatives and which might meet quarterly, or whatever it might be, to handle grievances?

**Mr Cottle**—There are a couple of issues there. One is that in our discussions with the ACCC the prospect of a dispute resolution mechanism has been put forward. We are not in agreement with the ACCC about the nature of the mechanism itself, but we have put forward a mechanism, the essential characteristics

of which are contained in our submission. We propose to establish that. We also propose, hopefully before the end of the committee hearings, to have developed what we say is a workable code of practice, and we hope to have some input from user groups.

On top of that there is the suggestion in the Simpson report for the creation of a position of ombudsman of collecting societies. Bear in mind that APRA is the oldest, biggest and most well-established copyright collecting society. But there are a number of others, and they are being contemplated in ways that may not have been thought of even two years ago. For example, the surveyors, who had their annual conference and dinner only two nights ago in Canberra, are looking at the establishment of a copyright collecting society for the widespread activity of copying of surveyors' plans. This is something that people had not thought of before, so the idea of the ombudsman for collecting societies, not just for APRA but across the board, is probably not a bad idea. So there are those three proposals up in the air at the moment. They are the ones that we are looking at closely.

**Mrs ELIZABETH GRACE**—I read somewhere that 87c in every dollar is redistributed back to performers. How do you determine who gets it?

**Mr Cottle**—It is not to the performers, it is to the composers and songwriters.

**Mrs ELIZABETH GRACE**—Yes—to your members. How do you determine who gets it?

**Mr Cottle**—APRA has a staff of 140 people. It has an enormous information technology sector and it processes, as I have indicated in the submission, over two million hours worth of radio broadcast logs and many millions of hours of performance information from television and other media. Essentially what we do is to try and distribute the money we receive from a particular sector in accordance with the information that that sector provides to us about the music played.

**Mrs ELIZABETH GRACE**—Could you give an example?

**Mr Cottle**—An example would be a promoter's concert, where the promoter will pay APRA a licence fee for the right to authorise the performance of music, the promoter will be contractually obliged to give us details of all of the musical compositions played, and those compositions will share proportionately in the licence fee paid. So it is a completely accurate and, in a sense, perfect distribution system. Such is the case also with radio and television, where the electronic exchange of information has enabled us to effectively have census logging of programs played on the broadcast media.

In an area like dance clubs, it is necessary to resort to a sample survey approach. We distribute the royalties there based on the dance music charts and on a survey of what is played in actual clubs. In the area of licence fees that we are talking about here—that is, the use of background music systems and in the playing of radios and televisions—we essentially pay out that money based on radio and television logs. So all the background system money and all of the radio money is distributed based on an analysis of radio logs, but television money is distributed on an analysis of television logs.

**Mr KELVIN THOMSON**—On the same theme of paying out money, the report says that your

revenue for 1995-96 exceeded $66 million, you had administration costs in excess of $8 million and distributed $47 million to members. Is the information concerning distribution to members publicly available?

**Mr Cottle**—The broad information is, yes, but we obviously do not publish the actual money that is paid to individual members.

**Mr KELVIN THOMSON**—When you say 'obviously', why is that?

**Mr Cottle**—Because it represents their income; it is the most private of information. If you are a composer and you receive a distribution of $10,000 or $15,000 based on performances of your work throughout the year, that is information that you legitimately would be entitled to have kept private. We can give the macro picture. We can give the micro picture to the committee in the event of individual composers waiving their right to confidentiality, but that is not something that we have asked our composers to do.

**Mr KELVIN THOMSON**—People who receive income pursuant to public decisions, legislation and so on, do not generally have confidentiality.

**Mr Cottle**—These are private property rights. It is true that they are conferred by public legislation but they are very much private property rights. I would have thought that a composer's or a playwright's or an author's income from book sales, record sales, public performances or productions of a play would be entitled to be treated like any other income. I have indicated in the submission explicit details of the number of writer members that we pay, both in terms of domestically earned income and foreign income. If the committee wished to see those payments in a way which could guarantee confidentiality, we would seek authority from our members.

**Mr KELVIN THOMSON**—What are the auditing arrangements that you have?

**Mr Cottle**—APRA is audited externally. We are treated as a public corporation for the purposes of the Corporations Law. We are audited by KPMG. I have provided to the committee a number of annual reports and I am happy to answer questions about any of that information at any time.

**CHAIR**—There was a reference to annexure E, I think it was, in your submission, which, as I recall, we have not received yet.

**Mr Cottle**—Which is that?

**CHAIR**—The list of cost to revenue percentages achieved by the principal collection agencies around the world.

**Mr Cottle**—That, together with the tariffs and the licence schemes from overseas societies, we are in the course of assembling at the moment, and we hope to have that within the next two weeks. There is no doubt that APRA's cost to revenue ratio is the lowest of any developed country in the world .

**Mr BARRESI**—Only one case has gone right through to litigation, apparently, and that is the ABC

case. Is that right?

**Mr Cottle**—In the Copyright Tribunal?

**Mr BARRESI**—Yes.

**Mr Cottle**—I think that is correct, at this stage.

**Mr BARRESI**—What was the outcome of that?

**Mr Cottle**—The Copyright Tribunal confirmed the licence scheme that had been proposed by APRA. It varied the percentage of revenue that had been sought by APRA, but it confirmed the licence scheme.

**CHAIR**—We are going to have to bring this hearing to a conclusion now because of other commitments that various members of the committee have. There is one final question I want to ask you because it is related to some other things.

Going back to your exemption form, there is a definition of 'performance in public' on the form but, when you look at the other side where a person fills the form in, it seems to me that there is no provision for saying that this is not a public performance. You have an exemption to be granted on the grounds that it is a music store, it is the sole provider of copyright music on the premises and there is no other means of transmission, or that copyright music is not played at the above premises. Should there not be a provision which says that music is not played in any public way?

For example, this is a situation put to us. Take a common place—a cafe or food premises where there is a preparation room at the back where one person works; or it may be a sole proprietor with someone out the front. There are probably thousands of these little shops around Australia where a person out the back is simply doing all the preparation as the proprietor and happens to be listening to the radio, but the radio is not playing in the public part of the premises. It would seem to me—but correct me if I am wrong—that that would be a private use of the music. If so, why isn't there a provision that there could be an exemption in that case?

**Mr Cottle**—It probably is not a private performance. It may well be a public performance, if I understand you correctly and the person is listening to the radio in the course of employment.

**CHAIR**—I am saying the person is listening to the radio in the course of running his or her business.

**Mr Cottle**—That is probably a public performance, I would have thought.

**CHAIR**—Why?

**Mr Cottle**—In accordance with the court decisions, the music in the workplace line of cases in public performance was most recently examined by Mr Justice Gummow in the Commonwealth Bank case.

**CHAIR**—That involved, as I recall, a training program where there were 11 or 12 people participating in a seminar.

**Mr Cottle**—That is correct.

**CHAIR**—Isn't it a long bow to say that putting on a training program for a number of employees is the same as me in my kitchen at the back of the shop preparing sandwiches and salad rolls and listening to the radio?

**Mr Cottle**—The court in the Commonwealth Bank case and also the High Court in the Telstra case made a point of saying that the size of the audience for the performance is an irrelevant factor. The performance could occur, theoretically, with nobody being present but with the potential for the public being present. What I do think is that that is a perfect example for the—

**Mrs ELIZABETH GRACE**—The public is not going to go into the kitchen—the same as the public is not going to go into the workshop of a jeweller where the jeweller is playing the radio, or that type of thing.

**Mr Cottle**—I absolutely agree with that. I think it is a perfect example for the indicative statement or code of fair practice that we are seeking to develop during this process. I think it would be quite wrong of APRA to license that kind of performance. Commonsense dictates that it should not be licensed and we would not seek to license it in normal circumstances.

Rather than saying it is not a public performance—because people will draw from that kind of statement all sorts of conclusions which they will then use to say that what they are doing, by analogy, is not a public performance—I think it would be far better to enumerate very clearly a code of conduct which would indicate that, in those circumstances, no licence fees would be sought.

**CHAIR**—If I recall correctly from what you said earlier, I take it that you are working on a code of conduct.

**Mr Cottle**—We are, indeed. We are trying to work on it really through the feedback that we get back from the committee's process. That, of course, is a process that has just begun for us.

**Ms Faulkner**—Just to add something quickly, that public performance does not refer to the general public. It is a misconception that it does. The whole line of cases through virtually the whole of this century indicate that it is the copyright owner's public that is the thing that matters. The copyright owner's public can consist of one person. Mr Justice Burchett said this. The earliest cases of public performance in the 1930s in the United Kingdom indicate that it can be one, two or three people who hear the music. It can be music that escapes from a kitchen so that one person hears it in a waiting room. It is still a performance in public. Obviously, as Brett says, commonsense is applied. These are not the kinds of usages that APRA has sought to licence through this campaign. Nonetheless, it would still be within the purview of the copyright owner, and it is a matter that is clearly defined in the cases.

**CHAIR**—I might finish here. If that is the case and that is clearly what the established law holds, and it is as wide as that in terms of the definition of public, I think it highlights why confusion arises, because the general perception of 'public' would not be as wide as that in this instance.

**Ms Faulkner**—No.

**CHAIR**—I am not talking about people who want to avoid paying a fee at all. I am just saying that fair-minded people would probably not regard playing a radio in the back kitchen for one person as being a public performance. I think that may well be part of the difficulty that we have got to address.

**Mrs ELIZABETH GRACE**—But a barbecue at home with 30, 40 or 50 people is more a public performance. This is where we have to get this definition right. We have got to get a perception there out into the community. If you are playing the radio, full stop, it is a public performance. It does not matter where you are playing it, because you are immediately receiving the reception that is coming through on that radio. Therefore, under your definition, you become 'public'. It does not matter whether you are in your motorcar, your kitchen, your bathroom or up a tree. It is a public performance.

**Mr Cottle**—No, that is not what the courts have said. The courts have said that the playing of music in a commercial or business environment is public.

**Mrs ELIZABETH GRACE**—So, in a taxi it is—

**Mr Cottle**—In a taxi, it may well be. But the barbecue at home with the 40 or 50 people is very clearly a domestic performance, and very clearly not a public performance.

**Mrs ELIZABETH GRACE**—It is all out of kilter. It is all perception, if that is the word we are looking for.

**Mr Cottle**—Yes.

**Mrs ELIZABETH GRACE**—But that definition has to be tidied up because that is where it is all falling apart. That is where it is all coming from.

**CHAIR**—I am going to have to draw this hearing to a conclusion. There are a range of other things that, obviously, we would like to take up with you. Our next hearing is scheduled for 31 October in Sydney. If it is convenient and we can make some arrangements with the secretariat, perhaps we could continue on that occasion.

**Mr Cottle**—We will certainly seek to put the views of the composers and authors themselves to the committee at that time, if that is acceptable to the committee.

**CHAIR**—Yes. Certainly that, and there are some other issues that we have not had time to address at this stage. But we will make some arrangements following this. I thank you for coming along today and for your submission.

Resolved (on motion by Mr McClelland):

That this committee authorises publication of the evidence given before it at the public hearing this day.

**Committee adjourned at 11.24 a.m.**