HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Copyright, music and small business

MELBOURNE

Thursday, 13 November 1997

OFFICIAL HANSARD REPORT

CANBERRA

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Members

Mr Andrews (Chair)

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

(Subcommittee)

Copyright, music and small business

MELBOURNE

Thursday, 13 November 1997

Present

Mr Andrews (Chair)

Mrs Elizabeth Grace — Mr Tony Smith

Mr Kelvin Thomson

The subcommittee met at 9.50 a.m.

Mr Andrews took the chair.

CHAIR—I declare open this public hearing of the committee's inquiry into the licensing of copyright for the playing of music in public by small businesses. I welcome the witnesses, any members of the public and others who are attending this meeting of the committee. I apologise for the delay in starting this morning. The subject of the inquiry is the law under which royalties can be collected from small businesses for the use made by them of copyright materials consisting of playing music in commercial premises. This hearing in Melbourne today will be the last outside Canberra this year. The committee expects to hold one more hearing in Canberra before the end of the year and some further hearings of the inquiry next year.

LAHORE, Professor James Campbell, Special Counsel, Mallesons Stephen Jaques, Level 28 North Tower, Rialto, 525 Collins Street, Melbourne, Victoria

ROTHNIE, Dr Warwick Alan, Partner, Mallesons Stephen Jaques, Level 28, North Tower, Rialto, 525 Collins Street, Melbourne, Victoria

CHAIR—I now welcome Dr Warwick Rothnie and Professor Jim Lahore from Mallesons Stephen Jaques. Although the committee doesn't require you to give evidence under oath, I should advise you the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false and misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of your submission of 11 September of this year. Would you care to make some opening remarks?

Dr Rothnie—I think perhaps just in very broad summary, the purpose of the submission was really to address specific questions arising out of the inquiry information paper: the position with the international treaties to which Australia is a party. In very broad summary, I think our view or understanding of those treaties is that Australia is a member of the World Trade Organisation and therefore obliged to comply with its obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights, otherwise known as TRIPS. Article 9 of TRIPS requires Australia to comply with articles 1 through to 21 of the Berne Convention with one immaterial exception in the present context. So that means that we have to implement the rights granted by articles 11 and 11bis of the Berne Convention, and they require Australia to accord authors' exclusive rights over the performance in public of their material, which brings us to the specific items in paragraph 3.5 under Inquiry, the playing of cassettes and computer discs and the replaying of broadcasts in public places such as small business operations.

Our interpretation of those obligations is that Australia is required to allow copyright owners the potential to recover royalties for that performance and that a broad exemption of the sort being considered is not justifiable under any of the exceptions under the treaties.

CHAIR—There has been some developments, if I can put it that way, in terms of evidence before the committee in the course of the inquiry, and I am not sure whether you are aware of that, but perhaps if I can inform you. For the purpose of doing that can we for our discussion take the position of the playing of a radio in a small business separate from the playing of tapes or CDs or cassettes?

The proposition that has been put to us by APRA, and in effect supported by the Council of Small Business Organisations, is a proposal that we adopt the Canadian position in relation to the playing of radios in small business which provides an exception, in effect, for them. The qualification to that proposition being that of course the licence fees would need to be adjusted at the point of the payment by the radio broadcasters so that the owners of the copyright weren't left out of pocket as a consequence of such change. Can I just deal with that aspect first before we come to the CDs and tapes. Are there any difficulties that you perceive or apprehend in relation to that if we were to make a recommendation that in effect the parliament amends the Copyright Act to pick up the Canadian provisions or something similar.

Dr Rothnie—I think I should first say by way of preliminary answer to that, that members of your

administrative staff in fact faxed through to me yesterday a copy of that proposal. Unfortunately Professor Lahore has only been able to have a brief look at that this morning. I think any views we express on that at this point in time would be very preliminary. We haven't really had much of an opportunity to consider it and work through it. I think we would prefer if that is acceptable to the committee to perhaps provide you with a supplementary submission dealing with that.

CHAIR—Yes, if you are happy to do that, we would certainly be interested looking at it. I take it though in general terms that if it is an acceptable law in Canada as a member of the World Trade Organisation, then there is at least a prima facie case that it would be acceptable elsewhere.

Dr Rothnie—We would presume that they had looked into the question, but I am not aware of the background of that, yes.

CHAIR—Can we leave that aspect aside then. Coming back to CDs and tapes and the like, your proposition in a nutshell is that our international obligations are such that there can't be any exemption for, for example, small business in relation to that.

The tricky question here is there has been some court decisions on the parameters of what is a public performance. There was the case involving training within the Commonwealth bank or Telstra or somewhere like that. There was the English case about music being piped throughout a factory. Where do we draw the line, or is there a line that can be drawn? For example, there has been considerable evidence given to the committee and complaints are made by small business owners that if I am simply playing a CD on my premises for my private enjoyment, then that doesn't constitute a public performance and it should be treated differently.

For the purpose of discussion we have a looked at a three-part categorisation, one which is purely private. That might be the cafe which has got a kitchen out the back where the proprietor or an employee has got the CD playing, which is only heard in that room basically, versus a second general category that might be music which is used for the purpose of ambience which might be the restaurant that is playing music in the background, or the jeans store which is blasting music out to attract that particular age group that it wants to attract into the store, versus another category which is where the music is quite clearly, and I think unambiguously, a part of the commercial purpose of the business. Probably the best example I can think of that is a gymnasium where music is used as part of an aerobics class. It is pretty hard to see how you can have your aerobics class without the music for people to keep time to.

We are not saying necessarily that is the best categorisation but for the purpose of discussion I think it is helpful in terms of looking at the different sort of categories and the question then is, is there a line to be drawn somewhere along that spectrum in terms of when copyright is applicable and royalties should be paid pursuant to licences, et cetera. If there is a line, where would you draw it?

Prof. Lahore—I agree it is very difficult to draw the line. The High Court in the recent Telstra case developed the concept of what the court called 'the copyright owner's public', that is the public that the copyright owner would expect to receive payment from in relation to the use of the work. That discussion was in the context of music on hold on the telephone system, where of course the music was only being

heard by one person at a time.

I think it is helpful to look at that concept with two other concepts that the courts have also looked at; that is, whether the performance takes place in a domestic or quasi-domestic situation where you can clearly say this is not a performance in public. Some of the exceptions that presently exist in the Copyright Act, such as playing music in guesthouses and hotels for residents, might be thought of almost as a quasi-domestic situation and therefore not performance in public for copyright purposes. That is the first strand.

I think the other strand is whether the performance is part of a commercial activity or not. An example is the Commonwealth Bank case where they were playing music as part of a training session. They had I think 11 employees there, and of course that is clearly in public because it is part of their activity as employees of the bank. It is, in a sense, a commercial activity. It is not part of their domestic enjoyment as private people. So I think that is an important strand.

If you look at that, you then say, 'Well, who is the copyright owner's public?' Essentially it is the people that the copyright owner would expect to pay for the use of the work in those situations, whether they be non-domestic, whether they be part of a commercial activity or otherwise. That is, the music is being used in some sense for the benefit of the people who are playing it, rather than for the use of the people in their private capacities.

CHAIR—To tease that out a bit further, take the Commonwealth Bank case where, as I recall, that was an internal training seminar or workshop and it was being used as part of that. Perhaps you can remind me whether it was used as sort of background music or it was being used as—

Prof. Lahore—Part of a training video as incidental music.

CHAIR—Video, yes. It is incidental music. So in a sense that is the creation of an ambience for that training workshop.

Prof. Lahore—Yes, certainly.

CHAIR—Therefore one would suppose that in any other workshop or 'train the trainer's' program, all these things which have become increasingly popular, the use of music to create the ambience there, according to the High Court, does involve a public performance such that the royalties ought to be paid. If that is an appropriate interpretation of the law and a reflection of our international obligations, then would not one have to include those other instances of the creation of ambience as circumstances in which copyright is applicable and licences and royalties payable.

Prof. Lahore—Yes.

CHAIR—So if that is the case then, the ambience and the more obvious commercial public performance fall into one category, that then leaves us with this more difficult category of where a public performance starts, I suppose. If we look at the domestic cum quasi-domestic strand, it is more difficult to say it is part of a commercial activity if you are talking about somebody preparing sandwiches in the back

kitchen of a cafe. If the music is being played right throughout the cafe, you can say, 'Yes, it's the creation of ambience,' but if it is somebody just out the back by themselves more or less—

Dr Rothnie—I am not sure that I see a problem in that situation, where it is really being played while, as I understand the example, the person is preparing sandwiches, or meals for the people coming to the cafe or whatever. That would seem to me very much the same as the examples where some of the English cases, which I think are mentioned in the information booklet, were cases where people were playing music while they were working in factories, to relieve boredom, as part of a morale-making sort of exercise to basically help make them happier workers so that they were working better. So I think in that situation you would say that somebody clearly perceives a commercial benefit in using the music, just as it might be better to provide more comfortable chairs or other pleasant surroundings or whatever for people to work in. Certainly it is a different type of use in one sense to the ambience, but I think I would still see that as being a commercial use.

CHAIR—The difference I see, Dr Rothnie, with the English case was that, as I recall, that was where music was in effect being piped around the factory by the employer for the benefit of the employees. That seems to me to be a different situation, where a sole proprietor or even an employee off his or her own back says, 'I'm going to bring in my hand-held stereo player, stick it on the corner while I'm cutting the bread,' or whatever the activity may be. I think as a matter of commonsense, people would say that there is a difference between the two. The difficulty I have is that if that, as a matter of commonsense, is right and the law ought to be commonsensical at least now and again, the quasi-domestic principle or strand in which to determine this doesn't seem to work very well. I suppose what I am trying to get to is: is there another way of establishing a principle which would stand up?

Prof. Lahore—Maybe there is a difference between the individual going into the sandwich-cutting activity with that individual's own earphones, or providing a radio to play for that individual's own private benefit, and a situation where the music is provided by the proprietor for the benefit of the proprietor's staff and work people. I think there is a clear distinction there.

Dr Rothnie—I certainly can appreciate the difficulties with the particular fact situations, but I think we have got the two principles, as it were, and then it really becomes more a question of applying those principles in different fact situations and it is extremely difficult I would think to draw legislation which can really say, 'Well, this fact situation falls on this side of the line or that side of the line.'

CHAIR—It may be that we can't draw legislation, but it may be the case that the committee can set out some guidelines. They may be not even called guidelines, but we could set out a scenario so that the difficulties that have arisen, if people are reasonable about the way in which they go about their actions henceforth, shouldn't arise again. That is, we are saying, 'Well, this is where we see certain activities falling and this is where we see others,' and if people are prepared to accept that, with a bit of give and take and commonsense, then we shouldn't have this angst arising between the copyright owners and small business proprietors into the future. If we could achieve that much, even without legislation, then I think it would be useful overall.

Dr Rothnie—Yes, certainly, and that is often one of the advantages of things like the inquiries and

reports that come before parliament. They often try and say, 'Well, this is what we see is the principle and these are the sorts of situations where we would see it working.' So there could well be very good potential for that.

CHAIR—It could be educative in that sense rather than legislative.

Prof. Lahore—Yes. I think there is a lot of misunderstanding about what 'in public' is.

CHAIR—Yes.

Prof. Lahore—People don't understand what they can in fact do quite legally.

Mr KELVIN THOMSON—The chairman drew attention to the provisions of the Canadian copyright law. Is it your view that these provisions comply with the Berne Convention and Rome Convention?

Dr Rothnie—Unfortunately, the Canadian provisions are very recent, and we only managed to find out about the proposal yesterday, so I think we would prefer, if possible, to provide you with a supplementary submission on that rather than say something off the cuff which, on further reflection, would look a little bit ill-conceived.

Mr KELVIN THOMSON—Yes. I had a look through the submission you made in relation to the Aiken exception, which applies in the United States. The observation that you made is that that exception is limited in that it applies to radios, TVs and similar devices rather than the playing of all recorded music. I really did think that the other points you were making in your submission would not cut much ice with a lot of the witnesses who have come before us, the small businesses who are unhappy about what APRA and others have been doing. That is, it would not be possible for us to say to them, 'Well, in the United States they have an exception, they are not required to pay these licence fees, but notwithstanding that, you are going to be required to pay these licence fees.' I didn't think that the distinctions that were being made between the US and here were really going to, as I say, cut much ice with people who have to pay the fees.

Dr Rothnie—Yes. I think the first point is—and I must confess I haven't surveyed all 170 or however many countries there are in the world—that the US exception seems to be the only country among the members of the Berne Convention which does apply that exception. It is an exception which the US implemented. It goes back some 30 years, and 20 years to the actual legislation. It was implemented in a context where the US was not a member of the Berne Convention and had no reference to obligations under the Berne Convention and, perhaps most significantly in the present context, it is actually the subject of an investigation by the European Union and a potential complaint there.

As I understand it, my latest checking is that the European Union hasn't actually initiated a formal complaint to the World Trade Organisation; it is still investigating and deciding what it will do about that. So I think it is certainly out there by itself at the moment and it has got a fairly substantial question mark hanging over it. There would obviously be the potential that somebody like the European Union might decide for other reasons not to initiate a trade war with the United States, but they might look around and say, 'Well, Australia has got the same legislation. Let's take on that and establish a precedent.'

Mr KELVIN THOMSON—Certainly if it became the case that there was an official complaint to the WTO and, arising out of that, the Aiken exemption disappeared or something happened to it, that would clearly be different, but my concern is that you have got a situation now where US small businesses are not required to pay licence fees in these circumstances and Australian small businesses are being required to pay licence fees in these circumstances, and this is difficult for us to justify. You might say the United States is a one-off, but in the eyes of people here no doubt it is a pretty impressive one-off.

Prof. Lahore—Yes, true, it is a one-off in some respects, and I understand the problem. I think the difficulty is that there are a number of anomalies in the US copyright law—not just this, but other anomalies—which arise because of the fact that when negotiations were taking place for the entry of the US into the Berne Convention, the international community was most anxious to get the US as a member and some aspects of the US copyright law were accepted, although it was, I think, generally recognised at that time that some of these aspects of the law were contrary to the Berne Convention. No doubt these will gradually disappear under international pressure. It may be hard to explain to the small business people, but that is probably the legal reason.

Mr KELVIN THOMSON—We can say to them, 'We need the US more than they need us,' but we have had other witnesses before us who are quite fired up about the paying of the licence fees which, in relation to radios and so on, they regard as double-dipping. They have concerns about the administrative aspects to this, and a variety of other issues, and so they would not be entirely taken with that line of argument.

Dr Rothnie—Sure. It is an obvious problem that some people in the world are apparently getting away with this, but under the Berne Convention it is quite clear that being able to charge licence fees for these types of things is not double-dipping. The Berne Convention draws a very clear line between where the broadcast ends and where the further relaying of the broadcast commences, and makes it quite clear under article 11bis that that is something which the author is entitled to receive at least equitable remuneration for.

Mr KELVIN THOMSON—Yes. Just to pursue that issue a little further, your submission on the Japanese exemption refers to 'for nonprofitmaking purposes'. There are a number of different ways of looking at this issue, and this is an alternative way of looking at the issue. I think it is potentially quite a difficult one, but it would seem to me that in that context—taking one of the examples that we have talked about—a motor mechanic working under a car in a garage and so on may be able to say, 'The radio is not on for profitmaking purposes, it is simply to while away the hours and make them less boring while I'm doing this work here.' So you could argue that in a variety of small business contexts they would say, 'This is not for profit,' whereas the use of them in the retail area and areas where customers come in and so on might be more readily identified with the profitmaking.

Dr Rothnie—Sure. I think it is always a bit difficult to know, with Japanese law, quite what they regard as nonprofit and how that gets translated, what that actually means. I think that is one difficulty that we face there. But I think, in broader terms, the type of issue you are raising is very similar to the sort of issue that the chairman was talking about, where the person who is sitting out in the back room making the sandwiches perhaps brings along a radio for their own entertainment or relief while they are isolated. That does have the appearance, I suspect, of being much more a domestic or quasi-domestic arrangement as

opposed to a situation where the employer actually provides the music or the radio or whatever as an amenity of the workplace. I think that is the sort of situation you get into and I think it has to be recognised that there will be situations between the two where the line is grey and you can't say with absolute certainty, 'Well, this clearly falls on that side of the line or the other.'

Mr KELVIN THOMSON—I have to say that I personally think that things like these distinctions involving profitmaking and nonprofitmaking performances or public performance are very difficult to define. Now, you might have a ready line, but so far I don't think I have seen it. I have been more interested in the distinction between radio and TV on the one hand and cassette players, CDs and so on on the other. It does seem to me that that would be much simpler to apply and that some of the intellectual property issues are clearly strong. In relation to CDs and cassette players—the choice of music by the small business—the issues are stronger, and fainter in the case of radio and TV, where people are picking up news and information and are using the radio for a variety of purposes.

Prof. Lahore—I think some of the nonprofitmaking uses that in the past were probably considered acceptable were things like religious uses and patriotic uses, which were under discussion at the time of the Brussels revision of the Berne Convention. It is what we call de minimis use.

Mr KELVIN THOMSON—Yes. One of the RSLs came in. I forget whether they had been visited by APRA, but they were concerned that the application of the licensing fees in its pure form would apply to them and they wouldn't be able to play the last post and so on.

Dr Rothnie—They might have more trouble with the playing of the last post at 11 a.m. on 11 November, but not in a more general social amenities type situation. I think certainly one of the cases—I don't think it is actually referred to in the information booklet, but it is in that line of authority—concerned a private women's club. I can't remember whether it was in Scotland or England. They were having a social performance, some sort of play or something like that, and the court there had very little difficulty in considering that to be outside the domestic/quasi-domestic circle and being more as part of somebody's public life.

Mr KELVIN THOMSON—What were they playing? I'm sorry, I missed that.

Prof. Lahore—It was the Women's Institute.

Dr Rothnie—That's right, yes.

Prof. Lahore—They were playing music at a social for members.

Dr Rothnie—And that is, I think, more outside the domestic/quasi-domestic type circle.

Mr KELVIN THOMSON—And were they choosing the music?

Dr Rothnie—Yes.

Mr KELVIN THOMSON—The format of the music was being chosen by them?

Dr Rothnie—Yes.

CHAIR—I'm sorry, I didn't quite follow. Was the decision there that copyright was applicable and fees were payable?

Dr Rothnie—Yes.

CHAIR—It is difficult to draw a line. Mr Thomson will correct me if I am not agreeing with him, but I think I am agreeing with him, that if music is played, say, in a restaurant and a licence fee is payable, it is difficult to see why, if the place happens to be the RACV Club or the Melbourne Club, that it shouldn't be payable. I can't see that there is any distinction, personally.

Dr Rothnie—Yes, I would agree with you.

CHAIR—If you accept that then, if it is being played in an RSL club or some other club, it is difficult then to draw a distinction that has got any sound principle that is defensible.

Dr Rothnie—I would agree with that too.

Mrs ELIZABETH GRACE—I have just got one question, and I think you have probably already covered it to a degree, but do you think there are any exemptions, any way that exemptions could be acceptable, or do you feel it should be just a blanket cover?

Dr Rothnie—I think exemptions are permissible where you can demonstrate that there is some sort of special circumstance and that it is not prejudicial to the normal exploitation of the work—that sort of test. A blanket exemption for small business, for the reasons we have set out in our opinion, I don't think meets any of those conditions.

I think it also comes back to some of the points which have been discussed here. For example, a small business could quite easily be somebody who is operating an aerobics class where the music is an absolutely crucial aspect of the whole thing, as opposed to a situation at the other end of the scale, which is where you have got the person out in the back room or whatever. So I think it is very difficult to say under the international treaties that small business, as a group, is a special class. Certainly I think it is very difficult to say that exempting such a wide class would not prejudice the normal exploitation of the work or otherwise be prejudicial to the author's rights.

Prof. Lahore—Yes, I agree with that. I think that the international treaties, particularly the TRIPS agreement, look at exemptions on this three-part test, special case, contrary to the normal exploitation and prejudicial to the legitimate interests of the author. These are the three ways of looking at it. I don't think a blanket exemption for small business in toto could be justified under that test.

CHAIR—Can I thank you for your submission and also for coming along this morning. We

appreciated both the submission and the discussion. If you are able to turn your mind to that other issue, we would appreciate any further advice that you can provide us in that regard. Thank you very much.

Dr Rothnie—Just as a matter of timing, is there any timing that the committee is now operating under?

CHAIR—We don't have a date by which we have to report; it is open-ended, but there are other certain practical realities facing us. We all have one or two, I think, hearings early next year and my hope is—I won't express it any more highly than that—that we will be able to report to the parliament in the first half of next year.

Dr Rothnie—Thank you.

Prof. Lahore—Can I just ask? Is the committee intending to get an opinion from the Attorney-General's Department on this issue?

CHAIR—We are endeavouring to obtain a submission from the Attorney-General's Department but it hasn't arrived yet. When it does arrive, it will be authorised for publication in the normal course and therefore be available, if you would like to peruse it.

[10.30 p.m.]

RUSSELL, Mr David Victor, General Manager, Corporate and Public Affairs, Victorian Automobile Chamber of Commerce, 7th floor, 464 St Kilda Road, Melbourne, Victoria 3004

WOOLARD, Miss Jane Louise, Research Officer, Corporate and Public Affairs, Victorian Automobile Chamber of Commerce, 7th floor, 464 St Kilda Road, Melbourne, Victoria 3004

CHAIR—I welcome Mr David Russell and Miss Jane Woolard from the Victorian Automobile Chamber of Commerce. Although the committee doesn't require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings at the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of your submission of 10 September this year. Would you care to make some opening comments?

Mr Russell—Yes, thank you, chairman. I thank you first of all for the opportunity to address the public hearing. The submission is made on behalf of our 4,000 retail motor industry small business members. Those members have, in the last two years, come to know a lot more about copyright and the broadcast of music and the requirement that has been requested of them to pay licensing fees through APRA. When our members first were delivered of requests for payment, some of them were quite incredulous. They said, 'Hang on a minute, I don't have to pay fees for listening to the radio.' In fact, some of them regard that request as akin to the sorts of scams that they occasionally also receive in the mail.

So we get a lot of contact, a lot of calls, from members saying, 'Eh, what's this?' Of course, we knew a little bit about it, but we have now come to know much more about it. I would say that we have had more than 50 per cent of our members contacted and many of them are very small businesses, one and two-man shows right across the whole of Victoria, up the bush in the remotest of places, and they weren't quite sure how to handle it. So we set about to try and help them and we've had contact with APRA. We have had discussions and negotiations with APRA—fruitful in some ways. We have also published for our members' information on this subject, which appears in the submission as attachments. That information is the sort of material that was being provided by the Attorney-General's Department and we think that the members understand the issue much better.

However, that doesn't mean that they are very happy about it. Our submission is that retail automotive businesses should not be required to pay for public performances of music and their primary purpose is to repair and sell and service motor vehicles. The fact that a radio is playing is not integral to their business. It is just something that happens like the domestic scene or situation that we all know. People play music as an accompaniment, as a companion, to the work that they are doing or to any other activity they might be doing. So I was attracted in some ways to the comments about not for profit, the fact that a motor mechanic is listening to a radio that is playing is not for his profit. The work that he is doing, repairing the car, is for his profit. The radio is just playing.

The other aspect which we are concerned about is that often the employer in his workplace is not the person who introduces the music into the workplace. Often the employee in a small business in particular will

bring the radio in, play the radio for his own reasons. The employer doesn't want to upset that and he doesn't see any reason to upset it. So the employer, in our view in those circumstances, should not be paying for something that the employee has introduced.

I won't go through the submission in its entirety but there was one other thing which we were quite taken by and that is we discovered that in the United States there was some activity at the moment under the Fairness in Musical Licensing Act 1997. This has been copied and handed up to you as an exhibit—in fact, there are two.

Miss Woolard—Yes, Senate and House of Reps—there are two bills.

Mr Russell—There are two bills in the United States parliament at the moment. What the proposal is under these bills is that:

It shall not be a copyright infringement in business to have music playing unless an admission fee is charged to see or here the transmission, or the transmission is not properly licensed.

That is attractive to us. People don't pay to go into a service station. People don't pay to go into a panel-beating shop. They go there to have their car repaired or to fill it up with petrol or whatever. We would see that going back to the not-for-profit aspect, that their attendance and the music being played is not integral to the supply of the petrol or the supply of the panel-beating service. So we would like that issue to be considered. Today—or was it yesterday, Jane—we heard of the APRA's—

Miss Woolard—APRA's new position regarding the radio broadcaster to pay instead. That is fine with us. I am not sure how radio stations would deal with that, because don't they already pay now, so then they would be paying for the actual broadcast as well as having the right to play the music? Is that how it would go?

CHAIR—The proposition is that so far as radios are concerned, there wouldn't be a licence fee collected from business, but there would be an adjustment in the licence fee payable by the radio stations. Obviously there are financial considerations as to what adjustment that would be, of which we have had some ballpark figures. That is basically the proposition.

Miss Woolard—That is certainly fine with us. I am not sure whether that would be successful though from the point of view of the radio stations.

CHAIR—Can I start with that then, because I wasn't quite sure, Mr Russell. You used the words interchangeably 'music' and 'radio' but I took the thrust of your comments to be mostly related to radio rather than music more broadly.

Mr Russell—Yes, it is we find mostly radio that our members use. Certainly there are members who would be playing music, CDs or tapes and we understand that should be separated out. It is different. They would tend to be larger businesses anyway.

Miss Woolard—New car dealerships probably mostly in the showroom, perhaps, having music playing.

CHAIR—Yes, can we take those two then, because that is the way things are progressing at the moment? In terms of the radio, the proposition then is, as we have briefly discussed, that the licence fees wouldn't be collected from business. Then there would have to be an adjustment made with the fees paid by the radio stations. We haven't yet heard from the radio stations about that, but I can imagine what their response may be. We will wait and see.

The evidence from COSBOA was that in fact would deal with about 95 per cent of the problem as perceived by business proprietors. Do you have any comment about that?

Mr Russell—Yes, I think it would deal with the vast majority of them. As to the exact percentage I couldn't say. It is generally radio that is being used and if the point of payment is to be put back to the radio station, that would be consistent with the view of our members. If you approached a small businessman who had no knowledge of the subject, and many of them approached us, he would say, 'Doesn't the radio station pay for this?' So it would be consistent with a view of small business that that is where the copyright fee should be paid.

CHAIR—I take it that if a new car dealer is playing tapes or CDs or background music in the showroom, that is for the purpose of creating the sort of ambience that they wish to create which they think will help to sell cars.

Miss Woolard—Yes, well, hopefully. They probably wouldn't see it as that but it is probably that, to have some sort of background in the showroom. I think most of those members are accepting that they pay at the moment. They probably would accept paying for it, especially if they have gone to the trouble of buying CDs or special equipment to have that stuff broadcast. But it is not their primary purpose, to play that music as such.

CHAIR—It may not be but then the question has to be asked, 'Why do you play it?'

Miss Woolard—Yes.

CHAIR—Surely the answer is, 'It creates a more soothing, or whatever it is, environment for selling cars.' Or the other question is, 'Instead of playing Vivaldi's Four Seasons, why aren't you playing Pink Floyd?' I would have thought the answer would be, 'That doesn't create the sort of impression or the sort of ambience that we want to sell cars.' Maybe it does for a particular market but generally I don't think it does for most new car buyers. In a sense, the answers indicate that it may not be the primary commercial purpose of the business but there is some commercial overtone to the use of the music.

Mr Russell—There is obviously a distinction, but where we get into more trouble is when we get into businesses where there is workshop activity. There is a dividing line. Motor car dealers have a workshop activity and they have a showroom activity. There is a dividing line between the two. Often, in fact, they are even in different places.

CHAIR—Yes.

Mr Russell—Smaller businesses repairing cars and selling petrol and accessories don't have that dividing line. You walk into the showroom, and the showroom and the workshop are almost in together. The radio that is being played perhaps in the workshop can be heard in the showroom or in the reception area, if you want to call it that. Is that a public performance? I don't think so. In fact, we had this issue discussed with APRA, and we were able to get from them this statement, from attachment 4 of our submission:

> APRA's position with regard to the licence of your members' commercial premises is that if the music is audible to the general public then a licence will need to be taken out with APRA. This includes showrooms, car displays, and public waiting areas. In a mechanical workshop where the general public are not permitted to enter, a licence from APRA is not required at this point in time as an employee is deemed to be the public under the Copyright Act 1968 for the definition of public performance. A licence should be held by the person authorising the use of the music, i.e. the employer. However, at this point in time APRA's policy is not to licence these workshops.

We thought that was a fairly good admission on their part that there is a problem with the way in which they were applying their request for licence fees to small business retail motor industry premises; and that is that the activity is such in the small business end that it is all mixed in together. The music can be heard over a distance. Where is the public performance and where is it not? If it is coming out the roller door onto the street, is it a public performance? Workshops are very noisy places. The music is loud because the performance of the activity, the work, is noisy. We had great difficulty with that.

CHAIR—This may be pie in the sky but, if possible, I think everybody would like to have a simply understood commonsensical dividing line between when a licence fee is payable and when it is not. Subject to what other evidence we hear, the best proposal, it seems to me, that has been put forward is to say if it is on the radio you are okay; you don't have to pay a licence fee. That is not necessarily conceding that it is not payable legally, but as a matter of practicality it is not payable. But once you play a tape or a CD you pay the fee. The onus is on you to show that it is not a public performance if it is in that situation. That gives choice, too. If an employer wants music, the employer has got a range of, in most places, stations and types of music to listen to. But if they want to go and play a CD, then the licence fee becomes payable.

Mr Russell—Yes, I accept that as being a commonsense approach. We would be happy with that.

Miss Woolard—About 90 per cent of our members would fall in that category of radio anyway.

Mr KELVIN THOMSON—The reason for looking at this sort of distinction, rather than the public and private distinction, is that although in some cases that is a clear thing, a workshop versus a retail outlet, on the other hand it does seem to me—and I think to other committee members—that the case for the licence fee in the more public place, the retail outlet, is greater. On the other hand these things are not entirely clear or agreed to in a variety of circumstances. For example, you could have a workplace where there are quite a lot of employees—Ford or Kodak or whatever—and if they are providing music to their employees, then APRA and those who are worried about the intellectual property and copyright issues say, 'You are using the work of that writer for the benefit of your workforce, and so on, and you ought to be paying something for that privilege'.

In a larger workplace you have got that sort of problem, and equally in some of the retail outlets. We have some small business witnesses who come before us and argue quite passionately that they are doing this for their purposes, and not for their customers, who only come in for five minutes and don't come in based on their particular musical tastes. Although it is one way of looking at it, this public-private way, it does seem to be complex, and it is far from agreed on all sides that this is the way it ought to be divided. Even APRA's letter here says it is APRA's policy not to licence these workshops, but they are not really conceding that there is no legal or even, on their view of copyright, no moral entitlement to do that.

Mr Russell—We accept that, but we think it was significant that they actually did put their policy in writing.

Mr KELVIN THOMSON—Yes, I agree. I think it is, as you were saying, a helpful sort of contribution on their part to make that distinction, so that you and your members have some understanding of it.

Mr Russell—They were only confusing the issue by continually sending letters to these small businesses who just were not accepting of them, and being further confused by the sort of language which was being used.

Miss Woolard—Yes, country members in particular, maybe a proprietor in the workshop or in the office section, may have the radio on, not for music but for information only, for news or weather reports, things like that. That is also a use for it. It is not entertainment as such.

Mr KELVIN THOMSON—This letter is of recent origin? No, it is a year ago. My question is, have you done any work in terms of publicising that to your members? Or have you seen this as being APRA's obligation to let everybody know? Or do you play a role in that too?

Miss Woolard—I think we reproduced that letter in one of our updates. We also attached in the submission something which we had got from the Attorney-General's Department. I think in a later version of that we published the whole APRA letter.

Mr Russell—That is right. We reproduced the letter, following its receipt, so that members were aware of it. That reproduction is not attached, but attachment 3 is a reproduction of our fortnightly update that was sent to all members on 1 June 1997, which is entitled 'Paying to play music', which attempted to clear up some of the questions that we were still getting at that time. That is actually an Attorney-General's Department document which we felt answered the questions. So we have made attempts to educate the members as much as we possibly can.

Miss Woolard—I think one of the terms of reference was whether the licensing agencies provide enough information to businesses. We answered no, we didn't think they did.

Mrs ELIZABETH GRACE—As a result of that letter from APRA, and that publication, have they stopped sending these letters to your members? Or are you still getting comments from members now? This took place 12 months ago.

Miss Woolard—Yes, up until about June this year applications were still coming through. Then I think once the inquiry was announced APRA stopped sending out letters.

Mr Russell—Although they would be up for renewals now, wouldn't they?

Miss Woolard—Yes, probably, from a year ago.

Mr Russell—We have probably got members now who will be receiving renewal notices. That may again raise the issue of, 'I paid this. I wasn't sure if I should, but I did. Do I have to pay it again?'

Mr TONY SMITH—Has there been much activity prior to last year in relation to APRA collections?

Mr Russell—I don't think we had very many contacts. We had an occasional one. It seemed to be intermittent. As I understand it, APRA undertook a campaign that commenced about two years ago, and that is when we became involved.

Miss Woolard—It commenced officially two years ago, but obviously it has been going a lot longer than that. I suppose once APRA stepped up their campaign, then obviously it became more in the public eye.

Mr TONY SMITH—Did you have any examples from individual members of APRA's quite aggressive marketing activity?

Mr Russell—As is shown in our submission, in the attachments, we have members who received initial notices and didn't respond. Then they get a letter saying, 'Did your application go astray?' Then later on they get a letter that says, 'Final notice'. These were quite widespread. You would have to ask APRA how they did this. As I understand it, they used a pretty big mailing list in the retail motor industry to send the initial notice out to a lot of motor vehicle repairers, service stations, panel beaters, and car yards, and then they followed them up a couple of times.

Mr TONY SMITH—Were these people, some of whom were your members, involved in very small operations?

Mr Russell—Yes. Eighty-five per cent of our members employ less than five people.

Miss Woolard—Yes, we did receive quite a few phone calls and queries as well, from that time, over the last couple of years about it. There is confusion. A lot of people are saying, 'I've just thrown it out' as though it is junk mail or whatever. So I think with the cold-canvassing of it, they were confused back then, and always had it in their minds it was a scam, or it wasn't authentic, or whatever.

Mr TONY SMITH—Were there any examples of anyone actually being taken to court over it?

Miss Woolard—Not that we know of.

Mr Russell—We are not aware of any. We have given you a copy of a final notice there that was

sent. The final notice is a little threatening, especially when the businessman—or woman, in this case—probably didn't understand what the notice was in the first place.

Mrs ELIZABETH GRACE—Just to quantify that, you said you had a lot of phone calls, and I know you probably didn't keep an exact record, but can you give us a comparison with calls you would normally get?

Miss Woolard—They were spread over a few different people. David got a few, I got a few, and even some of the divisional managers got them as well. That was concentrated, I suppose, once the first mail-out went out two years ago. It was probably in the tens, twenties, thirties. They were the people who were worried enough to ring us. So there could have been, probably, a lot of people who—

Mrs ELIZABETH GRACE—Yes. But that is a lot compared to what you would normally get for other things in your business? You would not normally get 10, 15, or 20 members ringing in on a day to talk to you about something else that has gone wrong?

Miss Woolard—Information like that probably comes from government and different sort of organisations and they would just deal with that themselves rather than ring us. So this thing they probably would never have heard of, so there probably was a bit of—

Mrs ELIZABETH GRACE—So it is unusual for you to get a series of phone calls like that?

Miss Woolard—Yes, in reaction to something like that.

Mr Russell—Yes, it is. I will give you an example which follows, I think. When a new business scam hits through the mail system, whether it be from Nigeria, or whether it be one of these advertising scams, we get 10 or 20 calls in a day. As soon as it hits, bang, they all say, 'I've got one of these. What do I do?' This is a similar situation. They perceive this to be a problem. They didn't know what to do, so they rang us up.

Mr TONY SMITH—Do you believe that it is as a result of your group's response that they backed off a little bit on this issue? Given what they said in that letter to you of 1 November it seems that they had retreated somewhat as far as mechanical workshops.

Miss Woolard—I suppose there has been a slowing down over the last 12 months. I think APRA stopped sending out straightaway. I suppose in the six months before then there were still a few inquiries, but as we educated our members more about it they probably accepted it more.

CHAIR—Can I thank you for your submission, and also for coming along and discussing it with us this morning.

Mr Russell—Thank you for the opportunity.

Miss Woolard—Thank you.

CHAIR—On resolution of Mr Thomson to accept as exhibits to the inquiry a bill for the Fairness in Musical Licensing Act of 1997, sponsored by Senator Thurman in the United States Senate, and a bill for a Fairness in Musical Licensing Act 1997, sponsored by Representative Sensenbrenner in the United States House of Representatives. There being no objections, so resolved.

[10.55 a.m.]

BOURKE, Mr Matthew James, National Private Practitioners Group Manager, Australian Physiotherapy Association, Level 3, 201 Fitzroy Street, St Kilda, Victoria 3182

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearings 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 the parliament. We are in receipt of the submission from the association of 15 September. Would you care to make some opening remarks.

Mr Bourke—I was just reading that new paper from APRA, which looks very interesting. It is very brief, but I think the key thing which the paper details is that most physiotherapists, particularly those in private practice, are certainly at the very microcosmic end of small business. I have given some details of how our members typically relate to the Corporations Law definition of small business. They are at very much the left-hand side of the continuum. Also the Physiotherapy Association's view is quite similar to those held by a number of other health professions, such as dentists and a range of others, whereby music is certainly not the primary purpose for the patient entering the practice.

It comes down to, really, an assessment of where the therapy commences, and we feel that therapy commences the moment the patient walks in the door, and that music serves a good purpose in relaxing patients prior to treatment of the musculoskeletal system. Patients often come in unaware of their condition, unaware of the treatment they are about to undergo, and the music forms a very good relaxing medium for patients in the waiting room.

CHAIR—If the music performs that purpose, which is to do with then providing physiotherapy, then isn't it difficult to argue, Mr Bourke, that it hasn't got some commercial advantage to the business?

Mr Bourke—When I say it forms part of the therapy, similar to any other part of the therapy, the professional service is the service being purchased, and I don't believe the music forms part of the professional service. But as a pre-treatment medium to relax patients I think it has value, but certainly not entertainment or commercial value.

CHAIR—On one hand, you are saying it is a professional service being provided but, on the other hand, you are talking about this professional service being provided as part of a business. From the business perspective, obviously the playing of the music has some advantages, even if it is not strictly part of the professional service that is provided.

Mr Bourke—Our research has never shown a distinction in consumer behaviour to head towards a practice which does or doesn't play music, or plays music of a particular nature. I don't think it actually impacts on consumer behaviour in choosing a service. I don't know whether it would have any increase in business or turnover or income for a business. But as part of the overall package, what I am saying is basically that it certainly isn't for entertainment value, and just forms part of that therapy. But I don't know that any commercial value could be placed upon it.

CHAIR—What is the proportion of the use of radios compared to CDs or cassettes?

Mr Bourke—Anecdotally?

CHAIR—Yes.

Mr Bourke—Anecdotally, probably something like 80 per cent, and that 20 per cent includes practices who either don't play any music at all, or play CD or recorded works. Some people have more recently been playing classical, copyright-exempt music via CD, where the artist has been dead for more than 50 years. They have been doing that just as a new way of doing things. But they generally find it an administrative burden to be changing tapes or CDs at 45-minute intervals, so the radio is more commonly used. Again anecdotally, it appears that some people transmit the music within the waiting room and treatment areas, and some people have one transmission point which, given physiotherapy practices are typically quite small, would filter through the entire practice.

CHAIR—Just dealing with the radio, you have seen the position that has been put forward by APRA that, in effect, if you are playing a radio in a business then, whilst legally it might still be the case that the fee is payable, they would accept an amendment to the Copyright Act along the Canadian lines which would, in effect, exempt small business, provided of course that the licence fee is compensated for in the amount paid by the radio broadcaster. What is the view of the association on that?

Mr Bourke—Yes, I think that would be a much more reasonable and administratively sensible arrangement to have. No doubt those costs will be passed on to the advertisers and various players who make up the radio arena. Our members typically don't advertise on mainstream radio, though, so I don't think it would impact on them. So that would be a reasonable arrangement from an APA perspective.

CHAIR—Yes. Leaving that for the moment, where tapes and CDs are played, we have tended to look at this, for the purposes of discussion, in three parts: one where it is used entirely privately, one where the music forms part of the ambience of the premises or the business—and a restaurant is an obvious example of that—and one where it is quite clearly part of the commercial activity, such as music being played for aerobics classes in a gymnasium. The question then is, where along that spectrum do you draw the line? I am interested in what you would say about that.

Mr Bourke—If that was the case, I think the members who are currently playing recorded works by CD or tape would be quite happy to change over, if the APRA proposal went through and it was amended.

CHAIR—They would change over to radio?

Mr Bourke—Yes. I think most of them have gone that way as an escape from APRA licensing requests. I didn't send it in as additionals, because it wasn't entirely relevant, but the acupuncturists have already had an exemption granted for music played as part of the treatment, and I would see physiotherapy being fairly similar. Another one was the Bed and Breakfasts Association. I don't know whether you heard of that one, but that was on the definition by way of primary purpose of entry, and given that the people were entering for the primary purpose of being accommodated, the music was deemed to be non-copyright

material, or an exemption was granted.

So on those two grounds I think we basically fit into those two situations in terms of both purpose of entry and the actual purpose. And whether a dollar value can be attached to the music, we don't feel that is the case. But I think if there was any sort of licensing requirement for recorded works, but not for radio and radio licensing, or copyright costs were going through broadcasters, then I think our members would happily do away with the CD and tape-playing and go back to the radio.

CHAIR—Or if they wanted to continue to play CDs, they would pay the fee.

Mr Bourke—Yes, that is right. It would be an option.

CHAIR—And I take it from what you are saying that if the onus was on them to prove it was other than a public performance, that that would be fair, too, given they have got a choice.

Mr Bourke—Yes. Yes, I agree. I think, just listening to the VACC representatives beforehand, our members have had fairly similar experiences with the approaches. Largely they have felt that they have been part of a consumer confusion campaign, whereby the approaches have come out and there has been a lot of non-clinical physiotherapy-speak and a lot of legal terms which they haven't understood, and the licence take-up rate has been largely an effect of that confusion, whereby they have thought that they might end up in court if they didn't obtain a licence.

We had one very active member in Healesville who went head to head with APRA and ended up with their legal services, Faulkner and Associates. There is some very interesting information in there. Faulkner and Associates in the end actually provided an exemption to this individual member. This individual member had consistent complaints and queries and problems with a lot of our other members, but being the one who took them on, and basically invested a lot of time and energy in taking them on, he was able to obtain an exemption. But it seemed to be a consistent argument all the way through. As his campaign became more aggressive, and probably more burdensome upon the staff of APRA and their legal services department, they eventually gave up on it and provided an exemption.

So that is a bit of a worry, if APRA is having one set of rules in terms of when an exemption might be provided, however only providing it in the case where someone really gives them a hard time in terms of getting there. So that exemption has already been given, and it is on the therapeutic, non-commercial basis. So that would apply to all of our members. But the APA's approaches have been knocked back on that.

CHAIR—Can we view those documents, Mr Bourke?

Mr Bourke—Yes. Would you like them now?

CHAIR—Yes, thank you. You also mentioned an exemption for the acupuncturists.

Mr Bourke—Yes. There is a copy of that, and the Bed and Breakfast Association document, in there. That is the overall package of documents which came through to me.

CHAIR—Right.

Mrs ELIZABETH GRACE—You are asking for an exemption, and in your submission you are saying that beauty therapists have already been granted an exemption too, and that the Dental Association are applying, and you see your application of music consistent with the way they apply music or background music. Why do you think that is the case then? Why have some been given exemptions, and people like yourself and the Dental Association are still fighting a battle?

Mr Bourke—I haven't done enough research on how they tackled the issue, but I think it is probably just a variation in the arguments used. I understand that the dentists initially took a pain approach as to why they should get an exemption. They were talking about the pain and the stress involved with dentistry being a good rationale to play music and that it didn't have a commercial value, it didn't have an entertainment value, but it was a good medium to relax people in an otherwise stressful environment.

Mrs ELIZABETH GRACE—I don't think anyone goes to a dentist for entertainment.

Mr Bourke—No, definitely not. There is some pain involved with physiotherapy sometimes. We haven't mentioned the pain issue because it is not inherent to physiotherapy in all cases.

Mrs ELIZABETH GRACE—It would be more an anxiety thing with physiotherapy, wouldn't it?

Mr Bourke—Yes.

Mrs ELIZABETH GRACE—And fear of the unknown.

Mr Bourke—That's right. Also, depending on the type of music, there has been sufficient research to show that doing things like biorhythm tests and everything else in response to music, there are a lot of physiological responses to music which are favourable for physiotherapy treatment. That could be a reduction in heart rate, it could be a reduction in blood pressure, it could be taking the person's mind off what is about to be performed on them, or it could just be relaxation. Given that physiotherapy involves manipulation of the musculoskeletal system, while the research is not in all cases proven or supported, I think it is quite effective in that medium. The dentists, as I say, were a little bit further down the pain and stress argument. But I don't know how the acupuncturists or the beauty therapists went about their approach in obtaining that exemption.

Mrs ELIZABETH GRACE—I can see a likeness in the reason that they used music or background music or radio, and I just find it extraordinary that some have been granted an exemption and others are still battling on, that was all.

Mr Bourke—Yes. I think their exemption may have been given earlier in the stages of the actual APRA campaign, where they sort of exaggerated their campaign two years ago. I don't know how long they have had their exemption, so they may have obtained that exemption before those businesses were identified as a likely revenue source.

Mrs ELIZABETH GRACE—Yes. Were you on the receiving end of the complaints or comments

that came in from various practitioners when this all became—

Mr Bourke—Yes.

Mrs ELIZABETH GRACE—And did you notice or become conscious of a change in the normal complaints, the normal problems, that were coming through? Was there an upsurge and was it very noticeable, and that type of thing, when they first started to receive notices?

Mr Bourke—I haven't been with the association long enough to talk on the pre-campaign figures, but certainly there seemed to be an upsurge. It hadn't really been an issue for the association before.

Mrs ELIZABETH GRACE—What were the main complaints that were coming from your practitioners?

Mr Bourke—I think the main complaints were that they felt it was a fairly pedantic campaign, they felt that it was an administrative burden, and they felt the cost was unreasonable for something for which, as I say, they didn't perceive a commercial value to them. When I say pedantic, I am talking about the analysis of the number of speakers, the size of speakers, the type of transmission, and the high level of detail in calculating the licence requirement and fee.

The other large complaint from some of the correspondents indicated that APRA representatives had greater rights of entry to the premises than the police. That is one of the things which Mark Quittner, a member, there highlights, talking about the fairly aggressive bully-type tactics. They ask you to place a sticker on your window. Because they are not allowed to enter the premises, that is basically putting your hand up as to whether you have a licence or not. I guess they were confused, and fearful of the tactics, and didn't want to roll over in response to it, but at the same time wanted to check out whether there was a real penalty involved if they didn't.

Mrs ELIZABETH GRACE—Did they perceive it as a scam, as some of the previous witnesses did?

Mr Bourke—I believe so. I don't think there is a high level of community awareness of copyright issues on the whole. I think typically the general public feel that the person is paid at the time of composition, and if a CD is produced they would be getting copyright and fees and various other types of income through that. Then for that to be paid by the purchaser and then passed on as well, in the way of an individual licence to all of the users, they saw as a bit of a double-dipping process.

CHAIR—I have a motion from Mr Smith that the documents handed to the committee today by Mr Bourke be authorised as an exhibit to the inquiry. There being no objection, so resolved.

Mr TONY SMITH—I have only just had a chance to look at it, but one of your members in particular finished up in litigation, did he, or she?

Mr Bourke—I am not aware of any litigation which actually went through past the stage of being a threat, but that could be the case.

Mr TONY SMITH—Was it just a little small business that he had?

Mr Bourke—Sorry, who are you actually referring to?

Mr TONY SMITH—Someone you were mentioning earlier.

Mr Bourke—Right. No, that person didn't end up in a litigation situation. The APRA staff appear to be trained in an administrative capacity, but that particular member was asking some fairly detailed and complex questions in relation to the structure and operations of APRA. Faulkner and Associates is effectively their legal department; they provide services only to APRA apparently. So his negotiations were basically then handled by Faulkner and Associates.

When you ask about the size of the business, he is in Healesville and he is a sole practitioner. I have given the averages in the submission in terms of the typical physiotherapy practice, which is commonly one principal, one professional staff member and one or maybe half an EFT support staff member. That particular member there is actually a sole practitioner who answers the phone, treats the patients, is the jack-of-all-trades within the practice as a sole practitioner, so certainly there was no music transmission to staff in that case either. But, yes, they are at the very small end of small business, undoubtedly.

CHAIR—Mr Bourke, can I thank you for the association's submission and also for coming and discussing it with us this morning.

Mr Bourke—Thank you.

CHAIR—We will break for five minutes.

[11.30 a.m.]

HARMER, Ms Suzanne, Legal Research Officer, Victorian Employers Chamber of Commerce and Industry, 50 Burwood Road, Hawthorn, Victoria

HEARD, Mr David Wayne, Administration Officer, Paint Specialists Association of Australasia, 10/6 Murphy Street, South Yarra, Victoria 3141

CHAIR—I welcome Ms Suzanne Harmer from the Victorian Chamber of Commerce and Industry, and Mr David Heard from the Paint Specialists Association of Australasia. Although the committee doesn't require you to give evidence under oath, I should advise you that the hearings 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 the parliament. Would you care to make some opening comments to the committee?

Ms Harmer—Yes. We actually have prepared a formal submission to the committee. You haven't got it before you at present, but that certainly will be forwarded within the next week. It is already prepared, with its appropriate attachments. What I have done for the purposes of today is, I have had a look at our formal submission, which is more lengthy, and I have extracted the gist of what we would like to convey to the committee. I would just like to indicate to you that I would like to give a very brief introduction about the basis for our input and what we are, I would like to touch on an evidentiary matter, and then I would like to specifically address the terms of reference in part 1, and not touch on part 2, which deals with the treaties and our position in a more worldwide framework. So if that is acceptable to the committee, I would like to start on that basis.

First of all, we thank the committee very much and welcome the opportunity to participate in this House of Representatives standing committee inquiry into copyright royalties for music played by small business. VECCI, as we are abbreviated, formed in 1991 as a result of the merger between the Victorian Employers Federation and the state Chamber of Commerce and Industry. We are the largest peak employer body in Victoria. We are multi-industry. We are the largest multi-industry body in Australia, and we are the largest member of the Australian Chamber of Commerce and Industry. We draw our membership from almost every sector of industry and commerce, including manufacturing, retail, tourism, leisure, hospitality, health, business services, local government, road transport and related industries, and also the trade sector.

As I have indicated, we are clearly not industry-specific, but we certainly have many industry associations as members. One of our members who has been tracking this issue quite pro-actively is the Paint Specialists Association of Australasia, and Mr David Heard has also come along and will follow me with his submission. We have just under 8,000 members in Victoria. That also includes those who subscribe for services like award information and other information that we provide. Approximately 90 per cent of our membership are small- to medium-sized enterprises, and approximately 30 per cent of our membership is in fact in the retail, hospitality and commercial services sector, which is our fastest growing sector. Eighty-two per cent of our small business membership employ less than 20 staff.

I would just like to now touch on the evidentiary matter I earlier heralded. To date, to my knowledge,

VECCI has not surveyed its membership in relation to matters concerning the subject of this inquiry. We would certainly like to do so, but it will depend on time constraints perhaps set by this committee. We are very up-front in saying to you that therefore it does not possess a store of empirical data, but certainly some of our members, as I have said, have been taking an interest in the subject matter of the inquiry and they have been very pro-active in tracking it. Therefore, much of the evidence that I will be giving I suppose will be anecdotal.

But I have to say to you that we were taken by surprise in relation to the level of interest in a recent article that we put in our Business Forum magazine advising of this inquiry. Calls were received right across our entire business spectrum, full-on, for the course of one week and thereafter. I will get Natalie to tender our Business Forum article to you. It is marked here. We have had a massive response from our membership. It is basically providing information about this inquiry. Why is this so? Well, we suspect that this is because small business is generally and traditionally reactive rather than pro-active, and they would be compelled or feel compelled to contact their peak body because they feel vulnerable legally—legally exposed—they have inadequate knowledge of the area, or they have already been burnt with a bad experience.

If I could just move to the terms of reference, just in relation to No. (1)(a), the adequacy of information from the organisations collecting royalties, there has been extensive feedback from our membership that the collecting agencies—to date, anyway—do not provide adequate information in relation to the legal basis which legitimises the collection. We have had aggrieved small businesses who have complained about intimidatory calls and correspondence. APRA seems to be a repeat player. We are aware certainly that APRA do represent small businesses—that is not lost on us, or that the complaints are about the presence of APRA representatives who have attended on their business—but they are mainly in relation to the telephone, and also correspondence.

Small businesses would appear not to know what type of creature APRA is. Many have mistaken it for a government or semi-government agency. Others have felt that they have been exposed to a try-on or a scam to extort money. This isn't surprising because the ACCC have flooded small business recently with posters, for example, urging them to beware of business scams. We would be submitting this is because APRA would appear to be diligent and forceful in pursuing their royalties. I suppose what we are saying is that small businesses have felt the pressure of APRA trying to recover fees.

We would respectively submit that not only the collecting agencies, but government, and also industry perhaps, should be more pro-active stakeholders in the information and educative process. We would also be saying that busy small business members are simply not in possession of the Copyright Act and, when they are, they don't easily understand its complexities; for example, the fact that playing a CD in a hairdresser's salon for ambience music might involve at least three kinds of creative materials protected by copyright. When that is explained to some of our small business membership, it is like somebody has pulled down the blinds. It really does need some explanation.

Just in relation to (b) of (1), whether the licences offered and the royalties sought take sufficient account of the likely audience of a small business, that is more difficult to comment on, again because of the lack of empirical data. VECCI can say that it has had little or no complaints in relation to the monetary amount claimed, but more so on the legal basis on which it is claimed, and also the collection methods. The

notion of the fact that playing music in public can only involve—how can I put it?—doing something in public life or in association with a commercial activity, is not easily understood or accepted by small business proprietors. There is still a notion that 'public' is something out there in front of everybody, for all to see, not in the confines of a clubroom, or a takeaway establishment, or while having your nails done at a beauty therapist. The proprietor and the clientele do not accept that that is public, or can be public.

Regarding the desirability of amending the law, we would submit that the Copyright Act should certainly be more user-friendly. There should be more public education programs on the different types of proprietary rights in the intellectual property area. We certainly welcome the efforts being made to simplify Australia's copyright laws. With this in mind, we would be very cautious in supporting any recommendations which sought to establish further potentially confusing qualifications or differentiations in a law that is already pretty heavy-duty to small business proprietors.

Collecting by one organisation is dealt with in (d) of the terms of reference. We would support the streamlining of administration. Again, why? Simply because it makes sense to deal with the one organisation as a one-stop shop. This cuts down time spent and the associated costs of compliance.

In relation to the present structure, we appreciate the tribunal is unable to hear general complaints in relation to copyright licensing matters. We have noted the recommendation or suggestion about the ombudsman of copyright collecting societies. That is a possible solution, we would say, but the experience of an ombudsman appears to be one of limited or emasculated powers, huge workloads, limited resources, and no real power, for example, in relation to effective dispute resolution. So that is what we would say about that.

Paragraph (f), and particularly part (ii) of (f), is probably an area that the collecting organisations are more qualified to comment on than VECCI. Obviously we would be saying that the Internet opens all sorts of variables for the playing of music in public, and we have been very aware, as a peak body, of the impact of the Internet just in relation to privacy laws. Obviously it is envisaged that the collecting agencies will be increasingly challenged in relation to developing effective collecting methods, particularly given the advent of global transactions and services in the field of electronic commerce. The area is very clearly continuing to evolve at a fast rate, and VECCI will be continuing to track the technological developments in this area.

I certainly don't want to take the committee's time. We have extracted the essence from our submission to be tendered. I am happy to take any questions or queries. I am aware of APRA's latest submission. Perhaps we can say that if indeed it is proposed that APRA collect, to their benefit also, from broadcasters in relation to music played on the radio, that is something that we wouldn't have a problem with. The submission appears to be silent on what would happen in relation to the playing of CDs, for example.

I take it that APRA would still have to collect that from small business. So there is just a query whether the problem ultimately will be satisfactorily resolved. They are still going to have to go to small business in other areas of copyright law, although we take on board and agree that it seems sensible that royalties are collected from broadcasters. That would suit business, and it would suit APRA, but I am not really sure whether it has been taken far enough.

There still is the question of, as I have said, CDs. They are still going to have to go after small business if indeed small businesses are playing CDs in their retail outlets, for example. I would probably like a little bit of time to consider this further.

CHAIR—Mr Heard, did you want to make some comments?

Mr Heard—Yes, thank you. I am familiar with the terms of reference of the inquiry, but I would just like to make a brief statement on one particular aspect on behalf of the PSAA, the Paint Specialists Association. I have copies of miscellaneous correspondence here which I would like to submit, and I will refer to it during my statement. They are all numbered.

The Paint Specialists Association of Australasia, known as the PSAA, is a nonprofit retail industry body that represents independent retail paint shop specialists around Australia. The board of the PSAA comprises honorary representatives from all the major paint retail buying groups. The PSAA has been a member of the Victorian Employers Chamber of Commerce and Industry, VECCI, for approximately two years. Whilst seeking resolution on a number of issues which will be addressed during this inquiry, our representation here today is to primarily express objections to what the PSAA considers to be surreptitious and intimidating tactics employed by one particular collection agency, namely the Australasian Performing Rights Association Ltd, APRA, in its attempts to collect licensing fees from our members.

The majority of our members have been associated with the retail industry for many years, oblivious to any requirements regarding licences for playing music in their shops. The modus operandi of APRA during this campaign invariably constituted a single phone call asking one question, which was generally along the lines of, 'Do you have the radio playing during business hours?' If the reply was in the affirmative the next contact our members had was a letter claiming it had come to APRA's attention that music was used at their place of business and that a licence was probably required. Submission No. 1 is an example of that letter.

Most of our members who were approached believed that the initial contact was nothing more than an innocent telephone survey. One glaring deficiency by APRA was its failure to identify itself as an independent nonprofit organisation. Without exception, members of the PSAA contacted by APRA saw the entire exercise as either a contrived money-grabbing operation by a government authority none of them had ever heard of, or some type of hoax. The confusion and bewilderment caused by the initial request for a licensing fee soon compounded to distress when they were threatened with legal action. The second letter I have submitted is an example.

The lack of information provided with APRA's initial contact was only exceeded by the reluctance of its management to respond to both telephone and written requests by the PSAA to clarify fundamental questions. Several attempts to speak with a director of the association were fruitless. On 20 May 1997 the chairman of the PSAA, Mr Lance Futcher, wrote directly to Mr Arthur Cooper, Director of General Performance Licensing of APRA, and signatory of all correspondence, requesting clarification of a number of questions. A copy of that letter has been submitted. No reply was forthcoming. If nothing else, we believe the campaign conducted by APRA has been an appalling public relations exercise which has only served to alienate and anger small business. If I was a member of APRA I would be extremely disturbed by the inappropriate behaviour of an association supposedly representing my best interests.

Finally, the PSAA considers that providing live radio and television broadcasting to staff and customers is a right and not a privilege, and that in an existing public broadcast royalties have already been paid. Because shop proprietors stand to gain no commercial benefit from engaging the radio or television during the day, the PSAA does not consider a levy on the end user appropriate. Thank you very much.

CHAIR—Thank you, Mr Heard. You made reference, Ms Harmer, to the subsequent position which APRA has put, and I wanted to explore that in relation to, first, radio broadcasts, and then separately tapes and CDs. The proposition which has been put before the committee, in summary, is that licence fees not be collected for the playing of radios in businesses, and that the Copyright Act be amended to reflect the Canadian Copyright Act, which is along those lines, subject to the qualification that the licence fees payable by the radio stations would be adjusted so that the owners of the copyright aren't out of pocket as a consequence of the loss of fees otherwise payable by businesses.

I think it is fair to say the evidence we have heard since then from those representing business organisations has been favourable to that proposition. Mr Bastian from COSBOA said, if my memory is correct, that that would solve about 95 per cent of the problem, and was favourable to that proposition as well. Would you like to comment on that?

Ms Harmer—Sorry, Mr Chairman, I thought I had already when I commented earlier. In short, our submission was that we are also favourable. We say that it takes a cost away from business, the worry about the cost of compliance. It has to be picked up, or it is proposed that it be picked up, by the broadcasters, and the broadcasters might have something to say about that. No doubt it would suit APRA, because APRA only really has to deal with the broadcasters in relation to that. So, yes, it seems sensible commercially.

CHAIR—Just on the same point, Mr Heard, in paint shops where music is played, what proportion of it is played from the radio as distinct from CDs or tapes?

Mr Heard—The vast majority would be a radio broadcast, probably 95 per cent or more.

Ms Harmer—We would also say the same, Mr Chairman: in the main, radio, but there are some specialist shops, particularly in some retail businesses or some service businesses, that employ CDs. It might be for ambience music, relaxation music or something similar.

CHAIR—Can we come to the CDs and tapes now. For the purposes of discussion, we have employed a three-part categorisation. It is not necessarily fixed; it is just helpful in terms of trying to tease out the issues. That categorisation has been to regard some circumstances in which music is played as being entirely private. An example of that might be a food preparation room at the back of a cafe, which is not open to the cafe, where an employee is playing tapes on a tape player. It is generally not overheard by people outside that area.

The second category is where music forms part of the ambience of the business. A classic example of that, I suppose, is a restaurant playing music in the background. There are other examples. We had the physiotherapists here, and their rooms seem to me to be, even on what Mr Bourke was saying, forming some ambience. The third category is where it could be argued that the music is much more integral to the

commercial activity of the premises. An example being put forward about that is a gymnasium where music is commonly played as part of aerobics classes. As I said, they are not fixed categories but they give us some idea of some way in which to try and address the issue.

Ms Harmer—I might just add there, we have had feedback from a member who runs a golf club. The golf club has the television going and also some CD music whilst members are in clubrooms or on the premises, waiting to tee off. So there is also that example as well.

CHAIR—If we use that categorisation for the purpose of discussion, the question then is where do you draw the line? That is, where is it that copyright shouldn't become applicable because it is purely private, versus when legally copyright is applicable and therefore a licence fee and a royalty become payable? I am interested in where along that spectrum you would draw the line, recalling that we are just talking about CDs and tapes. We have excluded radio broadcasts from this entirely.

Ms Harmer—The categorisation and the differentiation is interesting. We understand the rationale as to why that is being mooted. It would be our submission that it is perhaps not going to be as easy as that. Indeed, if that sort of qualification ends up in the act it could well be a lawyers' field day. Take your first example. Preparing food out in the back room of a premises is hardly doing something perhaps in one's public life, but query whether that person as an employee is still engaged in a commercial activity, in terms of preparing the food or the product, or whatever. That is still part of the commercial enterprise that is going on in those premises.

The other two examples given concern me less. It is just how it is going to be argued, how it is going to be framed, the smart points that could be taken with it. It worries us, particularly if the whole act is undergoing a simplification review. It has got to be user-friendly. It is always hard to make legislation simple and understood in black and white terms. We know that it is always subject to interpretation. Once these qualifications creep in, with the best of intentions, and with a view to making circumstances clearer, they can often cloud and make the issue really complex.

As I said, with regard to the first example alone, having been at the bar for seven years, that is the first one I would latch onto and I would have a really good look at that. Then I would have a look at the others. The legislation would be tested and those sort of loopholes would be looked at, I would suspect.

CHAIR—It may be that the response is not legislative though, Ms Harmer.

Ms Harmer—Indeed.

CHAIR—Maybe the law can be allowed to stand as it is, which basically says if it is a public performance then copyright is applicable. But there is a guidance, if you like, provided by the committee in the parliament which has an educative effect, rather than a legislative effect, to say, 'In these circumstances we would regard such use of CDs or music as being private,' more or less saying to everybody involved, whether they are business operators or APRA or the PPCA, 'This ought to be a commonsense approach which guides you in the future. If you want to go down the road of fighting each other in court, you can, but this is our suggestion of what a commonsense approach would be.'

Ms Harmer—That sounds great. The extent to which it is workable would have to be tested. I am taking it that perhaps it could be an intellectual property industry code of conduct perhaps, or something like that, which is not mandatory but would act as a guideline.

CHAIR—I suppose what I am saying is, if the onus then fell on the business operator, first of all, if the provisions about taking the radio broadcasts out of the arena is accepted, then there is a choice for business. The choice is, you can play a radio and you don't have to pay a licence fee, but if you want to play a CD then copyright does become applicable, and you ought to have a licence, unless you can show that there is some good reason why you shouldn't.

I think what would flow from that is that the onus is on you to show that you aren't using it in a public performance. I am wondering whether that is the sort of compromise, if you would like to call it that, that could be workable. So the question for VECCI is, is that approach something that VECCI would go along with? Could you say to your members, 'This has been a reasonable outcome. If you play the radio you're no longer going to be hassled about paying a licence fee, but if you've got a CD playing on your premises the probability is it's being used for ambience or being used for some commercial purpose, unless you can show otherwise, and you ought to pay your licence fee'?

I am not trying to be strictly legalistic about this, I am simply trying to find a solution where we don't have all this angst which has obviously been in existence, just from the correspondence Mr Heard has passed up, over the last couple of years. And then everybody involved can get on with their lives and get on with making money in the way they want to, whether they are songwriters or record producers or beauticians or hairdressers or whoever.

Ms Harmer—That sounds sensible. Of course it does. It is just, how workable is it going to be? If the legislation is going to remain as is, you will always get some who want to test it. It is going to be ultimately a matter for a court to test, and I am just wondering how that is going to accommodate anything else the parliament might want to do with it in terms of education and information, and what the known practice is. It may well be that a court may throw that out because the legislation is going to be unchanged. Possibly the only way around it would be an understood industry code of conduct, and small business will also have to have a knowledge of what the possible exceptions might be, so that they can show 'otherwise'.

CHAIR—Yes. I understand what you are saying. There needs to be an education campaign or information campaign as well as anything else.

Ms Harmer—Yes. And of course industry codes of conduct are often something the courts take judicial recognition of. They may not be underpinned by anything in this case, but they might take judicial recognition of that in terms of what the practice is in relation to playing CD music in a commercial enterprise. But if small business wants to seek an exemption that may be there for them to seek, they have also got to know what that is. Are those exemptions possibly listed in the legislation anywhere, or is it in APRA's discretion? There would have to be information and education about that. Otherwise, we would anticipate that there will be small businesses who will want to take the point. APRA are very diligent in relation to the collection of their royalties, and it will be tested sooner or later. So I think it has got to be made clear all round, really.

Mr TONY SMITH—I just wanted to get the background to some of this paperwork regarding, first of all, Bridgement and Smith. Are they a firm of solicitors?

Mr Heard—Yes, that is a good question. They are, yes.

Mr TONY SMITH—I think they are, yes.

Mr Heard—I haven't spoken to them, but I was most concerned when I first saw that, that there was only a postal box address and no street address. So that is why I actually traced them through the telephone directory. I haven't spoken to them, though. But they are, I believe, a firm of solicitors.

Mr TONY SMITH—In relation to that document, the bottom of it has a reference which is APRA 046746. We have been told in previous inquiries that that is an extant licence, and this is just a renewal. Are you able to comment on that in relation to that particular member?

Mr Heard—No, I am sorry, I cannot confirm that. This particular member, to my understanding, has never had a licence previously. Now, again, if that reference is to a previous licence or an existing licence—that could be the case, but it certainly would be a long time past.

Mr TONY SMITH—Would you be able to find that out?

Mr Heard—Yes, certainly.

Mr TONY SMITH—I would be very interested, because the date here—being 17 October, last month—is disturbing, because of some of the evidence we have heard from APRA, and the fact—I believed—that this sort of activity was in recess while we were having our inquiry. I would just be very interested to hear the background to that particular matter, if you could obtain that.

Mr Heard—Yes.

Mr TONY SMITH—Just in relation to the letter, I think that this is the one to Mr Futcher. As far as you understand, is it the case that people have been ringing up, not clearly identifying themselves as representing APRA, and interrogating small business owners about what sort of operation they have? Because in effect—and you might tell your members this—they are, by answering, providing evidence which may be used against them later on. It might be the only evidence that is provided, because these may be just speculative inquiries, you see. In fact, we have heard that speculative inquiries have been made in the past. Are you able to comment on that at all, the background to this? Because I was quite disturbed by that letter, and the tone of it, in particular.

Mr Heard—You are not alone there. My understanding is that in this particular instance—and I have done just a broad cross-section survey of members across Australia—Chenoeh Miller never identified him or herself. He or she certainly didn't speak to Mr Futcher. If he or she spoke to anyone, it would have been another staff member. Now, a name like that is fairly identifiable, and it is not one that Mr Futcher or any of

his staff recalled. As I understand it, the situation was that the phone call was made and, a I have mentioned in my statement, the question was along the lines of, 'Do you play the radio during business hours?' 'Yes.' The next thing you know is that letter turned up in the mail. Certainly the reference in the letter that 'Ms or Mr Miller conducted a conversation with you or a member of your staff,' and that is not true. The conversation was maybe one sentence. It was certainly not an in-depth interview or any specific questions other than that one asked.

Mr TONY SMITH—Do you know how close it is to the letter that the alleged conversation took place?

Mr Heard—No, I can't answer that, I am sorry.

Mr TONY SMITH—Just in relation to the general comments about the problem that particularly arises in relation to radio and so forth, leaving aside the position that APRA has put up on that—because I see one side of that coin is that APRA is going to do far better with their position paper than they are doing currently in the current attempts to raise money this way—do you see an approach as being that the onus of proof should be on APRA to show that the playing of radio or television has an integral connection to the operation of the business, going beyond the mere enjoyment of the staff and, for example, the owner of the business? In other words, APRA has to show that it goes beyond merely the private benefit of the owner of the business before it can levy the fee, and that would be a pretty high hurdle, I would think. But could you comment on that?

Ms Harmer—Yes, it might be a high hurdle but, arguably, if they want the royalties, perhaps it is one they may have to climb. Business might equally have to be creative in indicating why they should have an exemption. I think from what the chairman was saying, it might seem that there might be an emphasis put back on business. Obviously, business would really like to know where it stands, and would like to know the basis on which the royalties are payable and, as I said before, the exceptions. I think the onus of proof is going to be very vexing, and I think certainly APRA will say—and again, it is not lost on us that they do represent small businesses—that the hurdle is probably too high for them to climb, and to police.

Mr TONY SMITH—Which would then distract them away from what many witnesses have said to us is, and what appears here to be, quite obvious pettifogging behaviour.

Ms Harmer—Just in relation to that, I have had members say the same to me when they have phoned or come in. When Mr Heard indicated in a conversation to me that he also had that sort of thing, we had a look at it. I just might say that sometimes some of our members have not been sure whether they have been receiving correspondence from barristers and solicitors, who usually identify themselves as such, or from a mercantile agency, or from a subsidiary of the firm which is their mercantile arm. There has been a lot of confusion as to who is collecting. Some of them have just received an invoice out of the blue after having a conversation with somebody from APRA on the phone. Some of them have paid it because they think or perceive that APRA is semi-government anyway.

Mr TONY SMITH—Yes.

Ms Harmer—But going back to the hurdle APRA might have to climb, if they want the royalties paid to them, given the interests they represent, then they might have to make out a case for it. There are also arguments that it should not be business that has to bear the onus. As I said, it is very vexing. It is going to have to be worked out, because we cannot totally can APRA. We understand that they represent many small businesses involved in creative works, activities, et cetera, that should have their proprietary rights protected.

Mr TONY SMITH—The reality is, of course, though, that APRA collects, I think something like 66 per cent of royalties for overseas interests, which also puts a very different complexion on everything.

Ms Harmer—Yes, it does. I think this is something that has also caused the demarcation between APRA and the small business sector. It is perceived, once you get to know what sort of creature it is, as being something of a multinational that still insists, and is very diligent about it, collecting the $37.50 or whatever it is, forcefully from small businesses. Again, I would agree with the comments that have been made about perhaps a public relations image here also.

CHAIR—Just on the question of the Copyright Tribunal, do you have any views about whether the tribunal should have jurisdiction to hear individual complaints brought by an individual rather than by a group? You made some comments about the suggestion for an ombudsman, and you were dubious about that approach.

Ms Harmer—Yes.

CHAIR—Do you have any views about any alternate dispute resolution mechanism?

Ms Harmer—I think this is a difficult one. Yes, we did make a comment about the ombudsman. We think they are fair comments about that office generally. It just seems to VECCI that the role of the tribunal as it is presently constituted, and its constitution, really give it very limited jurisdiction anyway, and jurisdiction that does not permit it to address other areas of grievance in that whole area. So they really have a very limited function and jurisdiction. It may be better to expand their jurisdiction and set them up as a specialist tribunal with expertise, and perhaps give them powers of conciliation or mediation to get the parties together, and perhaps even foster their own dispute resolution mechanisms so people don't have to go off and litigate in another tribunal where it is going to cost them for filing fees and solicitors and what have you. It just seemed to us that the whole raison d'etre of this Copyright Tribunal is very limited.

CHAIR—Have you seen the proposals put forward by the ACCC for dispute resolution?

Ms Harmer—Under the new deal, fair deal, fair trading regime?

CHAIR—No, this is specifically in relation to APRA and licence fees?

Ms Harmer—No, I haven't. I have to say I haven't sighted them as yet.

CHAIR—As VECCI haven't made their formal submission yet, there may be some things that arise out of what we have discussed this morning that you may wish to consider as part of the submission. If we

provide you with a copy of the suggestions made in relation to dispute resolution by the ACCC, if you would care to comment on that in the submission, that might be useful to us as well.

Ms Harmer—Yes. Alternative dispute resolution, I have to say to you, is a subject dear to VECCI's heart. It keeps the lawyers out of everything, and makes matters more amenable to settlement and resolution. So I would be very interested to have a look at them. Is this in the round table conference situation between the government and the ACCC?

CHAIR—No.

Ms Harmer—It is something separate again?

CHAIR—This was specifically proposals put forward by the ACCC—to APRA, wasn't it? We will provide you with the details, anyway.

Ms Harmer—Sure. So it specifically was to APRA?

CHAIR—Yes. I think APRA have made some suggestions which are slightly different, and we will try and provide that as well from the evidence, but we would be interested in the response of VECCI to those various proposals for an alternative dispute resolution system.

Ms Harmer—We would be happy to respond. I have to say honestly this particular issue has received more member response than some of the issues that were also very prevalent in relation to the fair trading report such as retail tenancies, franchising, and that sort of thing. There are a lot of members and we had a lot of member input and feedback over that, but this particular issue really touches the heart of the small business community. Many of our membership, those that haven't had an experience already, think that they are exposed. They feel vulnerable, as I said earlier, because they don't feel they really know enough about it. It is a brave new world for them—the whole intellectual property rights area. So increasingly it is something they want to know about, and we have indicated that we will continue to use our industry magazine, which goes out to our 8,000 members, as an educative thing.

CHAIR—Thank you. We look forward to the formal submission.

Ms Harmer—It looks like the submission might be a little bit lengthier but it certainly will have attachments to it. Thank you.

CHAIR—Can I thank you both for coming along this morning and discussing the matters with us.

Ms Harmer—Thank you for the opportunity to present before the committee.

CHAIR—There is a motion from Mrs Grace that the documents tendered by Mr Heard be accepted as exhibits to the inquiry. There being no objection, it is so resolved. There is also a motion that the article on the copyright inquiry in the 10 October edition of Business Forum be accepted as an exhibit to the inquiry. There being no objection, that is so resolved.

[12.23 p.m.]

KENNEDY, Mrs Elizabeth Jane, Corporate Solicitor, Australian Medical Association (Victorian Branch) Ltd, 293 Royal Parade, Parkville, Victoria, 3052

CHAIR—I welcome Mrs Elizabeth Kennedy from the Australian Medical Association. Although the committee doesn't require you to give evidence under oath, I should advise you that the hearings 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 the parliament. We are in receipt of the submission from the AMA (Victorian Branch) of 10 September this year. Would you care to make some opening comments?

Mrs Kennedy—I am rather pressed for time, sir, and I realise that you would like also to break for lunch, so I would like to simply reiterate the written submission. But I would like to briefly touch on two issues, having had the benefit of hearing the last submission and dialogue between the committee. I would like to emphasise that it seems to me that the issue is the definition of what a public performance is, and that really, in my submission, would require legislative amendment. As I understand it, there is no definition contained in the Copyright Act, and it has been the subject of judicial interpretation giving rise to the belief that music played in a back room of a sandwich shop for the listening pleasure of an employee would constitute a public performance. That is my understanding of how the law stands.

I do not see how guidelines emanating from this committee could be in any way binding, given the precedents that have been set in the formal legal arena. Obviously, if things go to a dispute resolution process that may not be binding, in that the laws of evidence and precedent and so forth would not be considered. That is the problem, and that seems to me to be the stumbling block and the issue to be addressed. In other words, the playing of music in a doctor's surgery or a waiting room or in the administration area where no patient ever wanders is, as I understand it, at risk of being held to be a public performance. That is the issue with which I would like to not only take issue, but I do say, as a lawyer, my understanding is that doctor is at risk of being held liable for breach of copyright if he allows his staff to have the radio on in the office area.

CHAIR—Can I say I beg to differ with your interpretation. I am not sure that the playing of the music in the background in the sandwich shop is a public performance. What it seems to me the cases have said, if you take the Commonwealth Bank case where music was played as part of a staff training seminar, is that that constituted a public performance, or in the English case where music was piped through a factory for employees, that was held to be a public performance. I think on those decisions, on that precedent, then playing music in the waiting room would constitute a public performance.

Mrs Kennedy—That is correct, yes. I agree the grey area is where the doctor allows his own staff to bring their own radios to work, which is a common occurrence. APRA would have it that that constitutes a public performance too. That is certainly the emphasis that their literature has made.

CHAIR—I am not sure whether you were here, but APRA's position has been clarified, if I can put it that way, during the course of the inquiry. They are now positing this suggestion: that we, in effect, adopt the

provisions of the Canadian Copyright Act, which would mean that the playing of a radio—and I will have to clarify this but I think it also would involve television—in a business would no longer be subject to copyright, and would no longer be subject therefore to licence fees and royalties. If a business, which one can take for this purpose to include a medical practice, played a CD or a tape, then that would still be subject to the copyright laws as they stand at the present time. The question is, what would be the response of the AMA to that proposition?

Mrs Kennedy—I certainly think that would go a long way to alleviating our members' concerns, because by far, it seems to me from my perception—and I must admit to not having any objective evidence of this—the perception is that most doctors seem to play the radio or the television in their practices. I think it would be fair enough that if they chose to play cassettes or CDs they would see themselves as being the subject of a licence fee. So that would certainly go a long way, I believe, to alleviating most of the concerns of our members. I might add that television does appear to get a run in some doctors' waiting rooms; either educational or medical-type videos are played or in fact it is on for the relief of boredom in the waiting room area.

CHAIR—The video would probably fall into the same category as the CD.

Mrs Kennedy—That is right.

CHAIR—If they are playing Days of Our Lives, that is one thing, but if they are playing, what is it, the health television network—

Mrs Kennedy—Yes, I believe that is actually already covered.

CHAIR—Yes.

Mrs Kennedy—I don't believe that doctors are getting videos and not paying a royalty in respect of that material.

CHAIR—Yes. Sorry, I interrupted you. Did you have something more you want to put to us?

Mrs Kennedy—No, I think that is the main emphasis. I suppose it goes without saying that I would ask you to accept that doctors do carry on a small business. The AMA Victoria has approximately 7,000 out of a possible 10,000 practising doctors in this state as members. Of those 7,000, two-thirds are not employed in our hospitals and therefore I would say whether or not they carry on business in a group practice or as sole traders, they are, on anyone's definition—unless they are a Geoffrey Edelston—carrying on a small business. So we would say that doctors working in hospital get to listen to the music. Hospitals are exempt under the Copyright Act because they provide rest and sleeping for patients, and it just a curious anachronism that their colleagues out in private practice are subject to a licence fee for the same activity.

I would reiterate many of the comments that were made by the previous legal counsel regarding the kinds of reactions she has experienced from her members. In other words, the members have been irate, and thought that APRA was at first not a bona fide organisation. My job has been to correct that

misapprehension, and to state what I believe to be the legal position—as I say, an educative role—but at the same time I think that the AMA owes it to its members to come before you today and ask for there to be either an exemption or a change to the law.

CHAIR—Can I thank you both for the submission and for coming along today.

Mrs Kennedy—Thank you very much.

Luncheon adjournment

[1.40 p.m.]

SHAFIR, Mr Nathan, Director, Peninsula Sports and Leisure, 14 Klauer Street, Seaford, Victoria 3198

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearings 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. Mr Shafir, we are in receipt of your submission of 11 September of this year. Would you care to make some opening remarks?

Mr Shafir—Yes. I also forwarded quite a lot of additional information by fax and express post a few days ago. I assume that has been distributed to the members of the committee. It is dated 10 November.

CHAIR—Yes, we have that.

Mr Shafir—The second one is a follow-up to the first one. I have been in the fitness industry for over six years and am actively involved in state and federal bodies as well as being in regular contact with the leading international centre operators association called IHRSA, which is based in Boston. I am one of a few fitness centre operators who has seen fit to challenge the music fee royalty companies when they sought to increase their fees by up to 600 per cent in some cases.

I was involved in the APRA case about two years ago in the Copyright Tribunal and I am currently involved in a board of review with the PPCA. This board of review will deliberate shortly in what is a test case, I believe, for many other centre operators who, like myself, are aggrieved at the high cost of music, which is a significant cost, and are also aggrieved at the heavy-handed uncompromising stance, initially by APRA and now by PPCA.

The fitness industry is truly small business; many small operators fighting for market share. In classic economics, perfect competition. Many operators lack the time or knowledge to challenge these fees. Some operators, such as myself, must do the bidding for them. It is my belief, as stated in my two submissions to this committee, that the fees paid for the music copyrights as claimed by APRA and PPCA separately are too high and are not based on a satisfactory evaluation of the role of music, if any, in our businesses.

Whilst we appreciated the ability to talk with APRA at the time, PPCA were not willing and are still not willing to talk to industry representatives such as myself. I ask the committee to consider our industry sector and to bear in mind that we are not a strongly organised industry with good representation such as I observed this morning when VACC were presenting to this committee.

Our limited organisational structure and the fact that there may not have been many objections to either APRA or PPCA, or submissions to this committee, should not be taken to imply acceptance of the music fee structures. The fitness industry feels that the music fees, the approach taken by the collection companies, the higher rate than other international situations, and their lack of justification for the fees when arbitrarily imposed, shows the music fee companies to be insensitive to the fitness industry and should be, in my opinion, requested to review downwards the rates charged after full and representative fitness industry

discussion.

CHAIR—Can I just clarify a couple of things in your submission, Mr Shafir.

Mr Shafir—The first or second?

CHAIR—The first one. You note that there is a board of review hearing with PPCA, which is expected to be completed by November. What is the status of that?

Mr Shafir—It hasn't yet been completed. We have both had our chance to reply twice and I understand that one of the board members may be away for a week and that the board will probably reconvene in about a week's time. Just in the last letter that came from the chief of this board of review there was an indication that had not come up before that he might push the two parties together to nut it out anyway, rather than the board finally deliberate.

CHAIR—The second question I had was: you say on page 2 of your submission in the second paragraph under 'Report by Nathan Shafir':

I am writing to the inquiry as I believe both APRA and PPCA have calculated music fees with respect to the fitness industry without due consideration for the role of music, if any, in exercise classes.

Then on the next page you set out some definitions of various classes: fitness classes, health classes, aerobic classes, et cetera. Then on page 4, about halfway down under point 1, you say:

I believe that (1) music is not central to exercise classes.

When you use the word 'exercise' there, what do you mean? Do you mean all of those things on the previous page: fitness, health, aerobic circuit, aerobics, circuit?

Mr Shafir—Yes, they could all be classed as exercise classes.

CHAIR—So is it your contention, Mr Shafir, that the music is only sort of ancillary to the exercise classes and therefore any consideration of it from a copyright point of view should be discounted?

Mr Shafir—People come to the classes not for the music. The music companies might contend that they come for the music and that it is a public performance, or whatever. People come to the exercise classes for exercise. You go to a concert to listen to music. You go to the picture theatre to watch a movie. You don't exercise at a picture theatre.

CHAIR—How many aerobics classes don't have music?

Mr Shafir—Not many. I would say that nearly every aerobics class has music, yes.

CHAIR—So doesn't that make the music integral to what is being provided to the client or customer?

Mr Shafir—Not really, because aerobics is just an evolution of exercise classes. School exercise classes in school playgrounds or those sort of things, or in gyms at school don't necessarily have any music at all. A lot of other forms of exercise still don't have music, but I suppose formal aerobic—

CHAIR—But they don't have to pay a copyright then.

Mr Shafir—No, they don't. No, of course not. The question to me is the role of music, if any, and where it is ranked, and the argument has been as to the fact that music is not the pre-eminent issue for attending a class, as is certainly claimed by PPCA.

CHAIR—Can I just understand your position, though. Are you saying that copyright licence fees should not be paid at all in relation to the fitness industry activities?

Mr Shafir—No, I haven't argued for that. I have argued that the fees are too high and they are not representative of the value.

CHAIR—I am just seeking to clarify it on the basis of what you were saying. So for the purpose of discussion, we're not at odds about whether copyright is claimable.

Mr Shafir—No, I am not starting at zero.

CHAIR—Your complaint is about the quantum and the way in which it is calculated?

Mr Shafir—Yes.

CHAIR—Right, I will come to that then. Just before I do, I take it that most of the music played in fitness centres would be recorded music of one form or another through tapes or CDs or the like.

Mr Shafir—Yes.

CHAIR—There would be very little music by way of radio.

Mr Shafir—Radio is not an issue, no.

CHAIR—Not an issue.

Mr Shafir—Obviously some centres have radios on in their kiosks and things, and they may have them on in the gym from time to time, but that is not really the bone of contention. That is not the issue.

CHAIR—We are dealing with basically recorded music in one form or another?

Mr Shafir—Yes.

CHAIR—In terms of the mechanism by which the fees are calculated, you complain that there is little

or no consultation and that the price increases over a period of years have been exorbitant, if I could summarise your submission in those words. Precisely what is the problem, as you see it?

Mr Shafir—The music industry unilaterally went out and increased fees, and I am more familiar with the current PPCA case. In the case of PPCA—and I have said it clearly in my document—without consultation, without negotiation, without research, they effectively backdated a fee increase to the beginning of the year that was in question. I am of the opinion that they did absolutely zero research. In the sense that a board of review is not a court, they don't have to provide documents but they have been unable to provide any reason. Sending out a stereotype letter to people saying, 'We've increased your fees effective from 1 December last year,' is not what I call negotiation but it seems to be what they call negotiation.

They have shown total insensitivity to our issue. I don't wish to compare collection agencies and I understand that if you take it in the literal sense of the word—I believe, and I have said in my document, that there was a case here of just piggybacking, copying another fee and saying, 'If it's good enough for them it's good enough for us'. That is not to mean, by the way, that I ever agreed with the fee set by the Copyright Tribunal with respect to APRA. I felt that that was too high. I still believe it is too high but a tribunal is a tribunal. You abide by the umpire's decision. I am not in the business of disputing an umpire's decision, but it doesn't mean I have a different view. I still believe that even the APRA rate is far too high.

CHAIR—So what do you say should happen?

Mr Shafir—Ideally the first thing we should have is one fee payable and let the collection companies fight for it amongst themselves. We also should be told where the money is going. I have serious doubts about this whole operation because we use, as in the latest document, virtually only US music. The fitness industry seems to play music that is predominantly sourced from the United States. PPCA still have not even been able to answer whether they actually collect on behalf of overseas people and remit on behalf of them.

I can only take these companies at their word. I am not calling them dishonest in any way but I would like, in our case, the fitness industry to have a chance to have somebody totally independent—it could be a chartered accountant or somebody—review their documents to see that at least, if we are having to pay royalty fees, the money is being remitted to the people in question, and as to what is being retained for costs. I don't know what fair costs are. Once again, I am not disputing that. In PPCA's case they haven't told us what is happening with the money.

I undertook international comparisons and found that we were paying more and I don't believe that we need to pay more. We don't have to lead the world in everything. I also believe that in the case of the fitness industry, a lot of this could have been resolved with prior consultation and the majority of industry participants would have actually just accepted everything.

CHAIR—You say that an ombudsman might be a viable alternative and you have some doubts about the Copyright Tribunal. Should the tribunal have a wider jurisdiction to look at individual circumstances more?

Mr Shafir—I think so. I felt one of the things with the tribunal was that as an industry player, just a

person who owns a centre who happens to be involved in the industry, I found that the cost of even preparing to go towards a tribunal was nearly sufficient to make me not even attempt to go there. We are not lawyers; we are business people. Some gym owners happen to be lawyers but that is not me. That is not to say they can't help us, but the cost of going to a tribunal is sufficiently prohibitive to justify about discourage most small businesses from even attempting it.

So the procedure as laid down, whilst it might be a good procedure, is in reality a procedure that can't be used by the majority of people because it just becomes too awkward. That is why an ombudsman, which may be more of a complaints system, might be cheaper. It may be less effective, I don't know, but a different method of doing it.

CHAIR—Just so I am clear, I understand what you are proposing is that there are two levels at which you would want some independent assessment; firstly, at the level of establishing fees in the first place and, secondly, at the level of whether they are applicable in a particular instance or not.

Mr Shafir—Establishing fees?

CHAIR—Establishing the fee in the first place.

Mr Shafir—In what way does that differ from applicability?

CHAIR—You were saying they were too high over all; that the tariff is too high.

Mr Shafir—I would regard that as part of establishing, but I take your point.

CHAIR—But then there is a second level, is there not, of whether or not an established fee, once agreed upon, is applicable in a particular business?

Mr Shafir—Or whether we should be exempt.

CHAIR—Whether you should be exempt or, to take your example without necessarily agreeing with it, whether in some activities the playing of music is not integral to the performance.

Mr Shafir—That is a definitional matter, whether one type of activity is more or less dependent in this issue.

Mr KELVIN THOMSON—What is the fee that is charged? I have missed this on the way through. What are you customarily being asked to pay?

Mr Shafir—It works out for a centre, if they had to pay, at 70c a class. That is for copyright currently. So $1.40 per class by 40 classes per week is $56. That is $2,500 a year for the use of music, which is probably higher than some people's WorkCover levies.

Mr KELVIN THOMSON—What is the basis of calculation or the claimed or asserted basis of

calculation of those fees?

Mr Shafir—I'm sorry, what do you mean? They used to be on a flat fee per annum, and then just out of thin air we ended up with a cents per class basis. Certainly in the case of PPCA that was the case. They went from charging $600 a year to 71c a class, just like that.

Mr KELVIN THOMSON—And that was not on the basis of any consultation with the industry?

Mr Shafir—No.

Mr KELVIN THOMSON—Did it have a rationale accompanying it to say, 'This is why we're now going to charge 71c a class?'

Mr Shafir—I could be cruel and give PPCA's rationale, but it is not too complimentary to them. As I said, I don't believe that they did any research. They just saw what was happening with the other company and said, 'That's good enough for us.'

Mr KELVIN THOMSON—There is a reference in the material you have provided to specific tapes which appear to be compiled for the purpose of exercise classes or aerobics and things of that nature. So people in the industry would go out and purchase these things expressly for use in their classes. Is that right?

Mr Shafir—That is what happens, yes.

Mr KELVIN THOMSON—And they are probably produced with you or your industry in mind.

Mr Shafir—Yes, they are produced fundamentally for the fitness industry, and obviously copyright is paid on them when they are produced as well.

Mr KELVIN THOMSON—Yes. It does call up interesting intellectual property issues, because on the one hand they will argue the fact that this is being produced to a wider audience and you are gaining an advantage from it. They would say, 'If you don't want the wider advantage from it, you don't play it,' but that you are gaining a wider advantage from it means that you ought to be paying a publication fee. On the other hand, it seems as if these cassettes wouldn't sell in the first place if they weren't being purchased for that purpose.

Mr Shafir—Yes.

Mr KELVIN THOMSON—There was a submission saying:

Music is not central to exercise classes. People attend classes for exercise. They can exercise without music.

Mr Shafir—Well, that's true. You can exercise in the street without music. You can jog.

Mr KELVIN THOMSON - Yes. It does strike me that the number of people who participate in

aerobics classes would be greatly diminished if it were not for the music. That does seem to me to be pretty central to the whole thing.

Mr Shafir—I don't want to sound pedantic, but music is one of many factors. As I said in my second submission, the main factor is the quality of the instructor. If you put a bad instructor in front of a class, then the following week there will be nobody there. If he or she can't count and can't do their moves, people won't come back. If they have got a bad personality, they won't come back. Equally, other factors such as lighting, the floor surface, car parking, childminding facilities, are all very important factors in the success or otherwise, if you measure success by numbers in a class.

Mr KELVIN THOMSON—We would have other witnesses who would come up here and they would say, 'Well, if you think this doesn't matter, turn it off and see how well you go without the music.'

Mr Shafir—The answer to that is that I could also remove the instructor and see how well the class would go, or turn off the lights and see how well the class would go, too. I am not being facetious about it. If each factor was removed, you would end up with no class; if you removed all of them together, certainly.

Mr KELVIN THOMSON—Yes, that's right. There are presently two copyright collection agencies. Do you have a view about that, and something in terms of experiences in dealing with both of them?

Mr Shafir—I would prefer if we just had one fee to pay. It doesn't matter to me whether there are 20 collection agencies behind that fee. They can argue that amongst themselves. It is just a fee that we have to pay. We pay the one electricity company, the one tax authority. It would be probably a lot simpler if we paid just to one. It doesn't have to be, don't get me wrong. It doesn't have to be, but it would be simpler.

CHAIR—When do you pay the fee, Mr Shafir? Do you pay it prospectively or ongoing?

Mr Shafir—The fee is levied annually in advance. In the case of APRA, at the end of that year, when you are doing your next one, you have to put in a submission as to how many classes you did and they can make an adjustment. In the case of PPCA, you would have received that submission—I enclosed a copy of it—from a lady from the Dynamic Fitness Centre in Echuca.

CHAIR—Yes.

Mr Shafir—She made the point sufficiently well without the need for me to provide it again, but in the case of PPCA there is no provision for review. The other point that she made that I have also made is that it would be nice if all fees could be paid in quarterly instalments or something like that, if that could be introduced into the system. That is how we pay WorkCover and that is how we pay council rates and everything like that, but this cost here is just one hit up-front.

CHAIR—Can I just clarify something in terms of overseas comparisons. On annexure G, the second letter, on page 8—I presume it is taken from a submission to the board.

Mr Shafir—It is from my submission, yes.

CHAIR—There you say fees should be, rounded: Australia $2,400, England $1,700, Sweden $2,600, Ireland $3,900, Hong Kong $2,100. What is the equivalent fee in the United States?

Mr Shafir—Down the bottom, $1,026.

CHAIR—Right.

Mr Shafir—There I have also said that is on 1994 figures, which is not comparable, so allowing for a 12-month 10 per cent increase it came to $1,128. Do you see that paragraph there?

CHAIR—Yes. Do you know what the fee in Canada would be?

Mr Shafir—No, I don't know the fee in Canada. I know there are a lot of countries where there are zero fees though.

CHAIR—On those figures, leaving United States aside, then Australia is about mid-range.

Mr Shafir—That's right. That is what I said there. I said:

Australia's rate is mid-range, not lowest.

But as the USA was, in my words, conveniently ignored for this comparison, Australia goes well above the US figure, more than double it.

CHAIR—But can you compare a market of 260 million people to 18 million or, in England, to 55 million? Perhaps you can. I am just asking.

Mr Shafir—No, that is not valid, because Hong Kong and Australia are about the same, and they have got five million and we have got 17, 18 or 19 million. So you can't compare it on the basis of people because it is all based on the number of fitness centres and everything like that. Maybe what you are saying is that because the USA may, per head of population, have more centres, then the music industry is collecting pro rata the same amount of money. I don't know if it is correct that they have more centres per head and, even if they did, I don't know if that is a valid point.

CHAIR—Can I say I don't know, Mr Shafir. I am just asking the questions.

Mr Shafir—No, I am not saying you said that. Yes, I think you have got to look at it on a per centre basis comparison.

CHAIR—Yes.

Mr Shafir—And we should all have approximately similar costs. The only other costs that other people may have that are higher is in countries like Hong Kong. Their rent is probably a higher cost, as I said, for centres.

CHAIR—When you make your point about overseas music, that the proportion of the music which you use is largely that from overseas or recorded by overseas artists, are you simply saying in relation to PPCA that you don't know what the process or mechanism is for the remittance of funds to those artists?

Mr Shafir—I am asking the open question as to whether or not music fees are being collected in Australia and whether or not they are being actually remitted overseas in relation to what is collected here. They are also done to an agreed formula, I understand, which I think from memory was based on a radio station type formula, which doesn't necessarily apply in our industry anyway, but that is not significant to me.

CHAIR—No, but that is a fairly simple question to answer, I would have thought, on the part of PPCA.

Mr Shafir—But I can't ask them to answer it. Maybe the House of Representatives committee can, but they won't answer to me.

CHAIR—So that I am clear, you are saying you have asked that question but you haven't been given an answer?

Mr Shafir—We haven't got a clear position as to what PPCA does with their money, how it is sent, and we feel that if we are to pay money we want to know where the money goes.

CHAIR—Right. Do they provide you with a copy of their annual report or anything like that?

Mr Shafir—No, they haven't provided it. I haven't got a copy of the annual report.

CHAIR—Has there been any consultation between the peak bodies in the fitness industry and either APRA or PPCA?

Mr Shafir—With respect to APRA, the case went before the Copyright Tribunal a little over two years ago. I have lost track of the exact time. APRA and the peak national body and various state bodies did meet together virtually when the tribunal said, 'Listen, guys, leave us alone. Come up with a satisfactory answer,' and we did. We met then. PPCA have never met with industry. I will just repeat for the record: their sending a letter to something called FIWA in WA—which is the fitness instructors association of WA—saying, 'We've increased your music fees,' when they don't even pay fees because they are just an instructors association, is the only time PPCA have been able to show us where they believe they have had consultation with industry. Now, I didn't know that sending a letter in the post generated by a computer was actually consulting.

They have not met with any industry association. I am on the national board, I am on the state board, and I know that they haven't met with New South Wales either. During the course of this board of review, at the early stages of it, I made the decision to contact PPCA. I rang them up—and that letter may be in this file. I said, 'Look, we're both about to go down the track of a board of review. We maybe can sort this out if you want to finally talk with industry,' and they came back a day later and said, 'No, the board of review is

good enough for this. We don't need to talk to industry.'

Since then, or about the same time, they sent letters to, as far as I know, Fitness Australia and the VFIA - Victorian Fitness Industry Association - saying, 'Your fees have increased,' et cetera, and both those associations sent back a fairly standard letter saying, 'Look, we know there's a board of review, because it involves one of our committee members. If you want to talk to us after the board of review, we can talk to you,' but there's no point in talking once they have declined the opportunity to talk with us. It was a fairly clear offer on my part to the PPCA in-house solicitor. I believe she is in-house.

CHAIR—Mr Shafir, can I thank you for your submissions and also for coming and discussing them with us today.

Mr Shafir—It's a pleasure. Thank you.

Resolved (on motion by Mrs Grace):

That this committee authorises publication of submission No. 178 from Peninsula Sports and Leisure.

[2.10 p.m.]

SCARCELLA, Mr Bruno, Secretary-Manager, Liquor Stores Association of Victoria, Unit 9, 14/6 Audsley Street, Clayton South, Victoria 3168

BAKER, Mr Andrew Paul, Executive Director, Retail Confectionary and Mixed Business Association of Victoria, and Secretary, National Council of Independent Retail Organisations of Australia, Unit 9, 14/6 Audsley Street, Clayton South, Victoria 3169

CHAIR—I welcome Mr Scarcella from the Liquor Stores Association and Mr Andrew Baker from the Retail Confectionary and Mixed Business Association of Victoria. Although the committee does not require you to give evidence under oath, I should advise you that the hearings 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. We are in receipt of your submissions to the inquiry. Would one or both of you like to make a short opening statement?

Mr Scarcella—We believe that the collection of a fee for playing music in shops, particularly in our side of the industry which is mainly small business, is another impost on the retailer out there who is struggling to make ends meet. We believe that this should not be the case and we ask that the committee take into consideration the type of businesses that we do have, and suggest that no fee should be collected in small business relating to our side of the industry.

CHAIR—How do you define small business, Mr Scarcella?

Mr Scarcella—Small business—I suppose mainly family run businesses, two or three employees, maybe working by themselves. There are a lot of those in our side of the industry.

CHAIR—In terms of the music which is played, what proportion would be played by way of radio as distinct from music played by way of recorded music; that is CD, tapes, et cetera?

Mr Scarcella—Probably a greater percentage would be listening to the radio to keep up with current affairs, news flashes, et cetera, and also to soothe the nerves at times when they are in the shop on their own for quite some time, particularly now with the extended trading hours that have been opened up in the past 12 to 18 months. The retailer out there has got to stay in his shop between 9 and 9 every day of the week virtually. As you can imagine the business isn't constant. The customer sort of comes in, not in a steady flow but in dribs and drabs, and the retailer out there is either cleaning his shop up or doing some books, et cetera, and he has the radio on to soothe his nerves and help pass the time of day.

Mr Baker—If I could reiterate what Mr Scarcella has just said, and also add that we would see our members are primarily milk bars, small stores, takeaway food shops. The Australian Bureau of Statistics indicates that small businesses of that nature employ about 3.3 people. I think our industry probably is a little bit less than that, less than the average. Quite a lot of the operators are single operators operating a store, as Mr Scarcella said, for a long period of time. We believe that the music they play is not of benefit to the customers. It is of benefit to themselves. It is not a public broadcast. It is in fact incidental or accidental if it

is heard by the customers. Most customers coming in for a packet of cigarettes or a bottle of milk or a newspaper are not going to be listening to the background music.

Sixty-five per cent of our members are first or second generation migrants. 20 per cent, from our figures, show they are actually first generation migrants, and we feel that listening to the radio is a very important part of their ongoing education, because they don't get a lot of access to outside people and outside activities other than through the radio or maybe even a TV that they have got playing behind the counter.

In answer to the question, similar to Mr Scarcella, I would think that maybe even as much as 90 per cent of our shops are listening to radios, a few would have TVs on, small TVs, and there may be a minority, a very small minority of one or two per cent, that would have a tape playing. In the main, it is the radio for your own enjoyment and amusement.

CHAIR—Can I just take the radio as distinct from CDs and other recorded music for the moment. Since the inquiry began, APRA have put a proposition to the committee which basically is that we adopt the Canadian copyright provisions in relation to radio and television; that is that licence fees wouldn't be payable for use of radio and television in business. That is conditional upon the licence fees being paid by the radio stations being adjusted upwards to make up the income that would otherwise be lost by the recording artists. Do you have any comments about that proposition?

Mr Baker—That almost solves most of our problems.

CHAIR—Right.

Mr Baker—It is the radio, as I say, that our members are listening to. The impost of the two organisations, APRA and now PPCA, are in fact new costs for these businesses. We would concur that seems like a good solution if the buck stopped at the radio station from that point of view of our operators.

Mr Scarcella—Mr Chairman, I agree with that because we look at it as double-dipping. The radio stations do pay a fee to have the copyright paid for. Why should it then be passed on again to outsiders?

CHAIR—Can I leave radio aside for the moment then. Dealing with what may well be a minority of cases for your members, but nonetheless one that we have got to deal with, and that is the recorded music, the CDs, the tapes, the like. One way in which we have been looking at this for the purposes of discussion is to take a categorisation in three parts; namely music which has been played entirely privately. An example of that might be somebody out in the back room of the fish and chip shop cutting up the fish or mixing up the batter, or whatever might happen out the back of the fish and chip shop, but it is not in the part where the public is and therefore music is just being played entirely for private enjoyment.

The second category might be music which is played for ambience. Music in a restaurant is probably a good example of that, but I suppose it could also include music played by a jeans store to attract a certain age group and clientele into that store. The third category is music—Mr Shafir mightn't agree with this but he has gone—music which might be said to be quite clearly integral to the commercial operation. The example given to us in relation to that is music which is used in an aerobics class in a gymnasium.

The question is—and can I say we are not fixed to that categorisation; it is simply for the purpose of discussion but it might help us to look at the issue—if there is a line to be drawn somewhere, that is between where licence fees are payable and royalties are paid, where do you draw the line? Is it between entirely private and ambience, or between ambience and what is an integral commercial use of music in the business?

Mr Baker—From our point of view we would probably support the view that if music is being played to enhance the ambience of the store, then some sort of recognition would need to be paid. That doesn't cover very many of our members. In fact, the areas that are most grey, and where we have the most problems, are in fact a radio playing in the background in the back shop which is adjacent to the store and can be heard in the store. So the person preparing food or whatever listening to the radio comes in to serve the customers; at which time the customer can hear that music. That is where we believe it is not part of the ambience of the store but is part of the personal enjoyment of the operator.

However, if fixed speakers were to be put through a building and it was part of the selling of that particular establishment, then that would have to be looked at differently. As an association we would concur with that.

CHAIR—Right. Mr Scarcella?

Mr Scarcella—Yes, I would agree with Andrew. I suppose the only ambience songs that are applicable to our side of the industry, being the liquor, would probably be Mario Lanza singing *Drink, Drink, Drink* and—

CHAIR—Slim Dusty and *Have a Drink With Duncan*.

Mr Scarcella—Yes, *Pub With No Beer* or something like that, yes, *Have a Drink With Duncan*. There is no ambience as far as we are concerned. As I explained earlier, people come in, they know what their product is, they buy and away they go.

CHAIR—Yes, but what I am saying is if you go into a bottle shop—to take your industry, Mr Scarcella—and in the bottle shop they have got a CD in there playing and it is just playing some soft background music, whether it is instrumental music or Mario Lanza for that matter, then certainly probably under a strict interpretation of the current law, and also I think along the lines of what Mr Baker was saying, a copyright would be payable in those circumstances. If they chose to have the radio on under the other provision, then they wouldn't pay a copyright fee, but if they chose to put a CD on, then they do.

Mr Baker—Maybe I could clarify what I said. I really believe that if a store is set up with additional speakers, maybe through the ceiling or through the establishment, so that you do get the ambience of the music and there is some effort made to improve the business by using the music through that business, that is really the line I would draw in the sand as opposed to having a record player or a CD player in the background.

CHAIR—Isn't that an unsatisfactory line, Mr Baker, in that one can go out and buy, not much bigger than this these days, a sound system which quality-wise is fairly high? You can have it sitting on the shelf in

the liquor store. To me it seems like it is simply creating an unreal distinction to say if you have put the speakers in the ceiling you should pay a fee, but if you have got the latest sound system, which are becoming smaller every day, sitting on the shelf, you shouldn't. Aren't you creating ambience anyway?

Mr Baker—It depends once again on why the system is there and the style of the business. If you are looking at a restaurant and you had that there, the people are going to be sitting in that restaurant for half an hour or an hour or two hours and enjoying the total ambience of the establishment. I don't believe that someone coming into a sandwich shop or a milk bar for a one or two minute purchase is in that same frame of mind. I believe that is where there is a differential and you must take into account, not only the motivation in having the music there, but the benefit to the customers. That is where the line has got to be drawn.

Mr KELVIN THOMSON—Mr Baker, a couple of things coming out of your letter. You mentioned towards the bottom of the first page members receiving 'arrogant' phone calls. We have taken a certain amount of evidence on this point, but I thought noting that you had said that, could you perhaps tell us a little bit about that?

Mr Baker—We believe, from our members, that APRA are quite devious in the way that they obtain information. We have had cases where stores have reported that they have innocent phone calls about what is happening in the store and what radio station they are listening to and purporting to be a survey. The owner of the store then subsequently gets the notice from APRA, which is a very legal-looking document. As I say, 65 per cent of our people being migrants, if they see a legal-looking document start to cower in fright I guess. Then 14 days from that there is a follow-up letter which is a first and final payment with a legal demand setting out the details of prosecution.

That in no way, to me, is a fair way of going about this process. First of all, the way they find out about the radio in the store and then, secondly, going through this. There is no consistency. They would seem to target a town, and I would get six phone calls from a particular town to say that they have received the APRA information, but there are another six or 12 people in the same shopping strip, neighbours of these people, who also have radios or whatever in the store, who have not received such demands.

Mr KELVIN THOMSON—Yes. Your letter referred to retailers receiving three reminders and then the phone calls. What are the phone calls saying after they have sent the reminders?

Mr Baker—I have not had a phone call, but I have had them reported me, that they are of a very serious nature, and of a threatening nature in terms of their liability if they don't comply with the regulations, and most of our members take fright at that and seek assistance from the association when they start to get phone calls like that.

Mr KELVIN THOMSON—On the second page you made reference to the value of news bulletins and product recalls, which, given the events of the last day or two, seems again topical, and I might say in support of that we have heard from a number of witnesses around the country about the value of access to news and so on through the radio, with cyclones in Cairns or Townsville and things of that nature. So I think there is a valid point there. It is one of the reasons why we have been interested in a distinction between radio, on the one hand, and cassettes and CDs and the other. There are also intellectual property reasons for

making that distinction as well, where a person is clearly choosing to play specific music, but that does seem to be a more workable distinction than some of the proposals for public and private, or profit and nonprofit, that appear to me, anyway, to be a pretty difficult line to draw.

The other thing that I would mention: in your last paragraph you talk about members being advised as to where the money goes. Now, we have been asking these questions of APRA and getting information about where the money goes. It is essentially said to go to those who are the composers and artists, and so on, in the first place, based on surveys. One of the interesting points, I guess, has been that some of those or many of those who are the beneficiaries of this are reasonably well off in the first place, but they have produced information for us about that.

Mr Scarcella—Mr Thomson, on that point, how do the agencies define who collects that money on a personal basis? For example, does a one-hit wonder get a regular cheque every month? Is that split proportionally amongst the composers and/or artists?

Mr KELVIN THOMSON—Others may be better equipped to respond, but my understanding is that it is based on survey work of radios and so on concerning their outputs. Previously I referred to Bob Dylan and Paul McCartney. That turns me into a dinosaur, so I have to refer to the Spice Girls and Hanson, or something. But if they are being played more often they will show up in the survey, and therefore they will get a greater proportion of the royalty cheque, if you like. Someone who is a one-hit wonder may well receive very little out of the whole process.

Mr Scarcella—Yes. Going on a statement that you made in relation to Andrew's application, I have a letter from one of our members, and it opens:

According to a report written by our licensing representative, Stuart Walker, music is used at your place of business. This information was apparently volunteered by you, or a member of your staff, during a recent telephone conversation.

So I agree with what Andrew said, it is the way they go about finding out what type of stuff you are playing in your shop.

Mrs ELIZABETH GRACE—Mr Scarcella, you alluded in your report to the fact that retailers spend very little time in your shop, or customers spend very little time in your shop.

Mr Scarcella—Customers, yes.

Mrs ELIZABETH GRACE—And I can relate to that because, as you say, they come in, they know what they want, and they go again.

Mr Scarcella—Yes.

Mrs ELIZABETH GRACE—Mr Baker, do you feel that that is a fairly general line in the type of businesses that your association covers? Do you think it is a similar sort of thing?

Mr Baker—Absolutely, and in fact probably even shorter. We have done a number of surveys and find that, literally, people are in the store less than two minutes, in the main, buying—and I am talking about milk bars now, which covers most of our members—milk or bread or a newspaper and a packet of cigarettes.

Mrs ELIZABETH GRACE—Why I am asking is because it is just starting to evolve as maybe another line to take. Instead of distinguishing between radios and CDs, maybe we should look at whether the music or entertainment, or whatever you would like to call it, is likely to entertain the customer because they are going to be in the shop for half to three-quarters of an hour, because they are browsing, looking, that type of thing, as opposed to enter your type of business and are there, literally for a specific purpose, to pick up a product and go.

Mr Baker—That is right.

Mrs ELIZABETH GRACE—It is a bit like a service station where you are in, you fill your car up and go.

Mr Baker—Yes.

Mrs ELIZABETH GRACE—So I just wanted to clarify that, because it could be another line that we could develop as a process of getting a definition. We are just trying to find a definition that may be suitable.

Mr Baker—Yes. The radio one which Mr Andrews has mentioned before would suit our members if it stopped at the radio station, because, as I say, most members are only playing the radio. That would be very suitable, I would think, in our industry.

Mrs ELIZABETH GRACE—Thank you very much.

Mr Scarcella—Mr Chairman, there have been times when people have come into shops and the radio has been on and they have asked for it to be turned off because they cannot stand the music that is being played at the time.

Mr TONY SMITH—With regard to some of the difficult interrogations, by the sound of it, that some of your members have had, has that ever been put on the basis of, 'You don't have to talk to us'? Or has it always been a fairly mandatory type conversation? Has it been quite overbearing, in a way? Is that the way it has been?

Mr Baker—I used the word 'threatening' before. I don't know about Mr Scarcella's, but that is the impression that our members got. Once again, quite often they have not got good English skills, and people coming across the phone in the manner that they have reported to us would seem to be in a threatening manner, and certainly not assisting at all with any explanations, but talking legalistically and trying to frighten them with talk of lawyers and prosecutions.

Mr TONY SMITH—Have there been particular cases—if you know, and you may not—of specific

questions about what stations are being listened to? Has there been any detailed questions being asked?

Mr Baker—I believe they are only asked at the point of the alleged survey when they are trying to ascertain whether an audio device is being played, but not subsequently.

Mr TONY SMITH—Because I suppose if you were listening to the PNN network on ABC, as far as I am aware there is no music played on that; it is either parliament or current affairs, in which case you—

Mr Baker—It should be a higher royalty?

Mr Scarcella—Isn't there any introductory music when they put the program on?

Mr TONY SMITH—A bit of copyright? Well, not that I am aware of.

Mrs ELIZABETH GRACE—If it is, it is probably Beethoven or Mozart or something.

Mr TONY SMITH—Again, it is very imprecise. What you were saying before interested me because you were asking Mr Thomson about that, and that is a question that I have, too, about the imprecision involved in all of this; this sort of very broad brush approach, which you would also find hard to explain to your members. We are getting submissions saying, 'Small business needs to be better educated about copyright' and so forth. Well, that is fair enough, but if you cannot explain that somebody, an Australian, is in fact going to benefit from this, then it makes it much harder for your members to appreciate it. Is that a fair comment?

Mr Scarcella—Yes.

Mr Baker—Yes.

Mr Scarcella—What we cannot understand, either, is that there are two agencies. If anybody would like to point out to me which is which, and who collects what for what, I would be grateful.

Mr Baker—Our members are certainly totally confused and, as an association, we are reasonably confused as well.

Mr Scarcella—One of them, APRA, started in 1926, according to this letter, and the other one—CCPA—started in 1969. So what happened between 1926 and 1969 to the money that should have been collected on their behalf?

CHAIR—I think the simple answer, Mr Scarcella, is that there are different copyrights. There is copyright in the performance, there is copyright in the production, there is a copyright in the makers of the record, and in the publication and that has been an evolving area of intellectual property. I am not saying people aren't confused about it. I totally agree, they are. And if people don't have some understanding of the law then obviously it is even more difficult for them to understand what is involved. But I think we take the point generally that some better education and information is required, at a minimum. Can I thank you for

your submissions, and also for coming and discussing them with us today.

Mr Scarcella—Thank you very much.

Mr Baker—Thank you.

[2.37 p.m.]

STAFFORD, Mr Thomas Leslie, Executive Director, Hotel, Motel and Accommodation Association of Victoria Inc., Level 6, 230 Collins Street, Melbourne, Victoria 3000

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearings 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. Mr Stafford, we are in receipt of the submission from the association. Would you care to make some opening remarks.

Mr Stafford—General comments would be that the HMAA respects and understand the copyright, and the fact that artists are entitled to some kind of moneys when music is played. And so I am with the previous gentleman, and that flows on then to the PPCA and people that produce things. The association would like to say that they have concerns in relation to who is being targeted by the organisations for payment, which may not fit into sections under the act—which I think are sections 46 and 106—which states that it does not apply to where a person resides or sleeps, in general terms. There seems to be this, in relation to our charter as an organisation, which is accommodation—and to a large sector of our membership, which are bed and breakfasts.

That then seems to be quite confusing in relation to whether it does apply to a bed and breakfast, how it should apply to a bed and breakfast, in relation to—and again with the two previous speakers—how long a person spends within that area, matched against the cost that is incurred, the paperwork that is required, the lack of clarity in the paperwork that goes out to people—again, the two organisations. We would strongly suggest that there should be one. In the PPCA 1996 annual report it states that approximately $1.6 million was spent on costs, and around about—and again I am just quoting—around about $2.5 million went to the artists. One would assume if APRA had similar costs, there would be greater saving and more money could go to those who were in actual fact more deserving of it.

So the association is pleased to be able to come today to speak, and would like to clarify, as in the document, many of the situations in which we believe maybe the organisations are operating outside of what is legally put in there. I think I will leave it there.

CHAIR—Can you indicate what the current practice in relation to bed and breakfasts is?

Mr Stafford—The difficulty with that is to try and actually say what a bed and breakfast is.

CHAIR—Well, can we try?

Mr Stafford—Tourism Victoria is trying to define this, and they have a range of different definitions of what a bed and breakfast is. That ranges from the very broad range of it being where someone supplies a bed and breakfast—and in that category you have some of our members who are under another category, maybe motels, who are saying, 'That's what we do'—down to empty-nesters, people who have a couple of spare rooms after the kids have left, with ensuite, and they are running that as a bed and breakfast. That in

itself makes it very difficult to actually clarify. But generally it is a small premises where a person only supplies a bed and some form of meal for breakfast.

CHAIR—Leaving aside the motel which calls itself a bed and breakfast, when I think of bed and breakfast I think of either a sort of self-contained cottage-type situation or I think of, as you say, a couple of bedrooms in a house where you go out to the dining room and have breakfast but the proprietors or the owners of the house actually live in the rest of the house. You are sort of invited in as a paying guest in that house. That would be the traditional understanding, wouldn't it?

Mr Stafford—The traditional is the living within the house of the people running the business.

CHAIR—Can we just take that definition for the moment?

Mr Stafford—Yes.

CHAIR—What is the practice in relation to those premises? Is a licence fee—

Mr Stafford—Letters have been sent to people within those areas requesting that they pay. If we look at—and this is within the document—tariff R of the PPCA, it states 'Bed and breakfast' and this is applicable from 1 December 1996. Then if you note 'Bed and breakfast', underneath it states 'seating capacity of up to 50 people', which is quite confusing if you were running a bed and breakfast at your house. That is confusing. That also then links directly with the new updated—applicable from 1 December 1997 there is a new tariff R and I draw your attention that under the new one they have actually changed the wording slightly from being 'bed and breakfast' to 'bed and breakfast dining rooms'.

One may read into that that it is maybe an admission that they were in actual fact incorrect in charging bed and breakfasts, but it still leaves it wide open to what you would define as a bed and breakfast dining room. My parents actually run a bed and breakfast. In fact it is their home. It is where we go when we visit them, so is it a commercial premises? If they have the radio playing in the kitchen and their guests come in, should they have to then pay because they have actually got it playing as part of their routine daily life?

CHAIR—Apart from that issue, if you're are talking about, say, a motel which could advertise as a bed and breakfast but has a dining room—by that I mean a dining room that you would normally associate as being a dining room rather than the dining room in somebody's private house—

Mr Stafford—If it is clearly a dining room, then we agree that the members should pay. There was a member who has faxed me through a letter and in discussion he has clearly what I state is a dining room, and my advice was, 'You pay.'

CHAIR—So you don't have any objection with that?

Mr Stafford—Not with that.

CHAIR—It is the uncertainty that is your problem.

Mr Stafford—The uncertainty in other areas. It also not only links just directly to dining rooms but many of our members fit in that one to 20-room property, which are quite small motels that would take it that step further. In relation to that they may have within their residences actually part of the offices. That is how they have been designed, so you live in as part of it and then the accommodation is also part of that. There have been applications sent to our members who have that sort of a set-up, saying, 'If you've got a radio playing and a customer comes in to book their room, therefore the music is playing and you should pay a fee.'

It is difficult to then say that if a person is coming in to book and it takes a couple of minutes to book into a room and they leave, whether they should be paying that. That also then links in again with a concern about whether something that is technically free to air and on which there has already been copyright paid by the radio stations—whether there should be a double-dipping exercise where the members are asked to pay for radio that has already been paid for.

CHAIR—Can I take you to that. Since the inquiry began APRA has put to us a proposition that so far as the playing of music by way of radio or television is concerned, no licence fees be collected, the condition being that the licence fees paid by the radio stations would be increased accordingly so the artists are not out of pocket as a consequence. Do you have any comment about that?

Mr Stafford—Again off the top of my head, within say 80 per cent of our membership they would only be looking at radio and television. They wouldn't be looking at playing music as such. So that kind of thing I think they would be delighted to hear. It would stop the confusion that is out there at the moment.

CHAIR—In relation then to recorded music—the CDs, the tapes, the records, et cetera—we have been discussing this in a three-part categorisation: firstly, what is entirely private; secondly, where music is provided by way of ambience—the classic example of that, I suppose, is music in a restaurant by way of background—and, thirdly, the music which can be argued to be an integral part of the commercial activity. The music which accompanies aerobics classes in a gym might be an example of that. If we were to employ that categorisation, where do we draw the line between what is private and what is to be paid a copyright for? Between private and ambience? Between ambience and commercial?

Mr Stafford—Again it would depend on which sector of the industry you had been talking with. In relation to a bed and breakfast playing music, it may be that it was originally designed just for their own private usage and that a guest who is in their room comes into a dining room or another area. Can you claim that they are there on commercial reasons or are they there to come and talk to the guests because that is part of what it is about, being a bed and breakfast? Yet it is still the private residence of the person.

To take it a step further though, on to a motel, if the motel then is playing commercial music, then it would fall into that second category. I think there would be a division, based on what the members are doing, between those two groups. For the bed and breakfast, I would say a majority fall into that first group; that it is usually played for their own benefit within the house. Looking at the group as it usually is, a majority of the people with a B and B are over the age of 50. They are semi-retired and therefore spend a lot of time in their house; therefore would be playing music anyway, whether there was another person there or not, whereas in the commercial sense they may have music as ambience in the background.

CHAIR—I suppose your problem is what the meanings of sections 46 and 106 actually are. If we left them aside for the moment and we dealt with the radio as I suggested before, and we are just talking about recorded music now, would it be fair to leave it that if it is a public performance then a copyright fee is payable unless the proprietor can prove otherwise and can prove that it is private? That is, if there is some commercial activity going on, which a bed and breakfast clearly is, and music is being played, then you would accept it as having some commercial relationship unless shown otherwise?

Mr Stafford—Shown otherwise or in a sliding scale.

CHAIR—Right.

Mr Stafford—In 1994, I think it was, Tourism Victoria surveyed bed and breakfasts and found that there was something like a 17 per cent occupancy rate. So if you are running a bed and breakfast—and let's round it up to 20 per cent—that means you may have in one couple per week. So one couple per week coming to stay in your house—and they may only come down to breakfast for half an hour—the same charge applies. It is $46 whether you have 50 people coming through or whatever else. One would then assume that if you are going to look at a sliding scale it would become so negligible that it wouldn't even be worth the companies following it up.

My concern with it would be that if it then becomes the responsibility of the operator to demonstrate they are not—and we already have concerns with the way that currently the two organisations are sending information out and in some cases harassing—there would be greater harassment in asking those people to clearly identify whether they are commercial or not. I don't think that is fair on the operator to have to go to that stage.

CHAIR—Mr Stafford, are you aware of the history of sections 46 and 106?

Mr Stafford—No, I am not.

CHAIR—I am not either; we will have to look at that. Presumably when these sections were enacted they were aimed at what might be regarded as a sort of guesthouse situation. Presumably they predated motels, which have basically come about in my lifetime. Is one way of dealing with it, for example, to place a limit on the size of the premises and say, 'If you've got more than X number of people that can be catered for by way of providing a bed, then you should pay a fee'; that is, amend these exemptions? Or should it be amended to say, 'If music is played in the bedroom, that is the place where people actually sleep, then there's no licence fee but if it's played in some communal areas such as a dining room or a sitting room, that's different and a licence fee is payable'?

Mr Stafford—In the latter it would still come down to what is the privilege, or whatever else, for the person who actually owns that property and whether they are playing for their own personal use. I think that is the question. In relation to the growth of the industry, as written in the submission, that is one of the reasons things were brought up. It really does need clarification because there has been enormous growth just in the bed and breakfast sector alone.

If we are looking back at 1985, there were approximately about a hundred B and Bs within the state. There are now about 2,000. So just in that area is an enormous growth. Tourism is seen as the white horse doing all these things at this stage, but it does need clarification and the act may need to be looked at. I don't feel—and I would need to take that on notice—that I can make a statement at this stage on that without really looking at the detail.

Mr KELVIN THOMSON—You referred in your submission to APRA having a right of entry in the standard licence and then expressed some concerns about that. Do you have any instances of that right having been exercised?

Mr Stafford—I don't actually have any instances of that. We have sent a letter which only went out yesterday, unfortunately, to all our members, asking them just for further information if things had happened. So we will be able to pass that on at a later date. The concern is not so much whether it has happened, but the fact that it is there and can happen and does give people the right of access, technically really 24-hour access if they believe music is being played.

Mr KELVIN THOMSON—I think we saw somewhere that evidence—you suggested that PPCA had incorrectly licensed operators. Are you saying there that people had been asked to take out licences, or had taken out licences, when in fact they were exempt from taking out a licence?

Mr Stafford—This is the argument in relation to bed and breakfasts. The Victorian Bed and Breakfast Council, the VBCC, obtained legal opinion and the legal opinion is that a bed and breakfast should not have to pay the fee. I can't take that further because I wasn't a party to all of that. Therefore, if a person has been approached and under tariff R is asked to pay, one would assume that that shouldn't have happened.

Mr KELVIN THOMSON—I suppose there are a couple of things arising out of that. One is that we would be very interested in having a look at the legal advice if it were possible to make it available. The other is whether consideration has been given to taking that further; that is, a legal challenge to such licences being paid.

Mr Stafford—I am not sure but generally when you are looking at it—and it is the attitude of a lot of people—you are talking about $46 or $45. To put it mildly, what they say is, 'Bugger it, pay it.'

Mr KELVIN THOMSON—Absolutely. Presumably if there was going to be such a challenge it would be mounted by the association or something like that, rather than some individual proprietor.

Mr Stafford—And most associations certainly don't have the funds to go ahead and do that.

Mr KELVIN THOMSON—They don't regard that as worth doing?

Mr Stafford—Yes.

Mr KELVIN THOMSON—The other thing was the legal opinion. Is that available?

Mr Stafford—I can forward that on to you—the person who submitted that to the Victorian Bed and Breakfast Council—certainly.

Mr TONY SMITH—I regard it as a very good submission, thank you.

CHAIR—Mr Stafford, thank you for your submission and thank you for coming and discussing it with us today. There were a couple of matters arising which you indicated you want to give some more consideration to. If you do, and you wish to make a further submissions, we would welcome that. If the legal advice is available we would welcome that as well.

Mr Stafford—Certainly. Thank you for your time.

[2.55 p.m.]

McMARTIN, Mr Michael Arthur, Co-Chairperson, International Managers Forum (Australia) Ltd, PO Box 325, South Melbourne, Victoria 3205

WHITE, Mr Russell John, Director/General Secretary, International Managers Forum (Australia) Ltd, PO Box 325, South Melbourne, Victoria 3205

CHAIR—I welcome Mr Russell White and Michael McMartin from International Managers Forum.

Mr White—Thank you. I am a director of the International Managers Forum (Australia) Ltd and I am also a manager of recording artists, record producers, recording engineers and the like, the latter being my principal occupation, the other one being a task we take on for ourselves.

Mr McMartin—I am Co-Chairman of the International Managers Forum (Australia) Ltd and, likewise, I am a manager. I have a company called Melody Management and, being a member of the Managers Forum is a voluntary position, I am appearing on behalf of that organisation.

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearings 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. We are in receipt of your submission of 3 October. Would you care to make some brief opening comments?

Mr McMartin—I will go first, if I may. Further to the introduction, just by way of explanation of what we do as individuals, I, along with my wife, have a management company. I have been managing bands, one band in particular, for 16 years. We are a small business.

About six years ago the managers in Australia got together to form this association in reaction to what we perceived to be an attack on the copyrights of our artists by the PSA. Since that time we have put together over 200 managers and, as you will see in our submission, we represent a majority of the contemporary music artists in Australia, or we represent the managers who represent those people, from the well-known artists such as Tina Arena down to the majority of them being ones that you would have never heard of.

Generally, our feeling in putting forward this submission was the Managers Forum's frustration and concern that one of the limited rights of our artists—whether it is the artists we represent or the other artists that have gone well before them, be it the Olivia Newton-Johns, AC/DCs, Peter Allens or whoever, who derive income still from the copyright that is in question—may be in jeopardy. And rights are all we do have. We don't have any other assets.

CHAIR—What proportion of the income of performers, and composers for that matter, comes from royalties from the sorts of things that we are looking at?

Mr McMartin—It is very difficult to say, simply because it varies greatly. Given the propensity of Australian radio to play classic music and golden oldies instead of new music, you will find a lot of artists who are no longer earning record incomes because their records have been deleted or the band has broken up, or whatever, and their income from what we are talking about here will continue for many years, and because the records are deleted and there is no other income for them, obviously the percentage compared to their income is a lot greater.

I would certainly not be wrong in saying that a majority of our members would look forward to getting the APRA cheque twice a year for both broadcasts and the miscellaneous public performances, be that amount $500 or, as in the case of one artist that I am involved with, $5,000. She had one hit record, therefore one minor hit album, wasn't able to do anything else, therefore the live work diminished. She now lives in England where she is trying to eke out a career and she still receives about $5,000 a year from APRA for performance income. And believe me when I say that $5,000 is the difference between her just working part time in a shop or working full time and not doing music any more.

CHAIR—Right.

Mr McMartin—There are other instances of artists that I look after where the performance income is quite significant, and it's gravy. We look at this income as being superannuation because it goes on much further than the careers of the artist.

CHAIR—Can I come to the proposition that APRA have put to us, which you have probably heard me repeat to others, but I will for the record, namely that so far as the radio performance is concerned, licence fees no longer be collected for that but there be an adjustment in the fees paid by the radio stations to compensate.

Mr White—That is essentially the issue of the adjustment in the fees paid by the radio stations.

CHAIR—I was going to ask for your comment, yes.

Mr White—We are concerned to ensure that our members' clients—the performers, the songwriters—receive equitable remuneration for the use of their music when somebody else gains benefit from it, which is perceived as the public use of the music. I don't know if the Federation of Australian Radio Broadcasters, FARB, are going to be appearing before the committee. I am sure they will have something to say on that issue. But we would be happy with that if we could be assured that eventually, through a long and tortuous process that would end up in the Copyright Tribunal, there would be equitable remuneration adjustment.

Mr McMartin—My one concern with it—and it is only out of ignorance as to the structure—is that we are going through a period where copyrights and our industry seem to be under question and attack from government. So, should this be put together, as long as the ACCC were aware of it so that, once it was put together, they then weren't hit as a monopoly, one organisation collecting on behalf of both, and that it didn't put into jeopardy the rights still that each was looking after.

Mr White—In terms of the rest of APRA's new submission, or potential new submission.

CHAIR—Right. So, coming back to radio, your major concern is that there will be an adjustment. If those changes were made to the Copyright Act, what you are concerned about is that the adjustment would be made in terms of the fees so that the artists are not missing out.

Mr White—Yes. All we are concerned about is their remuneration.

CHAIR—That is your bottom line.

Mr White—Yes.

CHAIR—Literally, yes. Right, I understand that. Well, we haven't heard from the radio stations yet. One of their groups, and I can't remember which one, wrote to us and basically said—I am paraphrasing now, so I am not entirely correct—that the inquiry didn't concern them, but I suspect it does now. So I am sure we will hear from them. You say in your submission that:

. . . there is ample evidence of the significant value contributed by the use [of] music by small businesses in Australia.

Can you elaborate on that?

Mr McMartin—I think just on a straight personal experience basis, whether it is during aerobics or whether it is walking into a shop, whether the music is being played too loud, or whether it is rock music, people get the feeling when they walk in, from the music that is being played—or if there is no music being played at all—of the type of establishment. You get the feeling that they want you to have when you walk in; for example, the jeans stores playing youthful music, the restaurants. An interesting example is someone going into a bottle shop. I don't want to be too ridiculous about it, but if in the background people had on videos with a violent movie and that noise is coming through, the client walking in would have a totally different feeling about that establishment and the way they do business than if they walked in and there was Mario Lanza playing.

Mr White—It gets back to the benefit to the business. Not just to the customers, but the benefit to the business.

Mr TONY SMITH—What evidence do you have to say that?

Mr White—Personal experience, I suppose. We all shop like everybody else.

Mr TONY SMITH—I think we need a bit more than that.

Mr McMartin—With all due respect, if it weren't important then why would everyone be playing it? I don't mean to be disrespectful, but why would people be playing music in the stores, and certain types of music for different types of businesses, if it weren't, not a major part but certainly a part of the business—and, without minimising it, a $55 or $57 or, in the case of radio, a $37 part of their business—to give people a feeling, whether it is employees or whether it is the customers coming in?

Mr White—To say that it doesn't matter is to say that the music has no value, and we violently object to that assertion.

Mrs ELIZABETH GRACE—But the radio music that is being played in these stores is just that. It is a radio program that they have chosen to listen to in 95 per cent of the cases. There are the occasional people that bring their own CDs or their own cassettes because they have a particular bent. That is the area that we are looking at. I don't think we are questioning the fact that the jeans store can blast you out of Christendom because they think that is the way they are going to get young people in to buy their jeans or things like that, but it is back to the radio and people using the radio to keep themselves from going mindless, and to be company for them where they are working on their own, with probably that minimal contact with the public type of atmosphere.

I just wonder, when you say that one particular artist gets $5,000—I don't know whether it was once or twice a year you were saying—and I know this is an impossible question to answer, but how much of that money actually comes from the radio licence fees that are paid by the small businesses into APRA? Most of that money would come from the commercial licence fee from the radio and for the public. So, therefore, what we are arguing or what we are looking at—and you were saying that you felt we were wasting our time looking at it as a government—is: why is it necessary for this fee to be charged to a business which generally is not contributing a lot to the income of the artist? It is more the commercial licence fee and the public performance of those works that would be, I would think, contributing probably—I stand to be corrected, I know—up in the 90 per cent mark of that cheque that that person gets at the end of the six or 12 months. I throw it over to you for comment.

Mr McMartin—I will go first, because undoubtedly we both have something to say. I don't know the actual percentage. Certainly the greater amount would be from the radio broadcast. On the practical side, as the artists and we understand it, there is an international convention in law that states that it is a right that we have to get paid for broadcasts and where it is used for public performance.

Mrs ELIZABETH GRACE—And we are not disputing that.

Mr McMartin—But in the public performance, no matter by what means, whether it is AFTA, radio or whatever. On a personal view, I wonder if it may be a test if a person working in the store were told, 'No, no radios are allowed,' whether they would be seeking then other forms of compensation to help them not go mad in the job they were doing. If that music being played helps them in their work, then surely if they are not paying for it our writers are subsidising that other business. Does that make sense?

Mrs ELIZABETH GRACE—Yes, I can understand what you are saying. But what has happened because of this aggressive marketing policy of APRA is that these radios have been turned off and people are working in businesses now with none of this around them, and there are all sorts of other repercussions that are a domino effect from that. So people have made that choice and they have made that concerted choice.

Mr McMartin—The last thing that we want is for radios to be turned off.

Mrs ELIZABETH GRACE—Exactly, because it has defeated the whole purpose.

Mr McMartin—There are two or three parts to this. In relation to the education to the establishments that they do have an obligation to pay under international convention and Australian law, I don't know, but I trust it has been, in some cases, badly handled, otherwise there wouldn't be this committee. The fact that this committee is now dealing with it, and the awareness that the businesses have, will go a long way toward eradicating that problem. People will be aware of it, and I dare say everyone that is involved in collecting licences will also be a little bit more careful in the way that they approach it.

On the other hand, APRA is our organisation. They do look after our artists. I dare say we would be more angry and concerned if they weren't going after what is legitimately ours. We find them to be reasonable, and we certainly have in all the year that I have dealt with them. I don't think they are going to stomp on small people, and hopefully there is a mechanism for the exceptions. I don't have the answer to what the exceptions are. It is that line in the sand: what is just and what is not just. But we would be asking for them to pursue with due diligence the money we have got.

Mr TONY SMITH—Do managers get a proportion of the moneys collected by APRA?

Mr White—Definitely. Let's hope so. Yes.

Mr McMartin—It is the only way that we earn money, the only way, from commissions on moneys received by artists. And the only way our artists receive money is on the use of their copyrights and live performance. So, yes, we are not being altruistic about this. Our livelihoods depend on it as well.

CHAIR—I am not blaming you, it is just an observation, but it seems to me that there is a great ignorance about the whole way in which artists obtain their money. I might be wrong, but I suspect when people see huge concert performances, they think that is where they make their money, out of concerts. I am not sure how one goes about educating people, but certainly in terms of small business I suspect there is some need for more education on the reality of the position of artists. I am probably not thinking so much about, to take your list, the Tina Arenas and the Christine Anus, et cetera.

Mr White—There would be some people on that list who would be reliant solely on their APRA income, I can assure you.

CHAIR—I didn't want to show my ignorance, Mr White, but I don't even recognise some of these names.

Mr McMartin—That is why we put in a few recognisable names. If we could have put in more, we would have.

CHAIR—If I want to confess my ignorance, I have never heard of Custard in this form. I probably have by listening to the radio. We heard from a gentleman in Sydney who had a hit that is not available now, but is still played, and obviously it brings him in a continuing income.

Mr White—You mean Eric McCusker, I think. Was it Eric McCusker?

CHAIR—That is right, yes. Eric McCusker was making the point that one of his records which is still being played often on radio is therefore earning him an income, even though you cannot go down to a record shop and buy the CD. So I understand the superannuation aspect of it, as you put it, Mr McMartin. I also understand that, for new artists and up and coming artists who are looking for some recompense for their work, it can be important that they are getting paid for that.

Mr White—It can be the only acknowledgment, in fact, in many respects.

CHAIR—Yes. But again, one sees their performances in the local pub or the RSL club or things like that where there is some fee payable, that they are actually getting some return from that as well. I suppose all I am saying is that there may be some place for the industry—and the music industry more broadly, I don't just mean you—to engage in some better information and education campaign so that people understand that it is not just the Johnnie Farnhams and the Tina Arenas of this world who are making the money out of it, it is people at different stages of their careers.

Mr McMartin—We try to get most of our artists to understand how little money there is in it to begin with. That is the first thing you do, to try to make sure that they are very realistic about it. They will go on, almost without exception—unless it is a Savage Garden or one of those unique ones that just happens—for two, three, or four years doing concerts or shows in pubs, barely breaking even, certainly not being able to survive on it, and getting some airplay on Triple J, and that $300 of $400 that they get is the Christmas bonus. It is not even superannuation.

Mr White—It usually comes after Christmas, so they have still got it after Christmas.

CHAIR—That is probably sensible.

Mr TONY SMITH—Do you also get fees in relation to moneys collected for overseas artists?

Mr White—Ourselves personally?

Mr TONY SMITH—Yes.

Mr White—If we represent those artists we would be entitled to commission on their earnings. But I don't think you would find that many Australian managers who represent overseas artists.

Mr TONY SMITH—On a subcontract basis in this country, or something?

Mr White—It happens occasionally, but it is very rare. Australia, in the worldwide musical scheme of things, is a drop in the bucket. They are very rarely interested in having submanagers here. It would be nice.

Mr McMartin—The only representatives that some overseas artists may have is an agent, who simply looks after the live work and says when they come out, 'We want you to play in these places.' But I am not aware of any subcontracting of management to overseas acts. I wish there were.

Mr KELVIN THOMSON—In the submission you made reference to Australia's international obligations. What do you say about the evidence that we have that in the United States and Japan there are different circumstances prevailing, and not the same requirements for licence fees for playing of radios?

Mr White—I cannot really say anything other than that there are the Australian obligations and laws, and it would be great if Japan and America would catch up with the rest of the world.

Mr TONY SMITH—But that is not your strongest submission, is it?

Mr White—No. No, we are talking about the Australian market principally.

CHAIR—As a judge once said to me when I was a barrister, 'If that's your best submission, Mr Andrews, you can sit down now.'

Mr White—If you look at a country like England, for example, you can quantify a single play of your recording on BBC1. It is a quantifiable, put it in your pocket and go out to dinner amount. That is the other extreme.

CHAIR—Yes.

Mrs ELIZABETH GRACE—You couldn't do that here.

Mr White—No.

CHAIR—Can I thank you for your submission, and also for coming and discussing it with us today.

Mr White—Thank you.

[3.55 p.m.]

GILLARD, Ms Susan Marjorie, Managing Director, Ausmusic, 72-74 Pickles Street, Port Melbourne, Victoria

CHAIR—I welcome Sue Gillard from Ausmusic.

Ms Gillard—Thank you. For the committee's information I am also known as Susan Marjorie Elston. I am the managing director of Ausmusic.

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament, and warrant the same respect as proceedings of the house itself. The giving of false or misleading is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of the submission from Ausmusic. Would you care to make some brief opening comments.

Ms Gillard—Firstly, can I apologise for being late. I am in my roadie gear, so I am sorry I could not juggle this plus everything we have going for Australian Music Week. In essence, what Ausmusic has to say is quite brief. The position that we hold is that obviously we are very keen to promote and defend the rights of Australian artists. It was one of our basic mandates, and it continues to be, and Australian Music Week that is happening this next week is an extension of that.

Particularly given that we have an education and training focus, one of the things I am very aware of is the lack of understanding about copyright within the inner circle of the music industry itself, let alone the broader context of the general community. If I were a small business person, which I basically am now, running a company that is Ausmusic—it is now just a small company—to receive the notification from APRA without any knowledge and understanding of what it was all about—my response would have been probably fairly similar to what has happened.

I think a major solution to that problem is to increase the amount of knowledge and information that is available about copyright, and what copyright means, and particularly in regard to music, where music is an art form where you can press a button. The general consumer is now able to expect incredible quality of performance and sound by the simple action of pressing a button, so it is very difficult to expect the average consumer to be able to appreciate what that means in terms of the value of that sound, and where it was made and who owns that sound. So the major solution I have presented to you is that is has got to be in education.

I get my hair done at a hairdresser where the music is thumping out there, and that is as big a part of investment in that property in attracting clientele into that small business as any of the expense that has been put into the furniture and the existing infrastructure. Because of the lack of understanding of the value of that intangible asset, I think that is where our problem is.

CHAIR—You say in your submission that Ausmusic has worked over the last eight years to educate current and potential workers about its value to creators and investors. What has been the nature of that

education?

Ms Gillard—It has been very expansive. Probably most of the work has been in the school system. The new VET system is in place in schools all around Australia. We have a vocational certificate two course which covers entry level training and a whole range of areas of the industry, one of which is in the music business, and there is a particular module in that called Copyright in the Music Industry. Now, that is a very popular module from the teachers' perspective, and certainly from the TAFE perspective. It is not so much from the kids' perspective; they would rather be playing their guitars and having a good time, but particularly with those kids who are doing songwriting, what we are already seeing is those young kids—through our register, because they know about it, and they know the value of what they have produced—are able to register their songs and get small royalties back, and that is the beginning of what it is to earn an income as a musician.

It ranges from that sort of level to much broader and bigger issues when Ausmusic has in the past—although we are not in a situation to do it at the moment—run more major conferences, seminars with the industry, to talk about bigger issues, where copyright has come into place. Were we in the state that we were in the past, we probably would have done something around this parallel import one, for example, as a way of trying to generate some greater understanding about all of those issues in that proposed legislation.

CHAIR—What about education of the general community and, as a subset of that, the business community? Has Ausmusic been involved in that at all?

Ms Gillard—Not so much. Because we operate on a user-pays basis, it is pretty hard to get small business to come to a meeting. They have to have a reason to need to understand it. It has really been more in the general community, and I am talking not just about in Melbourne or in any of the capital cities. There are 1,200 providers around the country doing our programs, and a lot of that is in the bush, in the regional areas. If there has been any filtration down to small business, it would be through the kids at school who have parents in small business.

CHAIR—How important to artists are the fees collected from APRA and PPCA?

Ms Gillard—If they think they are going to live off it, they know that they are not going to be able to do that, but I think in the first place it is a recognition. It is a symbol that there is value being put on their endeavours, and it also represents to them some sort of financial gain. Obviously if they are quite prolific and successful writers, it can be quite substantial. But for most people it is a small amount that they receive as a royalty. I think it is more the recognition. Certainly from my experience I often have young people—and old people—coming to me waving their APRA cheque and saying, 'Look, it's only $15 or something, but it's like I've been recognised.'

CHAIR—In your experience does APRA make sufficient effort to fairly distribute, if I can put it that way, in relation to the music which is played?

Ms Gillard—Yes. I have had no complaints from the broad group of people from the industry that I work in, and from songwriters. I have had no complaints at all about APRA's way of operation. It is difficult

when they have got nothing to compare it with, but I can certainly say that I have heard no complaint about the way that APRA has operated and the way they divvy out their funds.

CHAIR—APRA has put a proposal to the committee in relation to the music played via radio in small business, namely that the Copyright Act be amended along the lines of the Canadian legislation so that copyright licences and the fees pursuant to them would not be charged for music played by way of radio in business, and that an adjustment would be made to the licence fees paid by the radio stations themselves. Do you have any comment about that?

Ms Gillard—As I said in my submission, it seems to me that the value of any product that is produced is not necessarily deemed by the people who produce it. The value is perceived by the people who want it. Radio stations obviously play music as a way of attracting people in to listen to basically their advertisements, so that is already basically covered. But, as I said, where I believe there is commercial gain from that music at any point along the trail, I do believe that that is another opportunity for that product to be exploited. I think that is quite legitimate, and it is done in any other business. You can perceive it as a product, basically a product that has all sorts of possibilities of being exploited and used or remanufactured or reprocessed, and at each point, if it is worth something to somebody, they all pay for it.

CHAIR—That may well be technically, legally and, for that matter, morally correct. The problem is—and this is why we are sitting here today—that in exercising that right it seems to have caused enormous angst to small business in particular for what, in the overall scheme of things, is not a lot of net income.

Ms Gillard—Yes.

CHAIR—We only have ballpark figures, but we seem to be talking, from the APRA side of things in terms of royalty fees from small business, of a net value of probably round about $1 million at the most, which is not a lot of money in the total scheme of things. The question is if the artists can be protected in terms of their income by some other mechanism, would it be best to change the system?

Ms Gillard—I understand what you are saying, but isn't this government on about open market forces, letting it happen as it really is, rather than trying to create any sort of artificial levying on it. I think if you follow it right down to the real value of that product, basically that product has value at a whole range of different levels, and it should be paid at that point. $1 million may not be a lot to you, or in the general scheme of things, and it certainly may not be a lot of money for government to have to stand up for or fight for, but for the artists it is—

CHAIR—That is not a million to Australian artists.

Ms Gillard—You asked me what is the value of that cheque, and I said the first thing of that value is the symbol of it. Artists can spend many hours working on their art form, as much as a small business person can also spend many hours on obviously trying to make a buck. It is very easy to perceive that an artist does it as a hobby, as a leisure, fun thing, and yes, they do it for that, but they also do it to try and earn some income from it. If you follow that economic rationalist position right down to the wire, that product has value in small businesses, and I would have thought the logical thing would be if small businesses wanted to be

exempt from that, they have the choice of not using the music, for a start, or to prove that it has no commercial value.

CHAIR—Are you saying as a sort of bottom line that you prefer the system to remain as it is?

Ms Gillard—I would think so.

Mr KELVIN THOMSON—Is it also the case, though, that the present collection method of that million dollars, or whatever the figure is, is a pretty burdensome one on the businesses concerned?

Ms Gillard—Yes, absolutely.

Mr KELVIN THOMSON—Part of what we are expected to do as a committee,. I guess, is to look at not only what is appropriate to collect, but also whether there is some better way of doing it which will be less intrusive and less expensive, and so on.

Ms Gillard—Yes. I understand the position. As I said, I am a small business operator with bottom lines now as well. I think I have said in my paper, one of the things this government is trying to do is to reduce the paperwork for small businesses, and this is an added problem.

Mr KELVIN THOMSON—Yes. That is the challenge as against the free market test.

Ms Gillard—Yes.

Mr KELVIN THOMSON—You say they have the free market test. If composers have legal rights, then let those rights be exercised, and so on, according to proper copyright law, but as against that, there is some responsibility on us to try and come up with a system which does not involve undue burdens on people, and is a fair way of collecting it.

Ms Gillard—Yes. I understand your problem, but I guess I am here because I understand the position from the artist's perspective, but I certainly understand from the small business perspective. The fact that it is a lot of paperwork for very little return is really a symbol. My argument is that you are looking at a symbol of saying, 'This is a way of respecting Australian artists.'

Mr KELVIN THOMSON—Yes. We are looking at whether you can get that return without the present grief involved in collecting it.

Ms Gillard—Yes.

Mr KELVIN THOMSON—You indicated in your submission—and perhaps following this issue a little bit further—that there should be a single collection point for both performing and mechanical rights, so perhaps you might like to expand on that, and the possibility of having APRA and the PPCA cooperating.

Ms Gillard—It is following on from what we were just saying. My position is to defend the

Australian artist, but I also do not believe in unnecessary bureaucracy, and if there is any possible way that we can satisfy the needs of the artists and to maximise that exploitation of whatever they do, wherever it is getting commercial gain, without any of the paperwork, I think that is a bonus, and I also think there is a logic. There is very little understanding out there of the difference between PPCA and—I mean, the amount of phone calls that I have had from people saying, 'And then there is mechanical copyright. A big issue is, I am sure—

Mr KELVIN THOMSON—Yes, that there is a consistent theme before the committee.

Ms Gillard—Yes, but I can only go back to when I was at the hairdresser and they did not know I was from the music industry, and they were screaming blue murder about this letter that they had received. They were going on about obviously just the frustration of this paperwork, that it was just the government trying to get them for some more tax. That was basically their first idea. Then it was, 'Well, it's going to those bloody multinationals.' I think there was something remiss with APRA that the presentation was not clearer, but at the same time I think in one letter it is very difficult to explain what is a very complex issue. To answer your question, yes, the less amount of processes, the better, but if anything that an artist does gives value for commercial gain, that artist is entitled to something.

CHAIR—To take your free market suggestion through, wouldn't we say that you can have as many collecting societies as people want to set up, and wouldn't one go further and say that there are restrictive trade practices exercised by the likes of APRA, who say, 'You can't get out of our membership except with'—I think it is three years notice. That is hardly free market, is it?

Ms Gillard—I am not here to defend APRA and processes of APRA.

CHAIR—But the processes of APRA and PPCA at the moment are partly restrictive, which totally advantage artists. So there are some restrictive market practices in place which advantage artists.

Ms Gillard—Yes.

CHAIR—So all I am saying is I don't think the argument is black and white one way.

Ms Gillard—No.

CHAIR—If you want a free market we can recommend a free market, but you might have 10 collection agencies which I am not sure will help artists ultimately.

Ms Gillard—No, I don't think it would help the small businesses either because there would just be more paperwork and divvying that million dollars up into five different packets.

CHAIR—Yes.

Ms Gillard—I am with you most of the way. I don't think anyone, on either side of this debate, wants to increase paper warfare, but the concern I have is that obviously small businesses can be very

articulate and it is hitting a nerve end. People understand that. What is not easily understood is the nerve end that is potentially going to hit the artists because you are dealing with such an intangible area, and with artists who are not used to be advocates for themselves.

Mr TONY SMITH—Actually just thinking about what you have been saying, and having heard so much evidence over the last couple of months, I start to wonder anyway whether artists aren't a bit like farmers and boxers; you have got all these other people in the chain before they get any money.

Ms Gillard—Yes, it is exactly that.

Mr TONY SMITH—By the time they get their money, if there is anything there, they must scratch their heads and wonder, 'What did I do it all for?' Perhaps that is where, in terms of the collection costs and so forth, maybe something really might come out of all this, that there is a way of reducing that aspect in terms of the dilution of the moneys that go to artists.

Can I just put something to you though, just as a general proposition—I noted your comments about small business and so on and education, but as a general proposition there would not be a fee unless there was a business, would there? You have got to have a business before you have a fee, and a person who starts a little shop and who puts stock into it and who pays his solicitor to draft a lease and then pays the monthly lease and all these other things on top of it because he is trying to generate income—and I am talking about the little person now, the real little person with the one-man barber shop, one-woman nail salon or whatever, playing the little radio in the back room. It is that sort of area where this has caused me anyway—as a member of an electorate that was pretty average and working class—a lot of trouble, and it is this notion that it is another fee on top of everything else they have got to pay. It is almost like the straw that breaks the camel's back for them; that is how bad it is.

So in terms of the overall scheme of things at the end of the day, are you prepared to move a little bit away from that hard-line position that you opened with, if you don't mind me saying so, that in effect the anger involved in the collection of a small amount and the cost of doing so, and balanced against the fact that these people are playing the music and are attracting potential consumers of that music through radios and so forth, that at the end of the day really isn't the focus a little bit better made on the bigger organisations or taking the focus right at the radio stations and so forth? What do you say about that?

Ms Gillard—I think that is where we were from the beginning. The big guys do contribute and yes, it would be lovely to get some more from the big guys, but the reality is that the product is—I am no politician, but I would assume that you can't legislate something and exclude certain sections or it gets too complicated. As I understand, small businesses have music going there for all sorts of reasons. They always could not have—and I don't know how you would ever police that, but I suppose it would be a crazy legislation to basically say, 'Well, don't have the music. If you say you're not going to have music, you won't have to pay your $35 a year' or whatever it is.

The hairdresser and the funky shops that use music as a major tool, they are the ones that are the primary target because they are genuinely using music as a real commercial asset, if you like. But if you look at music being played in the back storeroom or by people who have very boring jobs, one could argue, if you

looked at any music therapy studies and stuff, that music does huge things to keep these people focused in doing a boring job. Without that music you are not going to get the staff's workload done. I am sure that could be quantified on that basis. If you are talking about the little barber who doesn't really care whether the music is on or off, it gets a little unfair. It gets down to what legislation can you put in place that is going to—

Mr TONY SMITH—Well, just exempt people who are having it for private use, I suppose.

Ms Gillard—But with the little barber, it isn't for private use if he has got it in his shop.

Mr TONY SMITH—He would argue that it is, because he pays the lease, he provides all the infrastructure in the shop. He is trying to earn a living and he is saying, 'These people are coming along and telling me I'm not allowed to play a radio for my own benefit.' It is pretty hard to argue with that, isn't it?

Ms Gillard—It is if you don't understand the whole process of what made that sound on that radio, that someone put that song out and someone deserves to get some money back.

Mr TONY SMITH—But he is providing. You see, there is always the contra to it. Where he is getting something for nothing, you might say, he is also providing something for nothing, you see. So it balances out.

Ms Gillard—Why is he providing something for nothing?

Mr TONY SMITH—Because he is providing a space of air that he pays for, which other people can hear, and can then say, 'Well, I like that song, I'm going to go and buy that.' I see it anyway arguably that that is where it cuts out in relation to the little bloke or the mechanic under the car and those sorts of things. That is where I have found in this inquiry, the artist can't seem to see that. But if you are looking at it from the point of view of someone who has paid for that space and is paying to have a business, then it cuts both ways. In fact an artist is going to make much more money, I would have thought, from having people say, 'That's a great song, I'm going off to buy that,' than the piddly little amount that he or she is going to get from APRA. That is the argument.

Ms Gillard—I am sure someone has done studies on it, but I do think the issue of the mechanic under the car all day working away is probably going to be much more efficient at working if he has got music on than if he hasn't got music on.

Mr TONY SMITH—But is that an argument for regulating that bloke who is running his own business?

Ms Gillard—I know we are getting down to tintacks, but the issue for me is that I do believe the music provides commercial gain because it creates a certain ambience in that environment that encourages workers to produce better work.

Mr TONY SMITH—But what is the evidence for that? We have never heard any evidence about

that; we have heard people say that but we haven't had any evidence at all?

Ms Gillard—Have you heard of Muzak? You know, the supermarket stores that use music. It is quite scientific the way they can get you to buy all sorts of different products in different colours because it generates various consumer behaviour.

Mr TONY SMITH—Yes, you are talking about a concerted sales pitch with Muzak. That is what you are talking about. But that is not what I am talking about. I am talking about purely someone having a radio for information, news, the odd song or two in a private business. You would need to persuade me very strongly to make me accept that that is providing a commercial benefit to him or to his employees. You really need to have some evidence to persuade me about that rather than just say, 'Well, it must have a benefit.'

Ms Gillard—The only way we could prove this is to have a trial, where you would have a month in this barber shop with music on and see what sort of results you get and a month without the music, and I bet you that at the end of the month you will have a less frustrated barber, someone who hasn't cut quite so many beards—

Mr TONY SMITH—I see I am having trouble here, but can I put to you what the manager said to me—as a last question, Mr Chairman—and he said, 'We would rather have the radios on than off.' My constituents are saying, 'Righto, we will turn them off.' So what would you prefer?

Ms Gillard—To have the radios on or off? I know it is not possible but I do believe that there are some small businesses where there is quantifiable commercial gain from the music played, and if you could separate those out from the little guys that we are talking about, then I think it is a fair and equitable legislation. But as I understand it that would be impossible. How can you decide whether it is one—

Mr TONY SMITH—We will find a way.

CHAIR—Can I thank you for your submission and also coming to discuss it with us today. Moved by Mr Thomson that a subcommittee comprising himself and the chairman be established for the remainder of this hearing.

Mrs ELIZABETH GRACE—You have got to have three.

CHAIR—There being no objection from Mr Smith, so resolved.

[4.24 p.m.]

MURPHY, Mrs Marie Christina, State Coordinator/Editor, Australian Songwriters Association Incorporated, 85 Wootten Road, Werribee, Victoria 3030

WAUGH, Mr Michael John, Member, Australian Songwriters Association Incorporated, 85 Wootten Road, Werribee, Victoria 3030

CHAIR—Although the committee doesn't require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the house itself. The giving of false and misleading evidence is a serious matter and may be regarded as a contempt of parliament. We are in receipt of your submission to the committee. Would you care to make some opening comments?

Mrs Murphy—I am not real good at this and I don't know what is expected, but I just did a small background of the ASA. The Australian Songwriters Association is a national nonprofit organisation founded in 1979. It supports and promote Australian songwriters. It is run by a volunteer committee of which I am one. The ASA presently has around 482 songwriter members and a further 52-53 honorary members from affiliated associations, educational areas, recording studios and music media, etcetera. Whilst this is not a huge membership it is a very diverse one and we believe we have a credible knowledge of the present situation of Australian songwriters.

Of that membership approximately 60 to 70 per cent are working within the industry on a regular basis and a further 50 to 60 per cent have self-funded product available. I have asked one of our members to accompany me today—Michael. He will be able to give you a better view of the cost, both financially and personally, of acquiring that product, and an idea of how much of that cost he recoups. You will understand from this our concern with any reduction of royalties from any areas.

Songwriters primarily, from our understanding, exist simply out of their dedication and determination, not from any moneys they receive. We don't know how long that dedication will continue for. Yes, the royalties are not much; they are not huge but they are very important, and to take any of them away from our writers—as Sue said, the recognition is very important. Also our concern is where does it stop? If you start taking the royalties away from radio air play where do you take it away from next?

One of the things I said in my submission is a vast majority of the hotels would come under the small business area. Would we then be looking at the danger of them putting in a DJ, taped music, in preference to a live band? For God's sake, our songwriters don't get enough work now. A very large majority of them are working for nothing; the only thing they get back for that hard work is their APRA royalties from a live performance or any radio air play they are likely to get. That is our major concern. We don't want to see them lose any royalties from any area.

CHAIR—Mr Waugh, do you want to add anything?

Mr Waugh—Primarily I am a songwriter. I have a family to support. I have a three-year-old son at

home. I work part time, obviously to support myself through this process. I see myself as a small business, and the income derived from that small business is piecemeal. I receive some income from performing and some income from royalties in terms of the live performances that we do. We also have a long-term plan, and one of the potential sources of income for us in the future will be these royalties derived from radio play as well.

CHAIR—There are royalties that are derived obviously from the radio stations for the broadcasting of music, and that, I take it, is a major part of the royalties that are paid. When we look at the figures—and I know they are only ballpark figures supplied by APRA—and we look at the amount of money which is collected from small business by way of licence fees, and then you deduct the cost of collecting that, as I said to the previous witness, in the overall amount of money I think it was about $1 million. I am not suggesting $1 million is not a significant amount of money, but in comparative terms it is a fairly small part of the total money collected by way of royalty fees. So in terms of its significance for artists, it is not the same as if anybody was suggesting that radio stations shouldn't pay royalties, for example.

Can I ask you about the proposal that APRA has put to us, which is basically that, so far as business is concerned, royalty fees not be collected for the playing of a radio on a business premises and that the licence fees or the royalties paid by radio stations be adjusted upwards accordingly so that the artist—the songwriter for example—is not out of pocket because of any loss of income from the small business, but that royalties still be paid in relation to recorded music, whether by tapes or CDs or records or whatever. So it is to deal with this area of the playing of radios in businesses, which is obviously causing some angst, otherwise we wouldn't be sitting here. Do you have any comment about that?

Mr Waugh—This is a proposal that APRA has put forward?

CHAIR—This is a proposal which APRA has put forward. To add to your background, the Council of Small Business Organisations, I think it is fair to say, has endorsed it and most of the other business groups that have appeared before us have said, yes, that would solve most of the problem. The condition is, of course, that the licence fees be adjusted at the point of being charged to the radio station so that artists aren't out of pocket as a consequence. It is trying to find a practical way to solve what seems to be the cause of the problem whilst still protecting the income of the artists.

Mr Waugh—Is this a blanket fee that would affect larger supermarkets, for instance, as well as the smaller barber shops?

CHAIR—No, it only applies to the radio. As I said, it doesn't apply to recorded music. So if a business is playing recorded music, whether it is the hairdresser or Coles New World, it would still have to pay licence fees in relation to the playing of recorded music.

Mrs Murphy—So this is just radio?

CHAIR—It is just radio, yes.

Mrs Murphy—I haven't got a problem as long as the songwriters are getting their income. I wouldn't

have a problem with that. I would think it would be less work for the collection agency, APRA, anyway.

CHAIR—There is a substantial cost. As I said, they are ballpark figures that we have received from APRA, but there is a substantial cost of collection if you look at those figures. I think the total amount collected from small business was about $1.7 million or $1.8 million, and the cost component was a fair percentage of that. That is why I said we are talking about maybe a ballpark figure of about $1 million.

Mrs Murphy—We understand. A large percentage of our members actually have a small business. Our own president has a florist's shop. A lot of them actually have a business or a working business or have relatives in a business. We understand the situation they are looking at, but, as I said, most of our members have got recorded product. The average for that is around about $5,000 for 500 CDs.

CHAIR—Can you explain what that is?

Mrs Murphy—They are self-funded. They will go and do their own CDs.

CHAIR—And that is what it costs them to make 500 CDs?

Mrs Murphy—That is the bottom line, and they don't get terribly good quality for that. That is the average, to my knowledge. It goes up and down. It depends on where they get it done.

CHAIR—That sounds cheap.

Mrs Murphy—Yes. As I said, that's the bottom line. That is very cheap, and that's not great quality at all. They can go up to a lot more than that.

CHAIR—The manager of Yothu Yindi in Darwin told us that the recorded cost of the latest album was $400,000 or so.

Mrs Murphy—Yes, that doesn't surprise me. I am talking about the rock-bottom price, when a battling little garage band goes to the brother-in-law's studio or something and does 500 CDs. That is the rock-bottom price. But from that $5,000—and it can go up to $200,000—the only income they get back is what they might manage to sell at their live gigs, which is not very much at all, any radio airplay they may get, or live performance fee. They get around about $1 a song for live performance, so even if they were to sing 10 of their original songs in a week—and that is highly unlikely, given our public's predisposition to wanting most bands to play American covers—it would take them years to recoup the cost of that.

The only reason I am telling you this is to try to give you some idea of why we get paranoid about taking away their royalties or them losing any rights. They really are battered. They get battered around a lot now. We have got some great talent in this country and we don't want to see them get belted any more than they are.

Mr KELVIN THOMSON—You said in your submission that—or you made the comment rhetorically perhaps:

How many of those businesses—and their music suppliers . . . would be prepared to guarantee a 70 to 80% Australian content?

When we were talking with APRA we asked them about this question, because one of the complaints we get from the small business side is, 'I'm a struggling small business, paying royalties that end up with the likes of Bruce Springsteen and so on, multimillionaires.' So we say to them, 'What are you doing on this front?' and their response is, 'Well, we are part of international agreements that the copyright arrangements are based on. If we don't fulfil these agreements then we will be the subject of international criticism and retaliatory action and will have problems in terms of collecting overseas royalties, et cetera.' So I do get the impression that at that level there is not a lot of enthusiasm for trying to pursue an Australian content approach to some of these things.

Mr Waugh—In terms of where I would stand on something like that, agencies like APRA and the association have been incredibly supportive to me as a small business. They have had a lot to do with educating me about how to become more cost-effective, how to become more marketable and how to get our product out there. My concern about any cuts to the sorts of moneys that come through those agencies and that are redistributed amongst the songwriters and artists is that we are perhaps undercutting that ability to educate ourselves and to make ourselves more marketable against the like of Bruce Springsteen. It is about education. As a performer and songwriter myself, I am competing with Bruce Springsteen. Obviously he has a machine behind him which is promoting him to an extent that I could never hope to be.

Mrs Murphy—That's right. He has a huge marketing and financial machine behind him that Michael hasn't got.

Mr Waugh—And as a business person, as I was saying before, all of my income is piecemeal. That $10 a week might be small, but it's that, with the $300 that we get paid to play per week, and with any money that we would get from royalties from radio play. It might seem small, but it means a lot more than that.

Mrs Murphy—One of the reasons that Michael's share is small is because the radio stations are playing predominantly overseas material. We have been fighting for this for years; so has APRA and so has nearly everyone I know. For God's sake give us more Australian content. It is out there. We can prove it is out there. The quality CDs are out there, but the airplay is not there. So there would be a much bigger percentage for our artists if there was more Australian material played on the radio.

Mr KELVIN THOMSON—So are you saying that APRA has been pushing for Australian content?

Mrs Murphy—Well, APRA supports us, for a start. They have given us quite a bit of support over the years. In that way to my knowledge they do. In that way they give us the support. They will do things like distribute our material through their newsletter, which we otherwise couldn't afford to do. We simply couldn't afford to do it. And, as Michael said, I believe we have an important role with the songwriters in this education and support; more support than anything. They have got a support base there.

Mr Waugh—And in terms of the sort of awards that they put on, they give a higher profile to

Australian songwriters. Aprap, which is the magazine that APRA sends out to its members, informs us of overseas songwriting contests so that we can enter those and begin to develop a bit of a profile overseas as well.

Mrs Murphy—And there is an incredible variety of songwriters in this country. We have got members ranging from doctors to university professors to truck drivers. It is very varied. For some of them the royalties are not important. For others they are vital.

CHAIR—This is not the subject of our inquiry, but why is it that there isn't more playing of Australian content if, as you say, the quality is there and the works are being produced and performed? What is the problem?

Mr Waugh—I think it is about visibility. We can't be as visible as Celine Dion.

CHAIR—It is just the size of the market, the players in the market.

Mr Waugh—Exactly. One of the issues, for instance, is that if my songwriting made it and we had a gold record in Australia—that is 30,000 units—it is not a hell of a lot of money. When you work out the percentage of just the performer's fee, I think it is $3 a unit, so we would be making, after paying off the cost of recording, something like $60,000 between three members. That would be $20,000 each from seven years of very hard work. And that is if we are that successful within this country. I don't know what the figures are for a gold record in America or England, but they would be substantially higher. Because you have that volume of material going out, you can afford to make your artists more visible.

CHAIR—Can I thank you for your submission and also for coming along today and discussing it with us.

[4.40 p.m.]

RUDD, Mr Michael David, Professional Musician and Songwriter, 5 Granville Street, Burwood, Victoria 3125

SARCICH, Mr Paul, Professional Musician and Tertiary Lecturer in Music, School of Music, Victorian College of the Arts, 34 St Kilda Road, Melbourne, Victoria 3006

CHAIR—Welcome, Mr Rudd and Mr Sarcich. Although the committee doesn't require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrants the same respect as proceedings in the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of your submissions to the committee. Would you care to make some opening comments?

Mr Rudd—Yes. I am a professional musician and songwriter. I have been in the business for over 30 years and a good deal of that time I have been a songwriter. I have made some sort of living out of being a songwriter and performer. I represent the bulk of APRA membership in that I don't make a living out of royalties. It is part of my income but a very essential part, and APRA's activities in collecting on my and others' behalf are essential for our wellbeing. I look forward with anticipation to the cheques arriving, and with some satisfaction as well. I think there are points that can be made for the support of the local industry as a cultural input to the country, because I think there is something to be said for supporting musicians who are making a cultural contribution to the country. That is about it.

Mr Sarcich—Yes, I would like to echo those remarks, although I am in a slightly different position to Mike because I suppose I represent what might be called classical composers rather than songwriters. Our copyright royalty situation is, if anything, even smaller than songwriters who work in a more commercial field. Nevertheless, we are very aware of our reciprocal rights and responsibilities with regard to relationships with other countries, because our kind of music, although it is not commercial, although it doesn't make money at all overall, is very much part of many international exchanges at various levels; everything from travelling performance groups, to material swapped over the Internet, to the reciprocity between music centres, which is a very growing area right at the moment. So even though in commercial terms we may be very small beer, it is very much a stronger thing on the cultural level.

CHAIR—Can I ask you about the proposition, which you have probably heard me repeat—or at least Mr Rudd has this afternoon—that APRA has put forward that, purely in relation to broadcast music—radio music—the Copyright Act be amended along the lines of the Canadian Copyright Act, so that licence fees wouldn't be payable by businesses for the playing of radios in the business, and that there would be the condition that there was a corresponding adjustment upwards of the licence fees paid by radio stations for the broadcast of music. Do you have any comments about that?

Mr Sarcich—If a fair balance can be struck on paper, that is a fair enough solution. First of all, there is an international law issue here. In other countries it has been long accepted practice for this kind of licensing. If APRA has a failing, it is that it is amazing that it is the end of the 20th century before they have got round to addressing this issue. It has been standard in places like England for decades, and I have said in

my written submission where you can just go around and see PRS stickers on restaurants and hotels and businesses everywhere. I think in this case it is simply a matter of Australia catching up to what is standard practice worldwide.

Mr Rudd—I agree. I think it is fairly obvious the net is widening as far as APRA is concerned, and small businesses are reacting because they haven't struck it before. It is not culturally ingrained, so people who are striking it for the first time after happily conducting their business with radios blaring for the last 40 years are naturally kicking up about it. I can understand it, and there is a philosophical issue involved, but I would have to say there is an aesthetic there as well, because these people are making a choice, maybe on behalf of their customers, but they are making an aesthetic choice as to what will be heard whilst the customer is present, and/or workers. They have made a choice that their work is going to be improved by the addition of music.

Having said that, I think it is probably a solution to a problem and, as such, I think it is a good idea. If people accept it, and if the radio stations, for instance, accept it without qualms, which I would find pretty amazing—

CHAIR—We haven't heard from radio stations yet, Mr Rudd. Their submission said they thought the inquiry was—what was the exact wording—not relevant to them, but I suspect it may have become relevant.

Mr Rudd—Yes, it will, yes.

CHAIR—We won't worry about the exact wording. But anyway, leaving aside the radio, I understand your position. You have got property rights, and basically you say you are entitled to them, that there are international agreements about this, but you would concede if we can get around the problem and protect your income in some other way, that may be worth looking at.

In terms of recorded music then, leaving aside the radio for the moment, the difficulty seems to be that there is no clear definition of what a public performance is. There is a strict technical, perhaps legal, definition, but it hasn't been tested in all circumstances. Then there is the grey area where if somebody has got a cassette player playing in the back of the shop, does that constitute a public performance or not? One of the ways in which we have been trying to look at this, and it is for the purpose of discussion, is to say you can probably divide it into three categories.

The first is what is purely private use, for instance, in the room out the back of the cafe where somebody is cutting up the bread and making the sandwiches and salad rolls, or whatever, which is away from the shop. If they are playing it there whilst they are doing that, that might be regarded as private. The second is, if you are playing music—to take your example, Mr Sarcich—in a restaurant by way of background ambience music, well, that is ambience. Or it might be a jeans store that is blasting out the latest whatever. I am afraid I am not up with whatever. Then there is the third category, which is the use of music which is probably quite unambiguously part of the commercial operation. The best example of that I think is probably the music used in aerobics classes in a gym. I am not aware of too many aerobics classes without music of a certain kind of beat that goes with it.

The question then is, is that a useful characterisation that would help us tease out the difficulty a bit further, and where do you draw the line? Do you say between purely private and ambience is the difference between where you don't pay a copyright and you do, or is it between ambience and a more commercial use?

Mr Sarcich—There is a bit of a legal minefield there obviously, if these terms haven't been defined, but I would have thought that one way around it is that you in fact license a venue. You license that building, if you like, that space, whether it is front of shop or back of shop. Somebody out there cutting the sandwiches may appear to be listening in private, but that could be very much like people playing music to workers on a production line, which I don't see as very different to playing music to workers in a supermarket. It is all done to induce a mood. It is all done to aid the process.

CHAIR—Let me give you a real example. A block or two away from where I live there is a little strip shopping centre and there is a milk bar. The milk bar is one room and you open a door from behind that and it goes into what is quite obviously, from my observation, the lounge room of the residence, which is a couple of rooms behind the milk bar, and then upstairs. I can't remember whether this is the case, but if the proprietors of that milk bar who live on the premises have the CD playing in their lounge room, which happens to be able to be heard out into the milk bar, haven't they got a fair argument for saying, 'Look, this is really private enjoyment,' even though when they open the door to walk out I, as a customer, can hear it? That is the difficulty I have with your premises argument, because there are a sufficient number of premises, it seems to me, where there is quite clearly a dual use.

Mr Sarcich—I think the kind of milk bar you are talking about, which we are all familiar with, is a very clear dual use. There is a living space and there is the commercial space. I don't personally have an argument with that, because by and large milk bars don't go in for ambience and inducing music. They are not there to induce that sort of thing in their customers or, indeed, themselves necessarily while they are at work in the front of the shop. They are too busy watching kids, stopping them nicking sweets or something.

CHAIR—Yes.

Mr Sarcich—But for any purely commercial venue, I can't see an argument about the venue itself being licensed, whether it is preparation rooms out the back or selling points at the front.

CHAIR—So would you say leave the law as it is, and then it is open for challenge? If somebody says, 'This is purely private,' it would be for them to, in effect, show it is purely private?

Mr Sarcich—In effect, yes. If they can prove a strict private-commercial subdivision, well, fair enough. Let's face it, in the case of a small milk bar, it is not going to be up to much in the terms of—

CHAIR—I think in fact the onus strictly legally would be the other way. It would be up to APRA, whoever was claiming the licence, to prove that there was some public performance.

Mr Rudd—I would think APRA would probably not target a place like that. I would say that has gone beyond incidental to accidental music, that situation.

CHAIR—I think the difficulty is, one can't ever be sure of this. We hear evidence second-hand, but if there is some substance to the evidence that we have had, then it may well be that APRA has targeted places like that, which I think could be part of the angst that has arisen.

Mr Rudd—As I said, I think the net is widening, and I am sure they are going to include people that they didn't mean to include. That is part and parcel of widening the net. There are people they are going to miss out on too, and I think that has probably led to a disparity of reactions from people.

Mr KELVIN THOMSON—Mr Rudd, years ago you told us, 'Someday I'll have money.' Do you?

Mr Rudd—That actually was me for my entire career.

Mr KELVIN THOMSON—It did not turn out to be a self-fulfilling prophesy?

Mr Rudd—No, it should have been, 'Sunday I'll have money.'

Mr KELVIN THOMSON—Sunday, yes. We understand the importance of the rights of intellectual property for performers and the importance, as you and others have pointed out, of that to you in enabling you to continue work. I guess the issue for us is trying to recognise that, and enable it to be collected in a way which, if we can, causes less grief and angst and so on than the present method of collection appears to be doing. The chairman has asked you about your response to propositions that have been put forward by APRA, but in terms of understanding what the committee is trying to do, I think it is worth saying that.

Mr Sarcich—Yes. The licensing systems, as far as I am aware of them, in other countries are in essence very simple. Reading into the documents that I have seen about APRA's request, it is also as simple as could possibly be, in that a venue gets licensed. Their rates seems incredibly reasonable on an international level, and these are tax deductible expenses. So in essence, on our behalf, they are not asking very much at all.

Mr KELVIN THOMSON—What is your reaction to the observation that in the US and Japan there are exceptions, and the Canadian copyright law being suggested covers different situations apparently applying to radios and so on.

Mr Sarcich—Unfortunately I haven't read the literature, so it is very hard to comment without knowing what those exemptions are. But there are always exemptions in law, aren't there? If a legal structure was set up in which such things were clear, then you might have to have one or two test cases in courts to tidy up any loose ends. These licensing systems have been in place now for a considerable time in other countries. I fail to see any reason why they couldn't be made to work here.

Mr KELVIN THOMSON—On the other side of this, of course, small business finds it difficult to support the idea that they are going to have to pay a licence fee to do something which an equivalent small business in the United States or certain other places apparently does not have to pay.

Mr Sarcich—That is a rather a specious argument on their behalf, I think, because there are a lot of

things that we can do here which we you are not allowed to do in the United States.

Mr KELVIN THOMSON—All right. It impresses them. Are you confident that APRA is doing its best to educate its members and the licensees about copyright and how licensing operates and how the money is distributed? We do come across an awful lot of confusion, or just plain ignorance, about how it all works.

Mr Sarcich—It is hardly surprising. It is an incredibly complex area of law, amazingly complex. I wouldn't claim to have anything more than a composer's working knowledge of it. Being such a specialist subject, I think APRA does its damnedest to help people to understand this amazingly complex area. Just getting the concepts across, never mind the actual framework, is hard enough.

CHAIR—Can I thank you for your submissions and also for coming along and discussing them with us this afternoon. We appreciate that.

Mr Sarcich—Thank you.

CHAIR—Can I thank all those who have been in attendance today, and thank the reporting service.

Resolved (on motion by Mr Kelvin Thomson):

That the committee authorises publication of the evidence given to it at the public hearing today.

CHAIR—I now declare this meeting of the committee closed.

Committee adjourned at 4.57 p.m.