HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Copyright, music and small business

SYDNEY

Tuesday, 17 March 1998

OFFICIAL HANSARD REPORT

CANBERRA

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Members

Mr Andrews (Chair)

Mr Barresi	Mr Price
Mrs Elizabeth Grace	Mr Randall
Mr Hatton	Mr Sinclair
Mr Kerr	Dr Southcott
Mr McClelland	Mr Tony Smith
Mr Melham	Mrs Vale
Mr Mutch	

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

Copyright, music and small business

SYDNEY

Tuesday, 17 March 1998

Present

Mr Andrews (Chair)

Mr McClelland — Mr Tony Smith

Mr Price

Committee met at 10.15 a.m.

Mr Andrews took the chair.

CHAIR—I 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 witnesses, members of the public and others who might be attending this meeting of the committee. 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 the playing of music on commercial premises.

The inquiry has aroused some considerable interest around the country. We have taken evidence at hearings in all capital cities and gone to regional centres in Queensland. As well as these public hearings, the committee has received over 200 written submissions. We anticipate that this is likely to be the final day of evidence taking for the inquiry before the report drafting begins. In fact, we hope that a report, or at least an interim report, will be tabled by the end of June.

[10.16 a.m.]

BELL, Mr Anthony Edward, Chairman, Federation of Australian Radio Broadcasters, Suite 10, 82-86 Pacific Highway, St Leonards, New South Wales 2065

CAMPLIN, Mr Ronald Barry, Vice-Chairman (Country), Federation of Australian Radio Broadcasters, Suite 10, 82-86 Pacific Highway, St Leonards, New South Wales 2065

MEREDITH, Ms Tracey Geraldine, Copyright Consultant, Federation of Australian Radio Broadcasters, Suite 10, 82-86 Pacific Highway, St Leonards, New South Wales 2065

WALLACE, Ms Gay Michele, Director, Federation of Australian Radio Broadcasters, Suite 10, 82-86 Pacific Highway, St Leonards, New South Wales 2065

CHAIR—The committee is in receipt of your submission of 10 February 1998. Mr Bell, would you care to make an opening statement or some opening comments?

Mr Bell—Certainly. I am the Chief Executive Officer of Southern Cross Broadcasting Australia Limited. Southern Cross has television and radio stations around Australia including, in radio, 3AW and Magic 693 in Melbourne and 6PR, 6IX and 96FM in Perth. I am also Chairman of the Federation of Australian Radio Broadcasters, the industry association of commercial radio broadcasters. With me are my fellow directors: Ron Camplin, Vice-Chairman, Country, who owns and operates two commercial radio services in Bathurst; Gay Wallace, General Manager of Corporate Affairs at the Austereo Network; and Tracey Meredith, who is former general counsel of FARB and now consults to the industry on copyright matters.

This statement is made on behalf of the members of the Federation of Australian Radio Broadcasters. Currently, there are 217 services licensed to broadcast throughout metropolitan and regional Australia. The committee is aware of the strong opposition by broadcasters to the proposal that they should pay the licence fees of businesses in these circumstances.

APRA has been in business since 1926, and equivalent statutory provisions have been in force since 1912. We ask why this issue has only arisen now. It appears, based on the submissions and evidence provided to the committee to date, that it is largely the approach adopted by APRA in pursuing its members' rights together with poor public understanding of copyright that has led to this situation. APRA formulated and implemented a disastrous marketing strategy and has failed to revise its approach, notwithstanding significant concerns expressed by the community and its customers. The annual fee of $37 is a small fee. It could have no financial impact on any of those small businesses.

APRA is simply attempting to abrogate its responsibilities and place the onus on broadcasters rather than address the issue properly. Contrary to APRA's inference, no such scheme operates in Canada; in fact, APRA's equivalent in Canada, SOCAN, has been lobbying for the repeal of section 69(2) for some time. The act of broadcasting is specifically excluded under the act to constitute a performance and therefore, as a matter of law, broadcasters do not ever cause a performance in public merely by broadcasting musical works. Moreover, they have no control over a third party who chooses to use radio in a way which gives rise to a public performance.

The proposal contravenes the Spicer committee recommendation. The Copyright Act 1968 was based on that committee's report. It sets a dangerous precedent. Why then, for example, should broadcasters not be liable for the unauthorised reproduction by the recipient of a musical work or a film contained in a broadcast?

A scheme of this nature may also constitute a tax on broadcasters, as set out in 3.11 of our submission. Furthermore, it is inequitable vis-a-vis businesses that use other forms of recorded music, such as muzak, CDs or tapes. It also cannot distinguish between businesses that use radio services that contain copyright music under APRA's control and those that do not or that contain only a minimal content. The scheme may lead to other users of copyright material seeking an exemption on similar grounds.

We submit that there are significant practical difficulties with such a scheme. How would the number of users be known? How would the Copyright Tribunal determine a reasonable fee? How would use be taken into account? Would broadcasters be able to refuse a licence? Against whom would proceedings be taken in the event of default of payment? It does not solve APRA's need to license small businesses that are playing CDs or tapes.

The committee could give consideration as to whether a solution can be reached by APRA reviewing its marketing approach. APRA's existing scheme lacks normal commercial attributes such as payment by credit card, extended licence terms at a discount, and user friendly renewal procedures. There has been an insufficient education campaign on the part of APRA. APRA has no code of conduct; this should be developed in association with the ACCC and the Attorney-General's Department. APRA has made no real effort to license through the relevant small business associations throughout Australia. This could be approached as a joint venture by APRA and PPCA, where appropriate.

In the alternative or in addition, there could be legislative limitations placed on the public performance right where the performance takes place by reception of a broadcast. It is debatable whether a number of circumstances instanced by submitters should be regarded as a remunerable performance in any event.

There may be good public policy grounds for further balancing the rights of the copyright owner and the rights of the public in these circumstances, as has been proposed

in the USA. Certain exclusions—where, for example, the radio is listened to at work by an individual in a confined environment—may well be warranted. This would not appear to conflict with obligations under the Berne convention or the existing act.

In summary, there are substantial legal, equitable and practical reasons why this proposal should be discarded. To endorse it may have wide and unforeseen ramifications, given that it would amount to a complete departure from accepted domestic and international copyright precedents.

CHAIR—Your understanding of the Canadian situation is that, whilst the provisions that have been referred to are on the statute books in Canada, they have never been used. Is that a fair summary?

Mr Bell—That is correct.

Ms Meredith—Yes, that is right.

CHAIR—We have been trying to get on top of it too. Whilst we are still making further inquiries, it seems, on the basis of the material provided to us so far, that indeed that is the case. In fact, it seems that back prior to the Second World War there was some attempt to implement that system in a practical way. But it resulted in, I think, a licence fee of £1,000 or $1,000—it was probably dollars—being struck for the entirety of Canada, which was somehow split amongst the broadcasters. But it has never really been revived in any way.

Ms Meredith—No, that is our understanding, and that has been gained from the Canadian broadcasters. I think they were somewhat surprised to hear of section 69(2) being raised, because it has not been for a long time.

CHAIR—I understand what your objection is. Your objection is basically that there should not be in place a legislative scheme that shifts liability from those upon whom it should properly fall to another entity. That is it in a nutshell, is it not?

Ms Meredith—Yes.

CHAIR—Perhaps Mr McClelland has questions about that. I understand that quite well. You put some options as to the way in which this could be dealt with and the one I wanted to tease out was this notion of a performance in public, because it seems to me that this is at the crux of the problem arising in the first place. It is the person in a cafe playing the radio out in the back preparation room who says, 'I should not be paying a licence fee because this is not a performance in public.' You made reference to the proposals before the United States Congress. There is a proposal which you appended to your papers from Senators Thurmond and Helms—

Mr Camplin—That is the Fairness in Musical Licensing Act.

CHAIR—That is right, for which there is a long history of different legislative proposals being put to the United States Congress over the last few years. There would have to be an admission fee charged to specifically see or hear the transmission or the transmission is not properly licensed. That seems to me to be extraordinarily wide; that is, it would take out not only the sole business proprietor or operator listening to the radio but it would also cut out the payment of royalties in a whole lot of other circumstances as well. I do not know whether you have any comments about that.

Mr Bell—Not specifically.

CHAIR—If the copyright legislation in Australia were to be changed—and you made some suggestions about changing that in terms of what constitutes a public performance—would you have any specific suggestions about how that could be done?

Ms Wallace—There is a proposal—it is actually a voluntary agreement—that is in place in relation to the National Association of Broadcasters members in the United States. It only applies on a fairly limited basis because it applies to retail stores and to eating and drinking establishments. But it may be that we could explore a solution along those lines. The essence of it is that it takes those establishments and it looks at a formula of gross lettable space and combines that with a maximum number of speakers or TV screens. If you excluded from that any premises that had an admission fee then you would be starting to get some parameters, if you like, for a solution to perhaps put some exclusions in the legislation.

CHAIR—As I understand it, though, the problem with that approach is that the Europeans are jumping up and down now and saying that that is in contravention of the Berne treaty and that some action should be taken before the World Trade Organisation to have that declared in contravention of Berne.

Ms Meredith—Is that in relation to the proposed legislation?

CHAIR—To the current legislation and, by extension, to the proposed legislation as well.

Ms Meredith—What Gay was talking about, as we understand it, was an arrangement that exists voluntarily with BMI, which is the second largest collecting organisation in America and equivalent to APRA in Australia. The way in which they have addressed this issue is to set up, voluntarily, circumstances under which they will not pursue—if I can put it that way—certain retail establishments.

We have an extract from a NAB, National Association of Broadcasters, document which we are not quite at liberty to give you because we are not sure what its status is,

but it does outline the history of that. It involved some proposed legislation in the States in 1995 which never went through. I suspect that might have been the precursor to the current legislation. Then BMI voluntarily, as we understand it, continued on with some of the elements of that legislation. As I say, it does not have the force of statute, but it seems to be an arrangement whereby BMI says, 'Under these circumstances we will not pursue these sorts of establishments.'

CHAIR—I suppose I was thinking of something along the lines of this: the Copyright Act could say—this is not very elegant drafting; this is off the top of my head—something to the effect that for the purposes of this act the broadcasting of a radio for the sole enjoyment of a single person in a commercial establishment is deemed not to be a public performance. It could even go on and say that for the purposes of that provision it is just being played by a radio, not by a number of speakers as well. What I am trying to get at is that if you are just playing one radio for one person, even though it is on a commercial premises, I understand that under the Berne Convention we could deem that not to be a public performance. It is much narrower than what the Americans are doing.

Mr Bell—It is for personal consumption.

Mr Camplin—That is the view that I would hold. I am here as a very small market operator but I have been involved in this industry for 50 years, mostly in regional areas, and I speak as someone who is on the ground. The complaints that we received from small business were almost all from people who had taken the radio to work to listen to the radio for themselves, not for a public performance. They just did not understand this whole situation. The radios have since been turned off or taken out. Some of them still do not understand and so they put music on instead. It is very confusing in a small market like mine. There has been a lot of publicity, a lot of newspaper coverage. I have always believed that if someone can listen to the radio in the kitchen and follow it to work in the car and then turn on the same program in their office at work, it ought to be regarded as personal listening. I cannot see that that is now, after all these years, being sought to be a public performance. However, I do agree that copyright owners are entitled to a fair and reasonable return on their works where it is a public performance. Broadcasting stations already pay a very substantial amount for the right to broadcast. It is one of the largest costs that my small station has. I believe that this new cost is simply double dipping. I do not know that there is anything further I can say at this stage.

CHAIR—You are obviously speaking of a particular market and particular demographics and so on. To what extent is the radio used for anything other than public enjoyment? One of the suggestions made is that radio is used to create an ambience in some retail premises. What is your experience of that?

Mr Camplin—I cannot think of a single instance in my town where the radio is used to create an ambience. I have heard music being played in a Woolworths store, but it

certainly has not been my radio station.

CHAIR—You are saying it is recorded music.

Mr Camplin—Yes, recorded music. I know that there are many radios on in small businesses but they are usually tucked away in a corner. They are there for the listening enjoyment of the proprietor or staff of the store. More often than not the radio is behind a desk or in a corner. If it were attached to several large speakers and able to be heard halfway down the street then I would agree that it had a different purpose. But most of these people are simply listening to the radio for their own personal enjoyment.

Mr Bell—Even the research we do on workplace listening does not help because workplace listening can be private consumption through walkmans and headphones where it is not heard by any other person or in individual offices that are not open to the public, et cetera. Certainly, we could never record, through our normal research on workplace listening, listening by the general public where they have access to it because it is a personal diary system of research. You complete a diary on listening habits throughout the day.

Ms Meredith—We agree with your comment that the problem is where to draw the line. Something that takes the line back from where it currently is, which is individuals doing what they have done previously in their homes and translating that into their work environment, is probably worth looking at. Looking at the submissions, the transcripts and broadcasters' personal experiences we agree that the problem that people have is that they cannot distinguish when they are simply using their own radios in the same way that they would in their kitchens.

CHAIR—My concern is that if you draw the line where the Americans are proposing to draw the line then it seems to me that the Europeans are going to jump up and down, and there is going to be an action under the Berne convention. Whilst one cannot predict what the outcome of that may be, it seems to me that if you go as far as the Americans have there would be reasonable grounds for suggesting that the Europeans would be successful.

Mr Camplin—I believe that it is APRA's responsibility to police that.

CHAIR—You are very critical of APRA in your submission and in what you have said this morning. What do you think APRA should be doing?

Mr Camplin—APRA does very well from the broadcasting industry. As you can see from our submission, the increase in revenue that APRA has received over the years has been far beyond any other increase we get through CPI increases. When I first came into this industry I attended my first convention in Orange in 1955 and APRA was on the agenda on that occasion. In those days we paid one per cent of total revenue. Over the

years APRA has been extraordinarily successful in increasing that percentage. Today my FM station pays 2.66 per cent and my AM station pays 2.33 per cent. It is a very substantial amount for a small industry—and I am small business—in a small market. Those increases are far beyond the normal increases that we pay in other areas.

APRA has been very successful in finding new ways to increase their percentage of our revenue. I have no objections to anyone getting a fair and reasonable increase based on a CPI increase but to continue to get a far greater percentage of our revenue has been, for all sorts of reasons, very much in APRA's favour.

Ms Wallace—It is probably worth while adding—and Tony Bell covered this in some of his opening statement—that it is a universally held view, certainly among those people I have spoken to within the industry, that a lot of this happens to be about the way APRA went about its original campaign with no real marketing of its proposal to blitz businesses which had just not heard of this impost before. My assistant in the office was receiving up to 40 calls a week from people who, in many cases, were quite distressed, and most of the time it was because they were very confused. Many of them thought it was some kind of shonky scheme because they received this literature out of the blue.

It is a fact, and I think some of these comments were also covered in the submission, that APRA is a monopoly. If you are a monopoly, I am sure it is very easy to start to take some of these issues for granted and not to assume that you need to market your services. APRA does have customers: we are all customers of APRA and every potential licence holder is a customer. We spend a lot of time talking about customer service in the nineties, and I think it is something that was probably essential to think about.

There is probably quite a lot that APRA can still do now, and a lot of that is covered in the FARB submission: things like making it easier to pay and pleasant telephone methods with people. People are telling us that they have almost been abused on the phone. It may be that because they do not like paying the fee they are relaying it this way, but it seemed that there were a lot of people saying similar things. I guess there is a telephone operator at the APRA end who is probably getting quite frustrated with lots of confused people ringing. So you can see how this situation could easily arise, but I just do not think the solution is to ask somebody else to pay, because there has been—as we have said—a disastrous marketing campaign.

CHAIR—You say APRA is a monopoly. I take it, though, that you are not in favour of creating a further monopoly by bringing APRA and PPCA together.

Ms Wallace—I am not really qualified to remark on that, to be honest. They certainly cover totally different rights under the Copyright Act. I do not know whether that was addressed in any recommendation in Shane Simpson's report on collecting societies, but I would certainly defer to someone who had more expertise on that.

Ms Meredith—I do not think that for a particular, narrow purpose—as perhaps this would be with appropriate safeguards built in—that would necessarily create a further monopolistic problem, but there would have to be those safeguards. To some extent it makes sense, if you have got this need to license in the public arena, that you should not need to say, 'You two can't get together and do this in a sensible, pragmatic and reasonable fashion because it might create another problem for people.' Surely there has to be a way that you can put some safeguards in place so that there is some efficiency from the collecting society's point of view.

Mr McCLELLAND—To what extent has the criticism been against the PPCA as opposed to APRA? For instance, I understand that they do not use door-to-door techniques.

Ms Meredith—That is my understanding as well. Because PPCA does not have the same public performance right that APRA has—we receive a broadcast; PPCA does not have that right—I guess to some extent there has been less emphasis by PPCA and there has probably been less perception by PPCA to pursue that right in the marketplace, I don't know, so I would imagine that you are going to have less of a problem in any event because the total number of calls, if you like, would be reduced in PPCA's case.

PPCA does have a different marketing approach. That is an area where we think perhaps APRA could learn from their experience because it seems to us that a large part of the problem that APRA has had is that it has been trying to address approximately 20 or 30 years of relative inactivity in this area in two years of extreme activity. You cannot educate: copyright is a complicated enough proposition even for people who are trained in the area, and you cannot expect a community at large to suddenly come to terms with what this is about in a very short space of time.

From our perception we would have thought—and I think comments were made in the submission—that perhaps it would have been wise that if you think people are listening to radio then to use radio to actually educate businesses and explain to them what it is all about and do that over a progressive stage to marketing campaign before you actually even get to the point of writing to people about this problem.

Mr McCLELLAND—I suppose Mr Bell would say that, even if there is no merger, there should at least be a code of conduct involving the organisations and perhaps the small business industry as a whole.

Mr Bell—Yes, I would agree with that. Going back to our feelings about APRA, I do not think it would be terribly difficult at all to identify when radio is used for personal consumption and when it is used for a public performance. It seems to me that we are down to a point of being concerned whether the hairdresser turns off the radio when a customer walks into the store and then turns it back on when the customer goes out. That is a crazy situation and it would appear to me that commonsense should prevail.

In the area of public performance where a business is using radio as a marketing means—that is, for the sole purpose of contributing to their profits, creating mood, et cetera—then it does enhance their profit. They do not share that profit with us. Radio attracts only about 8½ per cent of the total advertising spent. They do not share that profit with us, yet there is a proposal here to suggest that we should cover their costs for their public performance so that they can enhance that profit. That just does not seem reasonable.

Mr McCLELLAND—In that context, while it is indirectly being put to us that the cost would be passed on to small business in the way of advertising fees, some radio stations—for instance, community radio stations—would have sponsors, I suppose, rather than advertising revenue from small business. Anyway, what do you say to the proposition that ultimately the costs would be passed on to small business through advertising expenses?

Mr Bell—It is just not though. Radio is not necessarily used as an advertising media; it attracts only 8½ per cent of the total advertising spent. So it is not used.

Mr Camplin—I would add that that is in a very small regional market. I suppose Bathurst is regarded as a large regional market in Australia. But, even in this market, in December 1996, after 31 years of submissions, we were successful in getting an FM licence. We felt that we would be able to increase revenue in our marketplace by regaining some of the listeners that we had lost to, say, city FMers that were clearly heard in our marketplace. But after 1½ years of operating our FM there has been no increase in revenue whatsoever in operating two licences in that marketplace. I would strongly submit that, in a small market like that, there is a finite level of the advertising available from local advertisers in the marketplace. This is going to be just an additional cost if APRA are successful, and currently regional radio, as you may have heard from Mr Thompson previously, is in an extremely parlous state. If you were to have asked me the question that you asked Mr Thompson about what percentage of our costs does APRA represent, I would have to say that in the last two years it is exactly the same as the percentage of our revenue because there has been no bottom line. Many small regional markets are in a very similar situation. We simply do not have the additional revenue to cover these additional costs.

CHAIR—Your argument also is, as I understand it, that 8½ per cent of advertisers should not have to carry the burden for the 100 per cent.

Mr Camplin—Yes, precisely.

CHAIR—And presumably, by extension, you would say that that 8½ per cent is actually much less than 8½ per cent because all advertisers are not all small business operators.

Mr Camplin—Yes.

CHAIR—I understand that.

Mr McCLELLAND—And, in that context, you are competing not only with each other but also with other means of advertising—newspapers, television and so forth—and that is the point of it.

Mr Camplin—Since the early 1990s, that has increased very much in regional markets. Aggregated television went from nine minutes per hour of mostly national advertising to a total of about 40 minutes per hour of advertising that had to be filled. That sold very cheaply in regional markets—in fact, in many markets, cheaper than we can afford. But the windows are there so they have to be filled, and there is a great deal of competition in regional markets.

Ms Wallace—Also, there will be additional competition over the next two or three years in many markets. There are some markets that have not even faced competition in their radio sector, and there is a legislative program, through the Broadcasting Authority, which is going to be issuing a lot more new licences. The situation is not going to get any better.

Mr Bell—Absolutely not. Technology will deliver various forms of receiving a signal—music. It will come off the computer, as it does now. You can listen to a CD on your computer now, and that will be in the workplace. It will be piped in. It may even be a part of the television licences of the future where they will have spectrum available to have various other programs—the same as radio may well do—and there will be other forms of private individuals presenting piped-type music programs—pay radio, if you like.

CHAIR—I read somewhere—I do not know whether it was in your submission or somebody else's—that, for example, John Laws is heard on 75 or so radio stations around Australia. There has been—as I recall from just reading the media—over a period of time, a contraction in the number of stations or networks that offer their own news service. Is that an indication of a softness in the market?

Mr Bell—I think it is an indication of the number of players in the market.

Mr Camplin—Absolutely. For instance, my broadcasting station in Bathurst employed 30 staff 10 years ago; today we have half that amount. We are still very much a local radio station. We do not take very much syndicated programming. We do not take John Laws; we have our own man in the marketplace. I think we are regarded as being one of the very local, local radio stations, but that localism has a cost to it. We now have 16 staff, with the prospect of having to get smaller. Every area where we see our costs increase, with no possibility of being able to cover it elsewhere, affects employment. Employment in country towns—even in the local radio station—is very important to that

town.

Ms Meredith—I have just one final comment. Yes, the industry has been critical of APRA in its submission and in this context. We understand that APRA has a job to do and it has to do that on behalf of its members where those rights may be legitimately pursued. The comment that we make is that two things probably need to happen. Firstly, we agree that you need to look at what constitutes a public performance and, secondly, we say that APRA needs to go back to the drawing board and do it again with a bit more finesse the next time around.

CHAIR—I understand that. I thank you for your submission and for coming along this morning and discussing it with us.

[10.56 a.m.]

THOMPSON, Mr Michael John, General Manager, Community Broadcasting Association of Australia, Level 3, 44-54 Botany Road, Alexandria, New South Wales 2015

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 your submission of 24 February this year. Would you care to make some opening comments?

Mr Thompson—I would just say that, on hearing about your requirement that we give evidence, I arranged for our community stations—5UV in Adelaide and 4MBS in Brisbane—to give evidence, and our chairperson, Kath Letch from 3RRR in Melbourne, spoke to you in depth. She has the experience of being both a station manager and somebody who knows about our policy. On that basis, the letter I wrote to you does not go into a great deal of detail, but I guess our position is similar to that of other organisations in the industry.

We have had a very good relationship with APRA over the years and, in the last year or so, we have negotiated with APRA a change in the system. In the past APRA took two per cent of the gross revenue of our stations, subject to a couple of minor matters which were not included in gross revenue. At their behest we did some negotiations which resulted in a different system, where the stations that play a higher percentage of music pay up to three per cent. There is a smaller number of stations that have mostly talk, including a sports station in Canberra, that now pay quite a bit less than two per cent. That was somewhat controversial with the stations that were having to pay more money, and we worked hard with APRA to finesse that through and to pour oil on troubled waters. If, as a result of these deliberations and possible changes to the act, something came through where our stations were required to pay additional money on the basis that somebody somewhere was turning on the radio and they alone were not listening to it but rather some businesses were, I fear that the relationship may sour somewhat.

In addition to that, the main points that our chairperson made were, first of all, the relative poverty of our sector—which I think she put to the committee quite eloquently—and also the position with community broadcasting where we do provide the first place of call for young Australians who want to get into the music industry. It is in community radio where many of the now famous bands cut their teeth and where people really get their chance. It has always been our view that our non-profit sector does provide an entrance level of experience for people who want to get into the music industry, and we think that is probably a strong point.

CHAIR—Have there been any discussions between your association and APRA in relation to the proposal they have put to the committee?

Mr Thompson—No, it was not mentioned at all in our negotiations, and it came as rather a surprise to us that this was the case, when we were approached by the people establishing your hearings. We certainly did not know about it.

CHAIR—So there has been no discussion about whether or not, if this proposal were to be implemented, there should be some exemptions for community broadcasting stations or a different fee charged or anything like that?

Mr Thompson—We would certainly make a strong case for that. From my experience in the area, I would have to say that there would probably be very few businesses which would rebroadcast community broadcasting or broadcast it within the business. There may be a few in the major cities, where we have stations such as 3RRR in Melbourne with a single format. But our country stations have magazine formats in the main, which are possibly not so conducive. They certainly would not be conducive to background music or anything like that.

CHAIR—Have you ever been into a business where they are rebroadcasting a community radio station?

Mr Thompson—I never have, although I have heard of a station in Forster, I think, in New South Wales, where, I am told, it is done. But I have virtually never heard of it.

Mr McCLELLAND—On that point, it has been submitted to us that the Copyright Tribunal would be the appropriate body to determine what the additional licence fees should be, if this proposal were implemented. Would the Copyright Tribunal be able to ascertain which businesses were playing which radio stations and, in particular, which businesses were playing community stations? Do you think that would be a viable or an impossible task?

Mr Thompson—It would require an inordinate amount of resources for very little result. I cannot imagine that the Copyright Tribunal would have the resources to be able to do that. I presume they would end up with some kind of finger in the air, to feel the breeze or something.

Mr McCLELLAND—But you think it would be inequitable to lump you in with the industry as a whole, given that you believe that not many small businesses play community radio?

Mr Thompson—That is right. The other thing is that I have heard that they might work it out in terms of ratings. The interesting thing about ratings is that community

broadcasting stations do not achieve a rating at all on the AGB McNair figures. They are lumped in 'other AM and other FM'. Through some requirement or other—there is some connection, I think, between AGB McNair and FARB—our stations can practically never find out what the ratings of the stations are. So I cannot see how you could use that method either.

CHAIR—One of the problems seems to me to be that there is ignorance, confusion and misunderstanding about copyright law in the community generally. Whatever else we may or may not recommend at the end of this inquiry, it seems to me that there is some case for saying that there should be some further education. Is there any role that community broadcasting stations can play in that regard?

Mr Thompson—We take what we believe to be a totally socially responsible attitude. We have public campaigns. Education is one of the main things we believe we do well. We have a national satellite service where we provide the better programs of community stations for others to use. We would certainly be happy to be part of any public education campaign. I suppose the only thing that might stand against that is if this idea built up some resentment among our members who had less than their usual sense of cooperation. But I would not expect that to be the case.

CHAIR—Mr Thompson, I thank you for the association's submission and also for coming to discuss it with us this morning.

[11.06 a.m.]

NUTTALL, Mr Clive, Vice President, Australian Video Retailers Association, Level 14, 300 George Street, Sydney, New South Wales 2000

CHAIR—I welcome our new witness. Although the committee does not require you to give evidence under oath I should advise you that the hearing is a legal proceeding of the parliament and warrants 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 the association's submission of 6 March. Would you care to make some opening comments?

Mr Nuttall—My comments are very simple and surprisingly short. We are certainly not going to plead poverty or anything like that. Perhaps a very simplistic way to show you how we feel is that our attitude is that a music store playing music is there to sell music. That is what it does. A video store is in the business of projecting pictures and dialogue, and the music that is there is absolutely incidental. We believe, therefore, that we should be exempted. We have been caught in this net thrown by APRA and our concern is that we are unable to take away the soundtrack in terms of music. I have already had discussions with various distributors on the feasibility of that; it is just not possible.

Our business is totally different to that of a record store. We are not in the business of selling the musical soundtrack. We have no argument with APRA in terms of its legal position and we certainly feel that stores that play music and have the pictures showing—different music, for instance, rock and roll or whatever they might like to play; a CD of some sort—or have movies showing are then liable to pay this copyright fee. We feel, however, that the music content of the video clips that we show is so incidental that we should be exempted.

CHAIR—What is the current situation? I must confess that I do not often go into a video store but, presumably, if one goes into a video store there are trailers running for different movies. Is that the situation?

Mr Nuttall—We run trailers which are provided to us by the various distributors of the movies. The whole purpose of flashing these things up on TV screens is that the image, which is the main part of our advertising, as it were, attracts people's attention and they are attracted to that particular movie. They are attracted by the star that is on the screen at the time. We actually feel—and I do not want to sound flippant when I say this—that, when people rent a video and take it home and then listen to the soundtrack in the privacy of their own home, we are assisting the music industry. Perhaps we should be looking at a different point of view and asking for a fee from them.

As far as the actual playing of music in a store is concerned, we are involved in

the picture and in the images of the stars, which is what rents our movies. But we have been caught up in this net thrown by APRA in terms of the music, which is totally incidental.

CHAIR—So currently, if you are the proprietor of a video store and you run these trailers, you are being asked to pay a licence fee by APRA?

Mr Nuttall—We are being targeted by APRA, who are making, I must say, some claims that appear to me to be outrageous. What has been forgotten is that, whilst there is the visibility in the video industry of having names such as Video Ezy or Blockbuster, with the exception of Blockbuster every video store is owned by an individual. In fact, something like 85 per cent of our industry are single-store owners. It is their business.

Mr McCLELLAND—Your association is called the Video Retailers Association but you cover retailers and renters. Is that right?

Mr Nuttall—We are primarily renters. The retail side is very incidental; it is a small portion of the business. Our main business is the rental of video.

CHAIR—I just want to work through this. When a video is rented out overnight or whatever and there is a fee paid to the proprietor of the store for that rental, to go back a step, the proprietor of the store has purchased that video from a distributor for a fee. Presumably in that fee there is some aspect which relates to the royalty payment for the music in the video.

Mr Nuttall—We do not get a breakdown of that. Movies cost something in the order of $100 each for a retailer to buy. The general public is not aware of that. They think that a movie costs about $25 because that is what they see the thing for sale at 12 months down the track in a chain store. We pay a fee something in the order of $100 to buy that movie. On the second hand market, which is 10 days later, that movie is worth $10, $25 if it is a good movie. So we feel that the impost we have already is enough.

CHAIR—When the distributor sells you the movie, you do not know but presumably there would be a fee paid by the distributor to APRA.

Mr Nuttall—Absolutely, and I think this is another example of double dipping.

CHAIR—Right. Then you say that, because you simply show trailers in your stores, you are charged a licence fee as well in relation to the music.

Mr Nuttall—In relation to the music, which we believe is totally incidental and grossly unfair.

Mr McCLELLAND—How heavy is that licence fee?

Mr Nuttall—The impost seems small, but I have projected the figures and, if APRA achieves what it is trying to achieve with my industry, we would be talking something between $400,000 and $700,000 a year, so it is not small money.

Mr McCLELLAND—In percentage terms, what would it be for a local video store?

Mr Nuttall—We have not got a final figure from APRA as to what they want to charge. We are arguing that we should not even be considering it.

Mr McCLELLAND—Is it in the Copyright Tribunal or are you in negotiations on these arguments?

Mr Nuttall—This is in direct negotiation with APRA. I have negotiated with them on behalf of the industry but I have said that in the final analysis it is going to go back to every individual who owns a store in terms of their discussions with APRA. I cannot on behalf of the industry make a ruling that says, 'You will pay this copyright.'

CHAIR—What is the ballpark figure? We are talking about $37 for a radio, as I recall. Say you have got a video store that has got half a dozen screens showing clips. Some would not have that many.

Mr Nuttall—Most video stores do not do that; they would have one or two in their stores.

CHAIR—What sort of ballpark figure are we looking at?

Mr Nuttall—I understand they are talking a figure between $130 to upwards of $200. We have not established a final figure. It is all very up in the air. Our contention simply is that we should not even be targeted because it is so incidental. If we were a music store, no argument. We are a video store renting pictures and so should not be caught up in APRA at all.

CHAIR—There is a logical argument against you, isn't there, that is, while we call it a picture, not many people go to silent movies these days, do they?

Mr Nuttall—Absolutely.

CHAIR—So the music is an integral part of the product.

Mr Nuttall—Our argument is that, with the playing of these in-store loops, which are snippets of movies, people are primarily attracted to the picture on the screen, the artist, the star who is on the screen, and dialogue and noise such as a car chase or explosions or whatever it may be. If, as I said, we could subtract the music from the

soundtracks for those clips we would do so, and it would not be of any loss to us whatsoever. We feel that, because we are not able to physically do it at this stage and would if we could, we should have an exemption. If we made money out of playing the musical soundtracks, then you would have no argument from me whatsoever.

CHAIR—Why can't you turn the sound off?

Mr Nuttall—As you rightly said, Mr Chairman, there is no such thing as a silent movie. If you go into a video store, you will find that what we are really interested in is the picture, the brightness, the colour and the sounds that come from it such as I said—car chases, explosions; things that attract people's attention—so that they come along and ask, 'What movie is that?' and we point to it on the shelf.

Mr McCLELLAND—Music would be one of the sounds that comes forth, though.

Mr Nuttall—But it is very incidental, because we are primarily in the business of the picture and the action.

CHAIR—I think we understand the argument. Thank you very much for your submission and for coming along.

Mr Nuttall—Thank you, Mr Chairman.

[11.16 a.m.]

WALKER, Ms Judith Kathryn, General Manager, Legal and Copyright, Australian Broadcasting Corporation, 700 Harris Street, Ultimo, New South Wales 2007

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 the submission, with a covering letter from Mr Johns, of 6 January this year. Would you care to make some opening comments?

Ms Walker—I would simply reiterate points that have been made in our submission. I will not go through all of them; they are fairly brief anyway. But our position is fairly obvious. We think that APRA's suggestion is inequitable, requiring, as it would, broadcasters to pay for a use over which they have no control, and that seems to be at odds with the concept of user pays. In the case of the ABC in particular, we have no ability to look to advertising in order to offset any increased costs that APRA would get from us if the suggestion goes through.

Our relationship with APRA is a good one. We do pay a substantial amount per annum to APRA for the right to broadcast their members' repertoire, and we have no problem with that. We might have a problem with the amount but not with the principle.

CHAIR—The commercial argument is that if this is an additional impost on the ABC then it has either got to be paid for by additional funds from the public purse or cutbacks in other areas.

Ms Walker—That would be correct.

CHAIR—I understand that. Can I ask you about this question of public performance because I think it is something we may have to look at. I think you were here when I was questioning FARB about that.

Ms Walker—I was.

CHAIR—Do you have any thoughts about the very rough proposition I was trying to tease out?

Ms Walker—Yes, I think it is an interesting one. I take your point that the American proposal is probably too wide—although it is what we suggested in our submission—and that any further parameters that can be built into such a proposal would be absolutely fine with the ABC. I do note that the Copyright Act already provides for one exception to the public performance right in relation to premises where people sleep.

CHAIR—Guesthouses and so on.

Ms Walker—Yes. So there is an exception to that right of remuneration already built in. But I appreciate also that APRA's members are entitled to receive money for the playing or reception of public performance of their works. The ABC has no quarrel even with the current position in the Copyright Act; it is simply the proposal that somehow we should pay for that right.

Mr McCLELLAND—How are your fees calculated by APRA?

Ms Walker—Percentage of our appropriation.

CHAIR—Total appropriation?

Ms Walker—Yes.

CHAIR—So you look at the line item in the budget and that is how they work it out?

Ms Walker—That is right.

Mr McCLELLAND—Even though the ABC, perhaps more than most, would have current affairs type shows?

Ms Walker—Correct. We were in negotiations for the renewal of our licence a few years ago with APRA. It was actually before the Copyright Tribunal, but we did settle the matter. We went through: what sort of scenario would be the best way to go? Should it be a percentage based on music use? In the end, as long as we could agree on the fee and then go back to what percentage of the appropriation that represented, we thought it would be better for future years. At least we knew it was going to be a percentage of the appropriation. In the current financial year, APRA will get less than they got last year because our appropriation has decreased.

Mr McCLELLAND—As a point of interest, who bears the onus of proving the use of music? Do APRA or does the broadcaster?

Ms Walker—When it was before the tribunal, both parties were going to produce evidence and, I think if APRA had been dissatisfied with the evidence, they would also have attempted to produce evidence. We log returns with APRA on a regular basis, so in some ways both of us would have been using similar information.

Mr McCLELLAND—In many ways, if the industry did not cooperate with APRA, they would have an almost impossible job to prove what music was being played and to what extent.

Ms Walker—It would be very difficult. If we did not have a licence from APRA, it would be extremely difficult for us to play any music because to individually clear the music would be impossible. It works both ways.

Mr McCLELLAND—The view of the ABC is that APRA's suggestion of collecting the additional burden that falls on small business at the source of broadcaster would be inoperable. Why do you think that would be the case? Is it because you would not know which small businesses were playing the ABC on the radio and so forth?

Ms Walker—I presume you could get those figures, but I think it would be an awful lot of work. I would imagine it would involve substantial surveys to come up with some figure or other. I have no idea, and I do not believe the ABC would have any figures available on small business playing. Most of the surveys we do are on our audience numbers. We can do some breakdown, given the amount of music that each of our stations played, but we would not go beyond that. I presume you could arrive at some figure but it would involve quite a lot of work.

Mr McCLELLAND—What do you think of the philosophy of the broadcasters being the small business collection agents for APRA? Is that an appropriate form of reasoning?

Ms Walker—I would not have thought so. Our signal is available to be picked up by anyone with a radio set that can pick it up, but I do not think the concept of an agency is the appropriate relationship. We have no control over who picks up our signals as long as they have bought a radio, and we have no control over who can buy a radio set, so I think that is drawing a long bow.

Mr McCLELLAND—Would it be worth while for the ABC to assist in an education campaign for small businesses on this issue?

Ms Walker—I cannot speak for individual programs. I have actually heard broadcasts on this very subject on the ABC. We have interviewed Mr Cottle from APRA on a number of occasions. There would be appropriate programs—perhaps like *The Law Report*—that could assist, but that would be up to the individual program makers. As long as it did not amount to an ad for APRA or a particular small business, I am sure that people would be interested in actually looking at it. As I said, we have already done quite a lot—probably more than anyone else—on the topic.

CHAIR—Without wanting to sound like this is a point of leverage, I presume the ABC would much rather encourage its producers to educate people than pay an additional fee.

Ms Walker—Yes, but editorial independence is most precious.

CHAIR—I accept all that. I was putting it in its broadest possible context.

Ms Walker—That is why I would never talk on behalf of a program maker.

CHAIR—Thank you very much for the ABC's submission and for coming in and discussing it with us today.

Proceedings suspended from 11.24 a.m. to 11.39 a.m.

SHARP, Ms Chris, Policy Manager, Special Broadcasting Service, 14 Herbert Street, Artarmon, New South Wales 2064

CHAIR—I welcome Ms Sharp from SBS. 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 contempt of the parliament. We are in receipt of the submission from SBS of 13 February. Would you care to make some opening remarks?

Ms Sharp—On the face of it, APRA's proposal may have a certain appeal in reducing the problems currently faced by collection societies and small businesses in the collection of copyright fees due to songwriters, composers and record producers. But SBS submits that it is an inherently unjust solution to impose additional obligations on broadcasters simply because it provides an easier collection system for APRA. Broadcasters, as you are aware, already pay substantial licence fees to copyright collecting societies for the rights to broadcast music. In the case of the national broadcasters, those fees are paid on government appropriations. In addition, SBS pays APRA a portion of its gross advertising revenue. We are concerned, especially at a time of straitened budgets, that this proposal would place additional funding pressure on the government to meet the increased operational costs which would rise if this scheme were implemented.

In addition, the proposal does not address the problems encountered by small businesses that operate televisions, CDs or cassettes on their premises. Recorded music—CDs and cassettes—is much more likely to be used for commercial purposes or to create an ambience or atmosphere conducive to customers than radio is.

There is also the problem of calculating the additional amounts to be paid by the broadcasters. We submit that it is likely to be very onerous compared to the small amounts collected. I know that there is a problem for small businesses in the collection of those small amounts. The amount currently paid by small businesses is generally about $50. Also, on what basis would you calculate the amount of music played in a small business from different broadcasters? SBS broadcasts in different languages which change every hour on the hour. The mind boggles as to how you would calculate what would be owed.

SBS submits that there are more equitable solutions to be found and that the onus of responsibility in this essentially rests with APRA to find a better way to approach small business and explain the function of those fees. From the evidence you have already collected, it seems to me that that is a fundamental problem. We also suggest in our submission that it may be worth while looking to amend the Copyright Act in relation to what constitutes performance in public or to the public in relation to small business.

CHAIR—Just to clarify, as distinct from the ABC, the APRA fee that SBS pays is calculated on two bases: one, on your line in the appropriation, and then on a proportion of revenue raised by way of sponsorship or advertising.

Ms Sharp—That is correct.

CHAIR—So if there were an increase in fees along the lines of the APRA proposal you would have to raise it by way of either additional appropriation, additional advertising, or the cutting of services?

Ms Sharp—The reality is that it would have to come from the appropriation we already have—the advertising market is not elastic; what we get from advertising from year to year is pretty firm—or we would have to go to government to ask for an increase to cover the increased costs.

CHAIR—There has been a suggestion of a refinement of what a performance in public is. Do you have any thoughts about what that refinement could be?

Ms Sharp—Not specifically, other than looking along the path that is already there in the Copyright Act of making exemptions in certain cases, such as where people sleep, or perhaps looking at businesses that have a small number of staff or that are not open to the public.

CHAIR—What about the suggestion where there is a single radio receiver being used for sole enjoyment, even though it is on commercial premises?

Ms Sharp—It is very hard to see that that is use of music for commercial purposes. When people think of music being used for commercial purposes, they generally think of large department stores, hairdressers, bars or places where music is perceived as enhancing the atmosphere for a commercial purpose. When you think of people in a garage who might be listening to news or music, in either English or another language, it is hard to see that that is actually a commercial purpose, in my view.

CHAIR—I suppose this can only be anecdotal, but is there any even anecdotal evidence about the extent to which people do listen to SBS in their work premises?

Ms Sharp—I do not have any anecdotal evidence. I would suggest that it would be pretty limited, if only because, in a workplace where there is domination by a specific language group, they would only be turning on SBS for an hour or so a day. It would be very hard to calculate turning from, say, the Italian morning program on SBS over to 2CH for music over to news on ABC. It is extremely difficult to calculate that sort of use.

Mr McCLELLAND—In your submission you make the point that, even if the system whereby broadcasters collected on behalf of small business were implemented, it

would only partially solve the problem of small businesses, in the sense that there would still be the need for collection in respect of CDs and recordings.

Ms Sharp—Indeed. And, as I said, in our view the use of CDs and cassettes rather than the use of radio—in particular SBS radio, which is not only in 68 languages but is heavily information based rather than music based—is more likely to be what we would perceive as a commercial enhancement to a business. But I suggest that, if you had a system whereby either the Copyright Tribunal made a decision or we negotiated additional fees with the collection societies, those distinctions between us and a more music based station would be very hard to define.

Mr McCLELLAND—Sure. Even for the Copyright Tribunal that would be a very difficult task.

Ms Sharp—Indeed.

CHAIR—Part of the problem, if I can call it that, seems to have arisen from the general ignorance of the law of copyright in society, which is understandable. Do you think there is any role that SBS could play in contributing to educating people about copyright more generally?

Ms Sharp—I think the broadcasters would be very happy to contribute. We are already very heavily involved in community information, because of the nature of our service on radio. There would be no problem in us participating in a campaign to make the public more aware of the purpose of copyright payments. I think a lot of the problem is that small businesses simply have not been properly informed of the purpose of these payments.

CHAIR—Thank you for the submission and also for coming and discussing it with us today.

[Midday]

BRANIGAN, Mr Anthony Michael, General Manager and Chief Executive Officer, Federation of Australian Commercial Television Stations, 44 Avenue Road, Mosman, New South Wales 2088

CHAIR—Welcome, Mr Branigan. We are in receipt of your submission of 5 February. Would you care to make some opening remarks?

Mr Branigan—I hope the submission is self-explanatory. I think it would be clear from virtually every section of that submission that we vehemently oppose the proposal that has been put forward: that broadcasters, specifically television broadcasters, should be responsible for effectively footing the bill for public performances which occur by the reception of television broadcasts. We believe that it is inequitable. We believe that it raises some real constitutional issues. We believe that at the end of the day there are simpler and more direct ways of dealing with the problems that have given rise to this proposal.

The only additional point I would like to make is in relation to section 13 of our submission, which may unintentionally have misled the committee. We note:

> Commercial television operators derive no separate and identifiable benefit from the public performance of their broadcast services to non-domestic audiences.

The point is that the commercial viewing of commercial television broadcasts is not reflected in audience monitoring. Audience monitoring is of home use only. In other words, the ratings, the monitored audiences for television stations, do not take into account any viewing in shops, factories or whatever, so stations derive no benefit at all from this viewing. To my mind that is an additional reason for opposing this proposal. We receive no benefits. We believe strongly that the people who receive benefits should be responsible for paying the relevant copyright fee.

CHAIR—On that point, in your experience are there many instances in which television is replayed for non-private use in commercial premises?

Mr Branigan—Leaving aside Cup Day, not all that many.

CHAIR—We are not interested in the music on Cup Day, are we?

Mr Branigan—Not so much, although many of us may have to face it! But it really is a matter of one-off events or special events like that.

CHAIR—What about the TAB, or do they have a special arrangement with Sky Channel?

Mr Branigan—They would normally show Sky Channel. I do not know the circumstances there but I would imagine that any copyright requirements would be sorted out in the TAB arrangements. So it is certainly not nearly as prevalent as the use of radio for the very good reason that radio is an eyes-free medium—you can go about doing things while you are listening. It is not quite as easy with television.

CHAIR—How are fees calculated for television stations?

Mr Branigan—It is a very rough and ready method; it is a proportion of gross revenue. In other words, it bears absolutely no relation to music used. We mention, I think as a footnote in the submission, that we have been in court with APRA for quite some years attempting to renegotiate the basis on which licence fees are paid—along the lines of recent decisions in the UK and particularly in North America where charges which are more closely aligned to actual music usage have replaced these very crude approaches that are simply based on revenue. What particularly irritates us is that the use of music on television has in fact declined very considerably over the past 30 years or so, and that partly reflects the fact that we no longer have test patterns with music over them. Most music is purely incidental to a program now; very rarely is it featured music. But the amount that we pay goes up year by year according to our revenue, and it is now in the vicinity of $20 million a year.

CHAIR—To take a hypothetical situation, if you are a television station that plays MTV or something like that all day compared with one that largely produces documentaries, soap dramas or news, that is irrelevant to the fee?

Mr Branigan—That is exactly it; it is a one size fits all approach and it fundamentally has no relationship whatsoever to the amount of music played, if any.

CHAIR—You make reference in paragraph 20 to what properly constitutes public performance and say:

> APRA appears to have operated under the assumption that *all* performances of recorded music and *all* performances of received radio or television broadcasts on small business premises are public performances. We doubt that this assumption is correct.

If there were to be some refinement of the law in that regard—and, as I understand it, we have not specifically defined what performance in public is and it would be open to us even under our international obligations to do so—do you have any proposals as to how that could be done?

Mr Branigan—No, I do not think we have anything specific in mind. We note a little further down in that section that this might be something that the Copyright Law Review Committee could look at. If it were to do so, we would certainly make submissions there; we would turn our minds to that difficult issue of coming up with a definition

that made a lot more sense. It is certainly less than satisfactory at the moment.

Mr McCLELLAND—On this issue of television stations being used as agents to collect the small business licence fees, from what you were saying of the extent to which televisions are used in small business, it is your view it would be negligible. Is that the case?

Mr Branigan—I would have thought so. I am trying to think of circumstances in which television might be—

Mr McCLELLAND—I suppose only Hungry Jack's. I have been into a Hungry Jack's store and they have had that.

Mr Branigan—Last time I saw a television set playing was when I had my passport renewed and the Immigration office had one blaring away. But that is the only time in several years that I can recall a television set playing in a commercial or government office.

Mr McCLELLAND—Has APRA had any discussions with you as to how they would propose to collect any additional licence fee if it ever came about, or has it just been floated at this stage?

Mr Branigan—It has just been floated. I imagine they would hope that the Copyright Tribunal would do the dirty work for them and simply add a percentage to the outrageous amount they already collect from us.

Mr McCLELLAND—Is that practical? Would the Copyright Tribunal be able to come up with a logical or rational figure?

Mr Branigan—I would be hopeful that the Copyright Tribunal would not give it the time of day but take the view that it was far too remote a 'use' and that it could not properly be attributed to commercial television stations. But, assuming the worst—assuming the government were to legislate for this—it would be no more difficult than a lot of the Copyright Tribunal considerations, many of which are very much of the 'how many angels will fit on the head of a pin' type of thing. They would come up with some answer. It might not make that much sense to non-copyright lawyers, but that is not to say that it would not be an answer which would stick and which would require us to hand over large amounts of readies every year.

CHAIR—Mr Branigan, I do not have any further questions. I thank you for the submission and for coming and discussing it with us today.

Proceedings suspended from 12.12 p.m. to 2.02 p.m.

KANE, Mr John Francis, Board Member, Country Music Association of Australia, 253 Marius Street, Tamworth, New South Wales

CHAIR—Welcome. 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.

The committee is in receipt of the association's submission of 29 September last year. Would you care to make some opening remarks?

Mr Kane—I work in the industry and have done for over 20 years as a writer, performer, producer, manager, touring artist, session musician—basically the lot in the country music industry. I have been a founding member of the CMAA, the Country Music Association of Australia. That is essentially an association of artists who perform and make their living from country music in Australia. I am sure you have heard everyone go on about every detail of this. From our point of view, we earn a good part of our income from the use of our songs and it is important that we be paid for that. I do not know how much you want me to talk about various facets of the industry; I do not know what you know already.

CHAIR—The crux of this seems to be where we draw the line between what is regarded as a public performance for which it is right and proper that royalty be paid and the primary purpose of playing music, which is basically for enjoyment. Do you have any views about that?

Mr Kane—I think the workplace is the best example we want to talk about. If in some way that business is being enhanced, that person's income or business's income is being enhanced, by the use of my song, I think I should be paid.

CHAIR—You have probably pulled up at plenty of truck stops and the like in country areas, as I have. If the radio is being played out in the back room, which has sometimes got an opening to the serving counter of a restaurant or a cafe, and it is basically being used for the enjoyment of the operator, do you think a royalty should be paid there?

Mr Kane—I guess that is one extreme. I do not quite know how far the committee has gone with this whole issue, but if a business that employs two or three people plays the radio the music is either being played to the public or enhancing the work of those people. You start to get to the fringe, and it gets hard to define those kinds of things. I do not quite know how you make that decision. If they were not listening to the radio and their work was suffering—they got disgruntled or whatever—then the music obviously contributes to their work performance. In that instance, you could argue that there should

be a payment.

CHAIR—In your experience, do you think that many businesses use a radio for work performance or ambience, or does it tend to be more recorded music by way of tape or CD or the like?

Mr Kane—Do you mean from my experience of just wandering around?

CHAIR—Yes.

Mr Kane—I mostly hear recorded music—tapes and CDs—but I do hear the radio at places, yes.

CHAIR—APRA have put a proposal that, instead of collecting the royalty fees from small business, it be collected from the radio stations by some proportionate increase in their fees to cover the royalties that would have otherwise been collected from small business for the playing of the radio. What do you say about that?

Mr Kane—From my end of it, it is important that it be paid. I do not know that I can say who should pay it. If I am representing the CMAA, the CMAA does not have a policy on that except that, if the music is being used, someone should pay.

Mr PRICE—If I could perhaps sidetrack you a little bit, I suppose we are dealing here with an issue of property rights and your right to intellectual, creative property. I think that, to assist us culturally, it is very important to promote and ensure that music, and particularly our Australian music, is getting more than its fair market share. We seem to be arguing about one small part of that copyright or property area. As far as the CMAA is concerned, looking at the bigger picture, do you have other areas of greater concern in the development and promotion of Australian country music in Australia?

Mr Kane—Obviously we are concerned with all kinds of things. We are undertaking market research all the time to determine how many people buy country music CDs and so forth and then going back to radio to try to encourage them to play more country music. You do not hear much country music in metropolitan areas—regional areas for sure. Yes, we are concerned with those kinds of things.

Mr PRICE—Again, with the indulgence of the chairman, what would you like to see the government do in freeing up or promoting more Australian country music in Australia?

Mr Kane—The quota thing comes up all the time. The bottom line is that people have to hear the music—be exposed to the country music—in order to buy it. Something needs to be done to make more people hear it, and the obvious thing is to somehow encourage more radio play, which may be by way of quota.

Mr PRICE—Or mandate it?

Mr Kane—Yes.

Mr PRICE—Let us say we did that, what sort of impact would that have on royalties?

Mr Kane—That would definitely have an impact on royalties. As you know, each airplay generates a certain royalty for the writer. I had a band for six years. It was called the Flying Emus and it would have been regarded as quite a successful band at the time. We won ARIA awards and Golden Guitars and we were at the peak of the thing. Having been through running a band, I know that you really need all the income you can get from whatever sources you can get it from. I would not want to trade off one thing against another. Any usage of a song is absolutely crucial. If you have a huge hit, great. But for the run-of-the-mill composers and performers and writers out there, it is a hard slog. There are a lot of songs out there in the marketplace, and you need everything you can get.

Mr PRICE—Pardon my ignorance about country music—my best mate will never forgive me for asking this question. We have had Australian rock bands go overseas and be successful. Have we had country music bands which have made a success internationally? Or singers?

Mr Kane—Not really yet. We are forging better links now with the US. The US is the obvious country music market. It is huge there, and they are very well organised. In fact, we have just had a delegation here from the American country music association. We have had a bit of exchange of information and so forth. It is very difficult. I know several of the record companies would like to get their artists released and promoted over there. I think it will happen, but it has not happened yet.

Mr TONY SMITH—Just noting the comments in the last part of your submission referring to small business, where you say, 'These people should realise', et cetera, what would you say to small business people who might respond to that by saying, 'We're running shops, we are paying enormous outlays to local councils, to state government and sometimes to federal government authorities. In some cases we are paying unconscionable rents. Through all those outlays of ours we are providing a venue for your music, by playing the radio. That is facilitating the possible sale and exposure of different groups and companies'?

Mr Kane—There are a few things there. Directly in relation to the fact of them promoting my music, I have never seen a CD propped up in a store or a small business to say, 'This is what is playing.' Even on radio you do not hear things back-announced much any more.

Mr TONY SMITH—Talking about radios in particular, just radio background

music.

Mr Kane—I do not think it has a great deal of worth in promoting the music, to be straight. And I am a small businessman in the same way. I have a studio at home, and I have exactly the same things as them and—

Mr TONY SMITH—Can you see that point of view?

Mr Kane—About 12 months ago, I bought a car. I was in the caryard, speaking to the guy about what I do. He said, 'You might be able to tell me about this.' He pulled out his APRA letter, and I explained to him what it was about, and he accepted that. He said, 'That is fine.' He could see that was quite a valid thing. So I think education is very crucial to this whole thing. It is one of those things that has to be paid.

CHAIR—Given that we are talking about an industry which is comprised of some of the most creative communicators in the nation—that is the very object of writing songs and having them listened to and sold—it seems to me that there has been some failure of communication in getting across that message which you were able to get across to the caryard salesman.

Mr Kane—Absolutely.

CHAIR—Do you have any suggestions about what should be done to improve that?

Mr Kane—I would encourage APRA and PPCA to educate. I know they are doing that and they will continue to do that. Perhaps some of the radio people might like to contribute—for example, through community service type radio announcements explaining these things, since there has been such a kerfuffle with radio anyway, or through general advertising. I am not quite sure of the specifics of it but I think that there is a definite ignorance out there in the community, that guy being a typical example. He said, 'I am not going to pay this. Why should I pay that?' When I explained why he should pay it he was quite happy to pay it.

CHAIR—I thank you for your association's submission and also for coming along and discussing it with us this afternoon.

[2.17 p.m.]

ROBB, Ms Julie, Executive Director and Principal Legal Officer, Arts Law Centre of Australia, The Gunnery, 43-51 Cowper Wharf Road, Woolloomooloo, New South Wales 2011

CHAIR—I welcome our new witness. Although the committee does not require you to give evidence under oath I should advise you that the hearing is a legal proceeding of the parliament and warrants 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 the submission from the Arts Law Centre of 23 October last year. Would you care to make some opening remarks?

Ms Robb—Thank you. Firstly, let me thank the committee for the opportunity to make representations on behalf of the Arts Law Centre of Australia, which is the national community legal centre for the arts and which since 1983 has provided advice and resources to all sectors of the arts community in a unique way which is worth emphasising here. Unlike other community legal centres, we advise anybody who calls with an arts related legal question because our charter is to improve professional practices in the sector. That means both educating users of copyright about the nature of copyright—because, as this inquiry confirms, copyright is complex and unusual and continues to take people by surprise in its operation—and, similarly, encouraging creators to develop professional independence and an understanding of how to negotiate in the real world.

We do not represent anybody in case work or in negotiations and this gives us an opportunity to get information about all sectors of the industry in an objective, non-partial way. That enables us to use that information to inform government, industry and the tertiary sector about how things work and what could be improved. One of the core activities of the centre is education. I think it is important to acknowledge that the motivation for this inquiry, as far as the centre is concerned, is not that there is something wrong with the law; the problem is that people do not understand it.

If I can pick up immediately on a point that was made by the last witness, I think the collecting societies do an admirable job in the way in which they try to educate people about copyright in the various sectors. This was something that the Simpson report confirmed in 1996, because it has always been a criticism levelled at collecting societies that they are mysterious and that what they do is not made apparent enough to people. But what the collecting societies can do is limited by the fact that they will always be seen as not partial—as representing copyright owners' interests, as they are required to do.

So, if nothing else, I would be optimistic that this committee would see fit to recommend that there be some independent educational material and resources put to it, because it is understandable for people to be suspicious of copyright collecting societies, not for any substantive reason but for an obvious apparent reason of partiality. That is the

first crucial point that the centre makes: it is ignorance that is the problem here and not a problem with the law as it currently stands.

The second crucial point that the centre would make—and the committee will have heard this in various ways already—is that musicians and composers in this country earn a paltry income from their creative work. The most recent statistics on this done by Professor Throsby from Macquarie University were that composers earned an average of $10,000 a year out of their work. Copyright for composers tends to be the chief way in which they earn their money, because usually composers are not paid to produce their work. If they are not paid by a commission arrangement to produce their work, then they rely on the public performance, broadcast and other rights comprised in their copyright for income.

We say that the issue of payment of copyright fees to composers has to be seen in light of the government's general concern that copyright is an area of micro-economic reform needing attention. The committee should be mindful of the domestic law as it is developing here—particularly in cases such as APRA v. Telstra, where all of the judges make a point about the broad nature of copyright, the entrenched right of public performance income and also the very long established international obligations that Australia has under the Berne Convention which enables a right of public communication for copyright owners. As digital technology makes greater publics ever more accessible, it is important that the outcome of this inquiry be consistent with the commitment of the government and the work it is doing in other areas, such as digital rights and moral rights.

CHAIR—You say that there is no need to change copyright law. Is it not arguable that there is at least some need for clarification in that the definition of 'public performance' remains unclear in its application to particular circumstances? Is it not open to Australia in its domestic law, consistent with the Berne Convention and other international obligations, to define that in some way which is not inconsistent with the spirit of those obligations? And would it not be preferable, given the difficulties that have given rise to this inquiry, to do that?

Ms Robb—With respect to the political process, I would say no, it is not preferable. It is preferable to have the courts interpret the law and to have consistency from their decisions as to what the meaning of legislation is. Copyright law is not alone but does have a particular feature in that a number of the core concepts on which copyright rests are not defined in the act.

I suppose there are several reasons for that. One is the general preference that legislation should be simple, as clearly drafted as possible and have as broad an application as is consistent with its intention and that where disputes as to that arise the court is the appropriate place for that to be resolved; and then it is always for parliament to override the decision of the High Court.

CHAIR—But in this case is there not a note of unreality in that this inquiry arose because a lot of small business people complained to their members of parliament and complained to government. The quantum of the amount in dispute in any one of those cases is probably very small. I suspect that in most cases we are talking about less than $100. To say that the court should resolve that seems to me to be placing a lot of emphasis on the ability of the court to resolve it when the chances of that being resolved by the courts is fairly remote.

But when you have a large number of people coming forward and saying, 'Well, the parliament in a sense is a court'—because we enacted the copyright law in the first place—why cannot we simply clarify it? Why cannot the parliament clarify it in a way which is consistent with our international obligations and, for that matter, the way in which the legislation is being interpreted by the court? I cannot imagine that, if we were to clarify it, we would do something contrary to, say, the Telstra case or the bank case in England.

Ms Robb—I would not be concerned if parliament sees fit, in order to resolve this problem, to have a clarification of 'public performance' which is consistent with what is happening in our courts and in the international arena. I just frankly suspect that it will not solve the problem, because the crux of the circumstances under which public performance royalties are payable is actually quite simple. It is where a commercial benefit is derived from by the user, it is the concept that you can relate to all use of copyright, and it applies in exactly the same way in this case.

The small business has a choice as to whether or not they play music in the workplace. If they play music in the workplace, they do so for a commercial purpose and where they are deriving a commercial benefit—not even where they can be shown to be deriving a commercial benefit—where they take that decision in that they believe it will be a commercial enhancement (and this reasoning is consistent with the High Court), then it is fair and consistent with copyright principles that the copyright owner share in that benefit in a fair way.

Given the reality of the licence fees that APRA charges, it is evident that the fees being demanded are fair and that the system is actually working very well, subject to there being sufficient understanding by copyright users—which I think is something that copyright collecting societies cannot be expected to do on their own—and also ensuring that there is access to justice for resolution of disputes. There again I think it is important to consider having an independent arbiter, because I know that the collecting societies have taken steps in that regard as well. I do suspect that the reason why they have not been more used is out of an understandable suspicion that the process will be skewed in favour of the copyright owner.

CHAIR—But are you saying that the mere playing of music on commercial premises constitutes a public performance?

Ms Robb—Yes.

Mr PRICE—What about in my office?

Ms Robb—I would probably say there too.

Mr PRICE—What if I connect the radio up to my telephone system?

Ms Robb—Yes, my word, without doubt—after APRA v. Telstra.

CHAIR—Do you mean to say that if a mechanic in a garage out the back, who is not near the customer service desk and who is employed to fix the exhaust pipe or the radiator or whatever else has a transistor sitting there playing next to him and he happens to be on commercial premises that makes it a public performance?

Ms Robb—Yes, I do.

CHAIR—On what authority?

Ms Robb—Not quoting authority; only relying on the principle of—

CHAIR—As a legal opinion?

Ms Robb—Yes.

CHAIR—You honestly think the High Court would find that?

Ms Robb—I think all the High Court is concerned to ensure is that copyright law is administered in a way which recognises the broad nature of copyright protection and that, whatever the circumstances in which copyright material is exploited, the purpose of copyright be seen to be taking effect. If a person uses music in the workplace, they make that choice, or their employer makes that choice, or the employer makes the choice not to stop that from happening, because it is an enhancement to productivity.

CHAIR—But, if there was going to be a claim in copyright, it is up to the plaintiff to prove the breach of copyright. If the evidence is from the single person working in the garage out the back by him or herself simply playing the radio when nobody else was about, for the life of me I cannot see a court reasonably coming to a conclusion that that constituted a breach of copyright.

Ms Robb—The court would look at the question in exactly the way that we are discussing it and ask all of those questions.

CHAIR—But ultimately that is a question of fact that the court must determine,

must it not?

Ms Robb—That is right, yes.

CHAIR—As I understand your proposition, your proposition is that, as a matter of answering the question of fact, the court would invariably come to the decision that there was a breach of copyright.

Ms Robb—No. I am saying that, on the level of principle, the court would be looking to see whether there was a commercial benefit being derived from the copyright by the copyright user. If the facts were, and the court was convinced, that this was not happening—

CHAIR—You are saying—if I get this right—that a commercial benefit is evidence of a public performance.

Ms Robb—Public performance is one of the rights of copyright which ensures that, where a user derives a commercial benefit, the copyright owner is equitably remunerated.

CHAIR—Yes, but the court has to do it according to principles such as public performance. Commercial benefit, as I recall, is not one of the aspects of the Copyright Act. It works the other way; that is, you have to show the performance. Therefore, the commercial benefit must be evidence that the court would take into account a performance for which a royalty is payable.

Ms Robb—This question came up not in relation to public performance but in relation to the diffusion and broadcast rights in APRA v. Telstra. The court was very clear—particularly in the joint judgment of Gaudron and Toohey—that if the evidence is that somebody is paying for a service, because there was a real issue in that case about what is the public, it is more important to look at why a person is paying for this service and that if they are paying for the service, they think it is worth something economically, then the copyright owner is entitled to benefit from that; and put less emphasis on the question of who the public is and how you define the public and more emphasis on whether a commercial benefit was being derived or believed to be being derived. Why else would a company be offering this service, whoever the public is?

CHAIR—I understand at the level of the company. But if you come down to an individual sole proprietor or operator, or you come down even to an individual employee, then you cannot rely on the company.

Ms Robb—I do not think the principle—

CHAIR—If a company is playing the radio, for example, which goes out to any

employee who happens to be listening, then I think your argument has some validity. But if you remove it from the realm of company I must say I beg to differ with the end result of your proposition.

Ms Robb—If the focus is on how many people are the public rather than the focus being on is there a commercial benefit being derived from copyright material, then increasingly these days the job becomes difficult. The motivation of the company must be the same as the motivation of the proprietor. The motivation of the company may have an effect on a greater number of people than the motivation of the sole trader.

CHAIR—But I am putting a slightly different proposition. That is, if it is only one person, can you consistently say that that is the case? To put it another way, if there is only one person, can you rule out that it is only personal enjoyment?

Ms Robb—No, I cannot. This is a question on the edge and it is exactly the kind of question that might come before the court. There are easier and more difficult circumstances in this question and that is one of the more difficult questions which would always merit an investigation of the facts.

CHAIR—Why shouldn't the parliament give the court some guidance? In enacting the copyright legislation, parliament has been prepared to say that the playing of music in a guesthouse does not constitute a breach of copyright. Rather than allowing all the angst that has arisen from this to continue, or saying to every small business proprietor, 'Have your day in court,' why don't we simply give some guidelines and hope that APRA and PPCA and the small business community will take the guidelines as some reasonable resolution of the problem? Then nobody ends up having to go to court.

Ms Robb—Guidelines are a tremendous idea which I would support. It probably will not surprise you to learn that the centre thinks that the provision that exempts guesthouses from paying music royalties should be repealed. I do not believe that the answer to this is to say, 'Have your day in court.' People cannot afford to go to court. It is not the answer. There is a great opportunity here for the committee to say to parliament, 'There is a problem here. You have asked us to investigate it. There is no question that there are issues which are not being resolved. There is a lack of understanding. There is something that we, as part of the political process, can do about it.'

Mr PRICE—You mentioned guesthouses. What is the situation with the radios and TVs in nursing homes and hospitals?

Ms Robb—It is part of the expense of doing business, like buying the radio or television is. This is another very important issue that this inquiry raises. It makes no sense to say, 'Because it costs us so much money to run this business we want to have the opportunity to not pay one of the costs of doing business.' You would not get away with it with your computer supplier. You do not have to offer it. You can make the business

decision that it is not worth the $50 or $200 or whatever it is a year. That is a commercial decision for the business operator to make.

Mr PRICE—Pardon my ignorance, but what were the facts in the Telstra decision?

Ms Robb—I am not the best person to ask about this but I am happy to say what I can. The issue for the court to determine was whether the provision by Telstra through its cable of music to customers of a company was a use of the transmission rights—

Mr PRICE—Is this like muzak?

Ms Robb—It is music on hold.

Mr PRICE—In my situation at work I have a radio in the back room. When we are folding and stuffing it is terribly noisy. The radio is usually played at the weekend. Do you see that as attracting copyright?

Ms Robb—To use a horrible legal expression, prima facie, I do.

Mr PRICE—I could connect that radio to the telephone system and provide music on hold. You also see that as copyright even though nothing is being conducted for commercial profit?

Ms Robb—Maybe not for commercial profit but I would say it is for a commercial purpose. I think it is also important to bear in mind the inherent flexibility in the way licence fees are set because this right of copyright owners to be paid is not a right at large; it is a right to be paid fairly. What is fair in any circumstance will always depend on the degree of benefit that the user derives, and APRA spends an awful lot of its time negotiating with separate classes of user about what is a fair licence fee according to all of the circumstances of its use.

Mr PRICE—You mentioned that yours is a community legal centre. When was it first established?

Ms Robb—In 1983.

Mr PRICE—I am not aware of any other one in New South Wales. You appear to have a national reach, not just state.

Ms Robb—That is right. We are largely funded by the Australia Council, and also by the Australian Film Commission and most state arts ministries.

Mr PRICE—And very bloody little from the Attorney-General.

Ms Robb—Nothing yet from the Attorney-General.

Mr PRICE—Okay. Are you associated, like the Communications Law Centre, with a university?

Ms Robb—We are not associated with a university but with the Communications Law Centre in the community legal centre network.

Mr TONY SMITH—Did I understand you to say that you believe that where music is being played it is automatically a commercial benefit in premises?

Ms Robb—No. I am saying that where music is played in commercial premises the assumption is that it is being played for a commercial purpose.

Mr TONY SMITH—And you would define 'commercial premises' as anything from David Jones down to the one-person barber shop?

Ms Robb—I would; and I would repeat that what is fair to be paid to the copyright owner will vary dramatically between those two situations. It will vary according to the degree of commercial benefit.

Mr TONY SMITH—The amount of the licence fee?

Ms Robb—Yes.

Mr TONY SMITH—How do you police something like that? The biggest difficulty with all of this seems to me to be that when you take that extreme example at the bottom end—let's say you have got a very lively and active barber who flicks the dial a bit and listens to parliament, heaven help him, for a while and then he flicks it on to the cricket—

Mr PRICE—A paranoid schizophrenic!

Ms Robb—And he wonders why the customers don't come through the door!

Mr TONY SMITH—In amongst all of that, APRA comes in at the end of the day—and the music content is possibly 10 per cent; no more than that—and says, 'You have to pay. You have got a radio going.' Do you understand the sense of absolute outrage of that person to be met with a fee that is so random?

Ms Robb—I do not accept that the fee is random. I do not work for APRA, but I do know that APRA does an awful lot of negotiating—that is, negotiating down in order to reach an agreement rather than have a fight, which makes neither commercial nor general sense—and that there are tariffs. Tariffs can be set at zero in pursuit of a copy-

right system which is fair and workable, and that is in effect what happens. To answer the question, 'How do you police it?', it is being policed by the Copyright Tribunal. There is an avenue for people go. I think it is worth looking at alternatives to that or looking at giving the Copyright Tribunal more resources to make it easier for people—especially people who cannot afford legal representation—to have those arguments if they need to when the negotiations fall down.

I should say that, even during the peak of media attention given to this matter, which prompted the inquiry, we did not have the phones running hot. We certainly had some calls from people who did not understand or who reacted in a hostile way to the call to pay a licence fee. But the Simpson report found that complaints to copyright collecting societies are not a pressing issue, and they are dealt with. I do think it is worth while for the committee to look at whether the way in which collecting societies deal with those questions can be assisted in other ways so that people are given an opportunity both to understand better how the law works and why it does, and to have a forum in which they can make their arguments, if negotiations fall down, which is an alternative to the Copyright Tribunal.

Mr TONY SMITH—That sounds absolutely great in theory, but in a lot of small businesses you barely get time to have a bite for lunch, let alone to wander off to be educated about copyright. What is the purpose of the law? The law is there to try to reimburse people, et cetera. We understand that. But in some cases the law is becoming—and we have heard evidence of this—an instrument of terror, effectively, for the people involved. They get demands and they get hot under the collar. All sorts of exchanges go on, either on the telephone or by correspondence, over $35. We have seen this in our inquiry. We should know how much of this amount of $35 being collected from people in small businesses of three or less goes to Australian artists. I do not know what the figures are, but if the amount going to Australian artists at the end of the day is one cent a week surely it is incumbent upon parliament to fix that situation. It is not working. It is divisive of society and it is oppressive. Would you not agree?

Ms Robb—I would agree that the call made by small business gives this committee an opportunity to come up with ideas that will improve the situation. I do not agree that the fact that some people are hostile about the way the copyright law works and what APRA does is a sufficient or good reason to have the law changed. I think there have to be alternative ways to fix that problem—because there is nothing wrong with the law. There may be problems in the way that the message is received. You may find that there are problems with the way in which the message is being communicated, although in my experience, from what I have read and from what I know about APRA, I do not think that is a problem either. The committee may get other evidence that leads it to a different decision, but I have seen nothing of that. It is an option to change the law, but I think that would have grave consequences and there must be other ways of dealing with the problem.

Mr TONY SMITH—Do you know Trajce Cvetkovski?

Ms Robb—No, I do not.

Mr TONY SMITH—He is a barrister and an artist. He presented a submission to us in Brisbane. He also lives in my electorate. Inter alia, he made a suggestion that the method of issuing licenses for background music on the basis of a flat annual fee should be revised. The suggestion was that the existing system falsely assumes most businesses listen to commercial radio. This has resulted in an inaccurate distribution process. What is your response to that?

Ms Robb—I do not understand the relevance of commercial radio.

Mr TONY SMITH—Commercial radio being listening to the radio with music. It means music playing on the radio in small business.

Ms Robb—The proof of not listening to it is not playing it.

Mr TONY SMITH—But do you see the force of what he is saying there? I wish I had the thing in full to read out here but, as I understand it, what he is saying is that there is an inaccurate distribution process because of the way that the system assumes various things about people's listening patterns.

Ms Robb—I do not have the detailed knowledge of how APRA sets its licence fees. I can only say that, of course, we all know from first-hand experience that there are degrees of listening and that you can have music on which you are not actively giving your full and undivided attention to. Nevertheless, we all know the benefit that we derive from having music on in the background. It is something that the court has had to look at on a number of occasions. I am not sure that I understand the submission but, to the extent that I do, I do not find it has any force.

Mr TONY SMITH—Perhaps we could send you a copy of that and you could provide a written response.

Ms Robb—I am happy to do that.

Mr TONY SMITH—There is one other thing so that I understand one of the answers you gave to Mr Andrews. Was it your view, apart from what you think a court might or might not do, that a person who is fixing the car at the back and playing that radio should be liable to pay a copyright fee?

Ms Robb—I am not going to get into that corner again. I will say that there are cases on the margins, and that would be one of them, where it may require a close look at the facts in order to make the assessment. In every case, circumstances such as that would

be relevant to setting the level of the licence fee. But where music is played in the workplace the first position has to be that it is played for a commercial reason.

Mr TONY SMITH—I do not know that everyone would agree with that, but that is an assumption that you make, is it, that once it is played it has a commercial basis to it?

Ms Robb—Yes, it is.

CHAIR—As I understand it, you are saying that if music is played in commercial premises there is a rebuttable presumption in that. Is that accurate?

Ms Robb—Yes, I can accept that.

CHAIR—Just for completeness, I take it that the APRA proposal that is being put forward about the licence fees not being collected from small business for the playing of radios but being collected from the broadcasters is not one which would meet with your agreement.

Ms Robb—I have not seen the Canadian proposal. I have no knowledge of its detail, but certainly the concern of the Arts Law Centre is that composers be paid for every proper use of their copyright and that, as a matter of legal principle, it is the user who should pay for that. But I do not make any comment on the political issues which might intervene and influence this inquiry on that question.

CHAIR—And I take it that you would be opposed to the proposition before the United States Congress that, where there is a transmission by radio, no royalty fees be paid unless an admission fee is charged specifically to see or hear the transmission, albeit the transmission is not properly licensed?

Ms Robb—That is true.

CHAIR—I thank you for the centre's submission and for coming along today and discussing it with us.

[2.55 p.m.]

SHEPPARD, Hon. Ian Fitzhardinge

CHAIR—Welcome. What is the capacity in which you appear here today?

Mr Sheppard—As a private citizen. I do not appear for any particular interest. I have come here because, as I understand it, the committee wanted to ask me some questions about a couple of matters. I will do my best to help the committee. It is a fairly big topic and has a lot of questions, but if I can be of any assistance I will do what I can. I am no longer a judge in any full-time sense. I retired from the Federal Court and from the office of President of the Copyright Tribunal last year because I reached a certain age in my life, so I have no official capacity in that respect any more. Somebody wrote me a letter and I responded to it, which led to this.

CHAIR—We appreciate your coming along. I will dispense with the usual warning I give to witnesses in your case. There are a couple of issues that I suppose we are trying to come to some view about. The background to this inquiry arose from complaints from small business proprietors and operators throughout the nation about the collecting societies and, because of the difficulties in resolving those issues, we have ended up with this committee to see whether we can do that.

One of the propositions that I would be interested in your view about is a proposition put forward by APRA that, instead of collecting royalty fees from small businesses where a radio is played in the small business, the royalty fees paid by the broadcasters be adjusted and the fee be paid at that point rather than at the business level. We have heard a variety of evidence about that from APRA, from small business and from the broadcasters themselves. One of the matters put forward this morning by the Federation of Australian Radio Broadcasters and the commercial televisers and others was that it would be almost impossible to arrive at an additional royalty fee that properly represented the use of the radio by small businesses. Given your experience on the tribunal, do you have any comments that could help us in relation to that?

Mr Sheppard—Until one knew more of the facts of a particular case, one could not comment with any degree of being certain of being right, but the tribunal in my time had to determine some very difficult questions. The most difficult, I think, was the education reference we had in relation to photocopying in educational circumstances back in 1985. I brought what I said in that case with me. I have copies here if that is of any use. There was no guideline and there was no way that one could ultimately, despite the mass of evidence, reach a conclusion on what really was a reasonable amount. I evolved a rate of 2c a page, which became a base from which the parties then very sensibly negotiated. That was after quite a long hearing. It was a very difficult exercise.

I have read what the Canadian tribunal is said to have said in 1939, I think, but it

may have been taken out of context. I have not read the whole case. All I can say is that I do not think the Copyright Tribunal here would be daunted by the reference. I think it would be able to cope and bring in a decision which was not simply for a nominal amount. It might be a drawn-out process to find out what that amount should be and thus it might be expensive, as the Copyright Agency case, the education case, was. Nevertheless, I would feel positive about the ability of the tribunal to reach a conclusion, and I would not agree necessarily with what the Canadian tribunal seems to have written. In dealing with the matter, I referred to all sorts of areas that the law has had to deal with in estimation, not just this area but all sorts of areas. It is not an uncommon problem, I suppose, in many areas and somehow a result is reached. It will have an arbitrary nature and it may not suit everyone, but there is a result; and, as I have said, a result can be reached here.

CHAIR—We were advised about the Canadian situation and that, having reached that decision in 1939, the system has fallen into disrepair in that the fees are not collected from the broadcasters any more even though the provisions are still on the statute books. I do not know whether that reflects a perception of the difficulty in that country?

Mr Sheppard—I just cannot comment, because I was not aware of this until I read what was sent to me, and I know nothing more about it than that. All I can say to you is that I would not be negative about it.

CHAIR—One of the other matters put to us was that there is a need for some further definition of what constitutes a performance in public. I think you were here earlier when we were discussing some instances with Ms Robb. It has been said to us by quite a few witnesses during this inquiry that, where a radio is simply being used for the sole enjoyment of the employee or the proprietor of some small business, it is hardly appropriate to regard that as a performance in public and there should not be copyright royalties paid.

Mr Sheppard—I think, as Ms Robb said, each case depends on its own facts and circumstances. There have been a number of instances recently where this has come up. In your discussion paper there is reference to the Commonwealth Bank case, which I think involved 11 employees. Mr Justice Gummow held that that was a performance in public. There is a well-known case that was decided many years ago that said that piped or diffused music to motel and hotel rooms was a performance in public. There are other instances that could be given. The matter was discussed recently in the Telstra case in relation to music on hold, and the principles were fairly clear, although in that case the court divided pretty sharply. It might not be a bad idea if parliament did attempt to clarify it more so than it is at the moment.

CHAIR—If I understood her correctly, Ms Robb was of the opinion that parliament should not attempt to clarify it.

Mr Sheppard—I think it might be a good idea if it did, but I think you would have to be very careful in the way that the legislation was drafted because you would not want to exchange one problem for another.

CHAIR—No, and we sometimes do that.

Mr Sheppard—That is always a difficulty.

CHAIR—Yes. The other matter which has been raised with us in relation to the Copyright Tribunal is whether there is some way in which the tribunal could mediate small disputes. The matters which have given rise to this inquiry often involve licence fees of less than $100. In my practice at the bar, I would not have advised anybody to go to court for probably less than $1,000, let alone less than $100.

Mr Sheppard—No. Of course, sometimes these small organisations act through representative bodies. The licensed clubs is one. I think there is some association of fitness centres. We dealt, in comparatively recent times, with fitness centres in one case and with discos in another. I should imagine the licence fees from any individual would be small, but the cases were not really opposed. I would not let them go by consent because there was nobody who could really give a consent. The trouble with the licence scheme is that it operates unless somebody says, 'I'm in a different position,' yet that person has not been heard. So it was open to others to come in, but that is when you have the problem you mentioned. If somebody says, '$50 for me is too much,' yet that is what the going rate is, then they have the problems that you mentioned unless they can negotiate their way out of it, and it is not worth while.

CHAIR—Do you see some role for the tribunal there different to what it is?

Mr Sheppard—I have spoken about this and I think I mentioned it in the letter I wrote to the committee, but I have endeavoured to advocate outside the purview of the present act an extension of the tribunal's role so that members of the tribunal—not necessarily judges, but people with experience in the industry or other people who are good at mediation—could act as sort of conciliator-mediators in the hope that that would solve some of those problems.

You were talking to Ms Robb about resentment in the community. We saw some evidence of that in those two cases because we had representations from I think state members of parliament—particularly one from Western Australia—who had had a number of constituents who were very angry about this and asked that this be taken into account by the tribunal. It was difficult to do that, but the letters that we received are on file in the Copyright Tribunal's records, and they would be along the lines that Mr Smith was mentioning here. There were not many of them comparatively, but there were some.

Part of the community's problem is that there is a tension, I think, between those

who think that they should not have to pay anything for copyright because, after all, they have bought the CD or it is their radio and they are playing it or whatever and those who understand that, unless the copyright owners are compensated in this way, their intellectual property—because it is a property—goes unrewarded. Then there are yet others who say, 'Yes, but we mustn't reward them too much,' and, 'They get too much.' There is a lack of balance about it. You can hear both sides of those arguments in many places, but there is never any satisfactory answer to them.

Mr PRICE—When was the tribunal first established?

Mr Sheppard—The tribunal was first established by the 1968 act, which came into effect in, I think, May 1969. I am not sure when it was constituted by the appointment of members, but it did not sit until 1979—10 years later—when it inquired into the royalties to be paid on records generally. Then I do not think it had another case until about 1982 when Mr Justice Lockhart, who was the deputy president, presided over a royalty question involving one of the FM radio stations. Mr Cottle, who is behind me, will correct me if I am wrong, but I think then came education, and since then there have been a number of cases before the tribunal. In the period of the 15 years it must have been that I was chairman, I do not really think we had a lot of cases in an absolute sense.

Mr PRICE—So members of the tribunal were Federal Court judges with a tribunal warrant?

Mr Sheppard—There has been no tribunal constituted that has not had a Federal Court judge presiding over it.

Mr PRICE—As the sole presiding officer?

Mr Sheppard—Whether it is a single tribunal with a judge or a multiple tribunal depends on the parties. If one of them requests a multiple tribunal, there must be a multiple tribunal, but unless there is that request I have no power to constitute a multiple tribunal, although I would have liked to at times, and I endeavoured to persuade parties to have them because I think they are a good thing. But sometimes the parties were opposed to that course and at other times perhaps I did not think of it and it was not done. So most of the cases have been presided over by a single Federal Court judge.

Mr PRICE—And multiple party, more than one judge?

Mr Sheppard—No. The only people who could sit, from the practical point of view, in more recent years were Mr Justice Lockhart, who was the deputy president, and me, who was the president. That position has not changed except Mr Justice Burchett is now the president and I believe Mr Justice Lockhart is still the deputy president, although I am not sure about that.

Mr PRICE—And parties to the tribunal can be legally represented?

Mr Sheppard—Yes. Sometimes the legal difficulties are enormous. There have been some very large cases.

Mr PRICE—What is the advantage of having a tribunal rather than just having the Federal Court with the jurisdiction to hear it?

Mr Sheppard—Probably, from a constitutional point of view, it would not be an exercise of judicial power; it would be an exercise of administrative power and it would not be within the jurisdiction of the court to do it under chapter 3 of the constitution. That is the reason for it. The state industrial tribunals can operate by exercising both judicial and administrative power because they do not have a chapter 3 problem, but the federal tribunals cannot do that.

Mr PRICE—If I understood you correctly, you are suggesting that some consideration should be given to widening the role of the tribunal to facilitate it.

Mr Sheppard—I would like to widen it with a view to making it more accessible, cheaper and quicker. That could not be done for every type of case. You could not try a lot of the cases that have been tried that way, but some cases, and the sort of case you are dealing with, would lend themselves to it. They could be dealt with perhaps by a mediator first of all and then otherwise by an arbitrator.

In a narrow compass perhaps with no question of the rules of evidence being applied in a very informal way, you would need special types of people to staff that sort of thing because not everybody can mediate and not everybody can conciliate—they do not have the ability. You need people who are prepared to cut corners and talk reasonably, like the industrial people do, to endeavour to bring people together and to explain things to them. I think there is a lack of communication in this area. I know that bodies like APRA endeavour to educate the community and I think the government does as well and has for some time. Nevertheless, people in a lot of areas are still quite ignorant about copyright.

Mr TONY SMITH—In relation to the tribunal—I do not know very much about it—does the tribunal have power to make orders for costs?

Mr Sheppard—Yes, but it rarely exercises it. It is a very rare case where it would order costs.

Mr TONY SMITH—Would that perhaps only be exercised in cases of frivolous or vexatious proceedings?

Mr Sheppard—Yes, where there was some sort of conduct that had brought about

a prolongation of a hearing or an unnecessary hearing or something of that kind.

Mr TONY SMITH—I notice you mentioned a case that went five days before it was settled with an applicant. I suppose for the person who is appearing in person or for a party appearing in person in that situation, from one point of view, that is a bit fairer to him or her where he or she is not risking an order for costs. But there are, on the other side of the coin, massive costs that could be built up in that situation for the other party. Generally speaking, the other party would be the party well able to afford it, I would imagine.

Mr Sheppard—Yes. I would not like to say that it is always so, but I think it is usually so.

Mr TONY SMITH—Did you believe that, as far as the tribunal was concerned, there were cases that could have been filtered out by mediation before they got there?

Mr Sheppard—That was one of them. To the extent that these people in the fitness and disco cases had these objections, if somebody had been able to get hold of these people, even using the telephone or the video link we have in the court, bearing in mind that some of them were in Western Australia and the tribunal was over here, I think we could have settled it down a lot better. But it is no good turning that sort of process into a drawn out and expensive process. The whole idea is for it to be quick and inexpensive. If you cannot do that, it is not worth doing.

Mr TONY SMITH—The tribunal itself does not have at the moment an in-built mediation process, as do so many other courts in the land?

Mr Sheppard—No. It is something that can be suggested. I do think APRA, for instance, but also Copyright Agency, endeavour to settle a lot of disputes. I think it is fair to say that they go out of their way to avoid being in court.

Mr TONY SMITH—I was going to ask you whether it was a predisposition of any of the collection agencies to rush to court, but I think you have answered that.

Mr Sheppard—No, I would say they are not quick drawers. Sometimes it is obvious that a dispute has to come to the tribunal, but it is usually between very large parties.

Mr TONY SMITH—As far as the spot fire type approach, if I can put it that way, would you envisage those people being attached in some way to the tribunal?

Mr Sheppard—They would have to have some authority.

Mr TONY SMITH—But simply with a mediative role—

Mr Sheppard—Yes, but you could also extend it into arbitration if mediation failed and have an equally quick arbitration—cut corners.

Mr PRICE—The same person?

Mr Sheppard—Fashionably now there is a lot of mediation in the community and the mediator does not usually act as an arbitrator. I started judicial life in the Industrial Commission of New South Wales and I used to try to conciliate, and if that did not work I would start arbitrating. It worked well, and the fact that I had been the mediator was not seen as a bar to my arbitrating, but I think it would be now. Usually they are different people.

CHAIR—Thank you very much for responding to the request for your submission and for coming along and discussing it with us this afternoon. It provides some insights that we would not otherwise have had.

Mr Sheppard—The only other thing I would say about the APRA proposal is that I am a bit puzzled about it from the point of view of how it is going to operate. It can only apply to the radio playing; it cannot apply just to taped music. So you are going to have that unevenness. And I do not understand what happens if you have an organisation that sometimes plays the radio and sometimes plays a tape. No doubt all that has been thought of, but you would not want to exchange one complexity for another.

CHAIR—No, we will try to avoid that.

Mr Sheppard—I think the radio stations do not get anything at the moment—it is section 25 and section 199. You can tape or broadcast a radio program, but it is the music in it that has to be paid for. How the radio stations would take to this I do not know, but no doubt you have found that out.

CHAIR—They were fairly forthright in their views this morning. Thank you very much.

[3.20 p.m.]

COTTLE, Mr Brett, Chief Executive Officer, Australasian Performing Rights Association, 6-12 Atchison Street, St Leonards, New South Wales 2066

CHAIR—We have some questions to clarify matters with you but, firstly, are there some remarks you would like to make?

Mr Cottle—Yes, thank you. I have a written submission of which I might hand up a number of copies to the committee. We had intended that this would be our final submission in the nature of a wrap-up of the issues that had emerged and some final comments on the Canadian proposal but, of course, we have now had the opportunity of looking at the FARB submission, which landed on our desks this morning, and in light of the contents of that submission we might wish to put some further written materials to the committee should the committee think that would be useful. Beyond that, I wondered if I could work through the written submission. I do not think it is too lengthy. I will certainly endeavour not to read it but to draw the committee's attention to the issues that we have put in it.

We have, as I mentioned, divided the submission in two. The first part of the submission deals with matters that have arisen or have evolved during the committee's hearings. Firstly, the main criticism that we have come under has related to our manner of approaching licensees. In a sense we are compelled to take our punishment in that respect because it is clear that the materials that were sent to people certainly upset a number of them. Having said that, I would urge the committee to go back and have a look at the materials themselves. I have done so many times during the committee's inquiry and I really think that, if one looks at the materials objectively, one sees they are fair and detailed and reasonable. I sincerely believe we made a brave attempt to convey the context and the reason for the payment of the licence fees.

One of the inherent problems was alluded to by Mr Smith today, and that was that small business people are pressed for time. You can provide them with the most informative and educative documentation that you can come up with and you can spend hundreds of thousands of dollars doing it but essentially they are interested in the bottom line, and the bottom line for them is that they have to pay $50 if they have a tape recorder in their shop or $35 if they have a radio. Frankly, I do not think the level of interest goes beyond being upset at being notified of that fact, and I do think that the reality is that is an inescapable fact of life for the position we find ourselves in. I did want to say that, of course, we can improve our educational and marketing skills but there also is a role for the government to play in that area, and it would be helpful if there were information materials available from the government for small business people in this area.

I made a point in the submission about these rights ultimately being legal rights and I do not think that APRA ought to be constrained in the way that a single copyright

owner would not be from notifying a prospective user that the rights are property rights and that disregard gives rise to legal sanctions and, indeed, under the Copyright Act, the commission of a crime if the non-compliance is intentional. We do not advise people that it is potentially a crime but, ultimately, if people ignore a lot of correspondence you have to advise them that they are potentially in breach of legal rights.

I want to draw the committee's attention to a number of steps that we have taken in response to the concerns expressed during the inquiry. We have removed the two contractual positions which gave rise to some angst early on in the inquiry. We have commenced quite costly work on a series of industry-specific brochures and information sheets. We have created the position of customer services manager within our general licensing department, and that position has been filled. We are in the process of joining COSBOA and we propose at the conclusion of this inquiry to seek to convene a meeting of national small business organisations to try and work out a code of conduct or a set of guidelines that might be helpful in the future. I will have some further comments about that proposal towards the end of this submission.

I also want to refer to a matter that has been raised by a number of witnesses during the inquiry process, and we have called it the camel's back complaint. What we have heard from a number of witnesses is that it is not the APRA fee which is the bone of contention but the fact that the APRA fee comes on top of everything else that a small business person has to deal with. We respectfully submit that the frustrations experienced by small business in having to deal with three tiers of government in this country ought not be visited on APRA or copyright owners.

We again seek to remind the committee that the fees are just about the lowest in the world—if not the lowest—and that the alleged administrative burdens, red tape and bureaucracy involves, in fact, two things: the completion of a one-page form once and the payment of an annual fee upon receipt of invoice. We have intentionally tried to keep the licence schemes as simple and straightforward as possible. Maybe that has been an error. Maybe we ought to seek to distinguish with greater detail the particular circumstances of performance, but we have always felt that if we were to do that and were to require more information of businesses playing music we would be open to the criticism of imposing greater administrative burdens. If you look at some of the licence application forms and licence schemes that are in operation overseas, you will see the kinds of more complicated schemes that people can devise.

One of the key issues during this inquiry process has been the evolving characterisation of there being three situations in which music is used: firstly, where it is an essential ingredient of the business, an example used was aerobics classes; secondly, there is the example of the jeans shop where everybody agrees it is important in creating an ambience for shoppers and for staff; and, thirdly, there is the example of the hardware store where there might be piped music or a radio but it is really peripheral to the business that is being conducted.

We think those distinctions are extremely useful. We think they have greater scope in the evolution of more sophisticated licence schemes for business generally, but we oppose that kind of approach in formulating a test for liability. We have put three things in there. We have noted that the convention test is one of performance in public, not purpose of performance. Secondly, we urge the committee to steer clear of legal tests which give rise to the possibility of subjective interpretation. The more subjective the test the more likely it is that there will be litigation, and I would like to echo the comments made here today: the last thing in the world we want is more litigation, particularly over small amounts of licence fees.

Thirdly, we also think that it is wrong in principle to assume, because the use of copyright material might be peripheral to, or not the main focus of, the attention of the consumer of the material, that it ought not be paid for. If you are a film maker and you use a particular song or if you have written a book and you wish to use a photograph, in neither of those instances is that material the principal attraction for the person who consumes or enjoys the material but, of course, in both instances the copyright owner is paid.

Fourthly, we have made a big effort, at some considerable expense, to attend all of the committee hearings around the country to genuinely learn what the areas of concern are. I have said that the experience for us has been on the one hand instructive and at times extremely frustrating. But we understand that the evidence given to this committee cannot be tested in the way it would be in a court.

By the same token, there have been highly prejudicial and adverse assertions made about APRA, which we can do nothing about—except tell you the truth. We do urge the committee that, if there are particular assertions of fact to be relied upon in the report, we would greatly appreciate the opportunity of being given notice of those so that we can at least give our version of the facts. A number of particular issues have been raised in that context to which I want to avert briefly today.

The first issue is that there has been some criticism—which I regard as totally ill-informed—of APRA's distribution system. The fact of the matter is that APRA's distribution system is internationally recognised as being world's best practice. Our expense ratio in delivering that system is also recognised as being world's best practice. We went to some trouble in our initial submission to outline in detail how the distribution system works. We can expand on any element of that system at the committee's request.

As I have pointed out before, we have more than 20,000 writer members in Australia. I can tell you that I speak to many of them frequently, and they regard our distribution system as being better than any other collecting society in the world. We have American writers wishing to join APRA to gain the benefits of our distribution system.

Mr Smith earlier averted to a comment made by Mr Cvetkovski, I think, in

Brisbane, who was critical of the distribution system in relation to background music royalties. He asserted that we distribute the money received only on the basis of commercial radio logs; that is factually wrong.

We apply or apportion the money pro rata to the licence fees we receive from commercial radio, the ABC, the Special Broadcasting Service and community radio across all four pools of money. So there is a distribution of those licence fees in proportion to the value of the broadcast right from those four sectors of the radio media. That was an interesting example, coming from a barrister and a member, of how facts can be wrongly interpreted.

We have been criticised because a substantial amount of the royalties we pay out go overseas. Firstly, we would point out that, of course, Australia has a convention obligation to treat foreign authors as it treats its own authors. The national benefit in that is that Australia's authors are, in turn, accorded national treatment in foreign countries.

Secondly, we would point out that the royalties we pay overseas are purely and solely a function of the choice of music made by music users—principally, the radio and television stations. If they played more Australian music, we would be remitting less money overseas.

Thirdly, I do draw the committee's attention to the fact that this year we will earn for this country more than $11 million in export income. Also, growth in that export income is currently running at better than 15 per cent per annum.

We heard comments, by at least three people giving evidence, about there being ridiculous charges for speakers. But the charge is 92c per annum for an additional speaker. We were criticised for refusing to negotiate with a Brisbane nightclub proprietor. Of course, we cannot negotiate a special deal with a nightclub proprietor. There are 3,000 nightclubs in Australia. Firstly, we cannot practically negotiate with all of them; and, secondly, we have to offer, and be seen to be offering, a non-discriminatory approach to those licensees. We must deal with them consistently, according to our published terms and conditions of licences.

There was criticism that we collect only from some venues. We are damned if we do and damned if we do not. If we endeavour to collect from all venues, we are criticised for being too aggressive. If we are not successful in collecting fees from all venues, then we are selective.

Finally, there was what I can only characterise as outrageous evidence in relation to our fitness tariff: a licence scheme for aerobic and fitness classes. I have outlined in very short summary what the facts of that issue are.

I would put this to you: the importance of music in that context is indisputable.

Anyone observing a class will see how fundamentally important music is. Secondly, the fee is $1 per class; from some of the evidence provided to the committee, you would have thought it was $1 per person attending the class. Evidence was given in Brisbane that someone was paying $10,000 a year to APRA for their aerobic classes. That means that they have got 10,000 classes a year, or 40 classes on every weekday of the year. We submit to you that that is an enormous use of music. If the facts were properly established, that would be generating very substantial sums of revenue for that user.

A fee was the result of a settlement reached on legal advice by all parties, with a national body and various state representatives of fitness associations, after we had initiated proceedings in the Copyright Tribunal. It was an amicable settlement. It was agreed to by everyone who had at that time become a party to the tribunal proceedings. If the judge had been questioned on the proceedings in that case, he would have told you that he made very—if I may say so—onerous orders upon us to advertise widely the reference and to write to every single licensee that we had at that time concerning the details of the proposed tariff. As the committee is aware, there are further proceedings now on foot in the tribunal.

The Canadian approach: we offered up the Canadian model as a gesture of good faith to try to find some kind of commercial, practical, acceptable legal solution. We are not going to the barricades for it. It has always been our primary submission that the liability should reside where it, in fact, lies. But I was surprised at some of the material put to you today in the FARB submission. I think, before you perhaps discard the proposal based on FARB's somewhat hysterical response, I would like to put our position about it.

Firstly, FARB has said that this is, in effect, an inoperable provision of the law—nobody pays it any attention; there has never been any significance accorded to it. If that is the case, FARB would have nothing to fear if that system applied in Australia. That provision is in the statute books; it is there. As a legal matter, it may be that no additional fee is paid by radio stations. But that does not alter the clear, unequivocal legal position that the liability is subsumed within the payment made by radio stations to APRA's equivalent, SOCAN, in Canada.

I would also respectfully point out that Canadian radio stations pay considerably higher royalty rates than do Australian radio stations, and one would be entitled to draw the necessary inference from those royalty rates. The fact that there has not been a recent particular, contentious valuation case on that matter does not alter the fact that the liability resides where the statute says it resides.

I will not make any comment about my paragraph C. So far as the assertions made by FARB concerning APRA's position vis-a-vis the ACCC and the Competition Tribunal proceedings are concerned, I would merely summarise my comments there by saying that it is more than disingenuous of FARB to assert that APRA's monopoly control of performing rights in music has caused it problems. There would be no radio station in this

country that would wish to deal with more than one APRA. Moreover, there would certainly be no radio station in this country that would wish to deal with individual song writers or music publishers every time they played a piece of music. They know very well—and you as a committee should not be fooled—that, without APRA, the business of broadcasting music on radio would be unworkable.

So far as our position with the ACCC is concerned, there is one substantive issue we have with the ACCC. The ACCC wishes to have APRA's members having the right to opt out, on a work by work basis, from the assignment they make to APRA. We have said to the ACCC that we believe the model approved by the European Commission and the UK Mergers and Monopolies Commission is the more appropriate. That would give all of our members the right to opt out medium by medium, but on an all works or no works basis. We think, if it is to be on a work by work basis, it will not work in practice. That is really the single substantive issue which will be the subject of review by the Competition Tribunal later this year.

Since it has been raised as an issue by FARB, I would urge the committee to consider the obvious public benefit in having a non-profit collecting society such as APRA, as opposed to the rapidly increasing market concentration of the commercial radio media in this country. Commercial radio is now effectively controlled by three, or maybe four, players in this country. There is no industry in this country which has been more characterised by market concentration and foreign ownership in recent years than commercial radio. I then made some final comments based on the fact that I hoped the committee would not forget that the people whose interests are most involved in all of this are in fact those who write and create the music, that is, the songwriters, and I think you have heard some intelligent, reasonable and constructive comments from those writers.

That brings me to the end of our written submission, but there is one additional matter that we would like to put before you. It really comes back to the opening comments I made, that is, there are really two key areas of contention here. One is the playing of music in the workplace—whether that should be regarded as a public performance. The second is the playing of radios generally. We have endeavoured to look at the second of those two issues as a broad brush approach to solving the problem. If the committee were so minded not to go down that path—for whatever reason—there is another practical solution that we would like, at this stage, to put before the committee. We would, subject to my board's approval and approval that may require a resolution by the general membership, be prepared to issue complimentary licences in circumstances where music is played in the workplace by the use of a radio where there is no evident objective intention that members of the general public, be they customers, clients or other people, hear the performances.

I would think that we would need to look at a reasonable number of employees which would be a cut-off point in constructing that voluntary policy, and I would have thought five, or perhaps 10, employees might be a reasonable cut-off point. It is clearly

something that would need to be refined. I think it is something that could be refined if possible at a round table meeting with small business interests. If possible, it seems to me it could be chaired by you, Mr Chairman—or someone like Mr Sheppard would be extremely helpful in refining that policy. If we were able to do that, I do believe that a vast majority of the heat would disappear from the issue and it might be acceptable because it would not interfere with the property rights that composers and songwriters have. I qualify this. It is not up to me to offer up repudiation of my members' rights but, subject to their approval, it is the kind of thing which I think could be constructed. Beyond that, I am very happy to answer any questions.

CHAIR—Mr Cottle, I am putting a view to you now which I qualify by saying is not the view of the committee because the committee has not discussed this. I am simply putting forward a personal inclination, if my fellow committee members will bear with me on this matter.

Mr PRICE—We will take a vote!

CHAIR—It is open to them to put forward a different inclination; I want to make that clear. I am not seeking to bind the committee in any way. It does seem to me, having heard the evidence to date, that there are some difficulties with the Canadian model. I hear what you have said today, but there is a different historical background to what has occurred in Canada and what has occurred in Australia, and whilst you make what is no doubt a valid legal point about the Canadian situation and reflect on the different licence fees paid, I suspect we would engage ourselves in some ongoing disputation, particularly with the radio stations and the broadcasters, if we go down that track. That is simply my view; I am open to being dissuaded or being persuaded one way or the other about that.

Secondly, it is clear—as you and others have pointed out—that there are international obligations. I do not see that this committee can responsibly say that the international obligations can be somehow swept aside. I am mindful also, for example, of the view being taken by the Europeans about the proposals before the United States Senate to widen their exemptions, the problems that that could well run into and their attitude towards the Canadian provisions in any event. It seems to me that what you say about the legal right is one which ultimately this committee has to accept is there.

That then leaves us in a position of what can be done. I was teasing out today this proposition of whether or not the public performance can be defined in some way which cuts out what most of us regard as a matter of commonsense and, even on the basis of what you have just said now, you would not want to include this. As I have said on numerous occasions, it is the person in the garage out the back who is playing the radio to stop them getting bored or whatever. I find difficulty with this, despite what Ms Robb urged on us today that a court would accept this as being sufficiently commercial or otherwise to constitute a public performance. I may be wrong about that. You know the old joke that, if you have two lawyers, you have three opinions.

So my query then is: is it feasible for us to recommend some definition of public performance that excludes that sort of situation? For example, I was playing around with some words like, 'For the purpose of this act, the use of a single radio receiver by a person for their own enjoyment, albeit on commercial premises, does not constitute a performance in public', or some words to that effect. That is one way of looking at it. The other way is your way, which is a voluntary code where there is agreement between APRA and small business groups that would end up with a similar result.

I am not sure which way is the better way to go. Throughout the discussion about the Canadian system, I had this feeling—if it is nothing more—that it will end up more trouble for you, your members and everybody else than perhaps it is worth because of different historical backgrounds upon which we arrive at this point.

Mr Cottle—I actually do not think that the Canadian situation would cause problems either for us or our members. I think that the Copyright Tribunal would have no difficulty accepting survey evidence and making a judgment about the value of those performances. However, having said that, I did note with some interest the position of the European Commission. In its decision to launch an attack on the US exemption it did state reasonably clearly that it regarded the Canadian provision as also being worthy of attack. It was certainly not acceptable to the Europeans. If that were the case, I think that would be a very difficult hurdle to overcome in enacting such a provision here.

So far as the parliament's right or ability to devise a definition of the expression 'in public', it is my own view as a lawyer that the parliament would be entitled to do that, provided that it did not cut across the letter and spirit of the convention. It does seem to me, however, that legislation does suffer from the disadvantage of being black letter in style and being inflexible. In a sense, legislation invites litigation. If the parliament were to decide that we are going to attempt, by way of either a positive or negative definition, to codify what the courts have said, but at the same time be seen to be cutting back on what the copyright owners' rights are, that really would invite further and increased litigation.

It would also be a definition if gotten wrong, as interpreted by the courts, which could, of course, only be amended by further legislation. I think the advantage of what I am putting to you is that it can be couched not in black letter style but in guidelines style and in an interpretative style, and it can be changed if it is not working in practice. What we need is some national forum and, believe me, APRA will be encouraged to attend any such national forum which can devise such a reasonable code of conduct.

Mr PRICE—And it does not take away your property rights.

Mr Cottle—It doesn't take away the property. It gives rise to no potential trade sanction or convention issue, and I do think for that reason it is to be preferred.

Mr PRICE—That is a very worthwhile contribution.

CHAIR—Roger, as you have to go, I propose that Mr Smith move that he and myself constitute a subcommittee for the remainder of this afternoon. There being no objections, it is so resolved.

Mr Cottle—So that really would be the submission that I would make.

CHAIR—It would be useful if you could provide a further submission and perhaps address what I have put to you because, even if it is only my inclination, nonetheless they will be matters that we will have to discuss as a committee anyway at this stage.

Mr Cottle—Yes, indeed.

Mr TONY SMITH—With respect to Roger—and I do listen to what he says—I would put a view that leans more to a definition simply because there is a chance for there to be a capricious interpretation from place to place which could give rise to more difficulties. I think the outline given by the chairman sounded all right—obviously we have to sit down and work out a decent piece of drafting. Mr Cottle, when you speak of the danger of litigation, I cannot see at the moment—but you would probably be able to lead me in that direction—where the litigation would come from when one is talking about that specific instance. You can comment on that if you wish, but that was just a view I had.

Mr Cottle—If I may comment, I did not write down the chairman's off the cuff definition, but it was something like use of a single radio receiver intended for enjoyment by a sole business proprietor.

CHAIR—This is off the top of my head, Mr Cottle, and I would want to avoid the sort of situation where there was some trivial overhearing of it, if you know what I mean.

Mr Cottle—Yes.

CHAIR—It has to be clear enough that everybody understands pretty much what it means, but if it were possible to come up with that sort of definition—

Mr Cottle—I think it might be possible to come up with a definition in many paragraphs of heavily qualified and explained language, but still based on that kind of definition. That is the kind of definition that you would see in the act. I can immediately tell you that, of course, there will be test cases on what 'intended for the enjoyment of that person' means—'is that a subjective test or is that to be overridden by objective observations?'

There is ample scope in that one sentence for a plethora of litigation. What

happens if you have a court at first instance deciding that it thinks it means X? Anybody wishing to upset that determination has to take that particular issue through to an appeal court, either on that case or the next time around, and we get bogged into exactly the same history of judicial interpretation that maybe has given rise to the situation now. I really think you need a more flexible approach to it and you need language which is itself interpretive and in the style of guidelines rather than legislation.

Mr TONY SMITH—But even in the definition you provided—I made a quick note of it myself—I would have thought that there was going to be strife over the interpretation of that. There can be problems with any sort of interpretation. Maybe one has to get down to exempting businesses by size in relation to that particular issue—a straight-out exemption for businesses by size. You might say in answer to that, 'That may not be fulfilling international obligations.'

Mr Cottle—If I may say so, I think it would be completely inequitable to do that. It would also be clearly in contravention of the spirit and letter of the convention; I have no doubt about that whatsoever. Some kind of blanket exemption for small business would be arbitrary, unfair and illegal. Again, what happens if one moment, when a business with, say, five employees is playing music, it does not have a liability? The minute it hires a sixth employee a liability is attracted. I would also come back to the fact that there are some very small businesses, one-person businesses, that make enormous use of music. I know some shops with one or two people in them where the music is clearly not the sort of usage which you would envisage exempting.

Mr TONY SMITH—When you talk about spirit and intent of international conventions one has to be a little bit careful because we get a lot of different interpretations of international conventions. I do not know whether you had some particular things in mind there but if you took the Convention on the Rights of the Child, for example, you would have as many interpretations of articles 12 to 16 as you probably would have people on one side of the argument or the other.

Mr Cottle—I am sure that is true but, by the same token, the document that you have just received from the European Commission gives a very clear indication of the way in which the convention, in this area, is interpreted by one of the two biggest players in the game.

Mr TONY SMITH—This inquiry has gone on for a while but one of the things I was concerned about, before we knock off, was the issue of how much—and we may have it in the evidence—in legal costs and outlays APRA spends in terms of litigation. Also in relation to the end result situation—I hinted at it before—how much is actually being collected, leaving aside the convention for the moment, for Australian artists by collection of fees from businesses having three employees or less per year? Would you be able to give us that figure?

Mr Cottle—I am afraid I cannot because we do not capture the information from licensees about how many employees they have. That is not information which is entered into our system. It is not part of a licence scheme. We have, in the original submission, provided quite extensive details on the total sums of money collected for performances by radios, TVs and background music systems. But I do emphasise that in the committee's deliberations, with respect, it is considering not only the interests of Australian composers but also the property rights of people around the world in this country. I can do nothing more than emphasise that point.

CHAIR—I perhaps have a slightly different view to the one that Mr Smith has expressed in terms of the size of the business. If there is any what I will call 'exemption'—and I am not using that in a strict legal sense; even in your guidelines you are talking about, in effect, an exemption—then it seems to me it is more appropriately a product of function rather than size; that is, the use. That is why I was trying to concentrate on the sole use being private enjoyment—so it does not matter whether a business has a turnover of $10,000 a year or $10 million a year, it is still a question of the function of the use, if you like.

Mr Cottle—Although I did indicate, in the kind of guidelines that we would issue a complementary licence for, that size of business would be one of a number of relevant factors.

CHAIR—Yes.

Mr TONY SMITH—Where does that dominant purpose test come from? It is somewhere in the law. I just thought of that then.

CHAIR—It is in the tax law, or it used to be. I am not sure where else. That has been the subject of a reasonable amount of litigation in the High Court too.

Mr Cottle, I thank you for your further submission and for being here today, and for having someone present throughout the inquiry. We would appreciate any further matters along the lines that you have suggested being put to the committee in writing, and we will certainly take them into account. If there is any matter that we feel we would need to clarify with you, we might call you back for that purpose. Otherwise, I would not expect that we would. There has to be some finality to this process. I think we have teased out some positions which, putting a lot of things aside, are coming to the crux of it anyway, so that has been useful. Whilst we have not spoken about other matters in your subsequent submission, we will take them into account as well.

Mr TONY SMITH—I would also appreciate a more refined definition of what you were saying.

Mr Cottle—We will submit that proposal to the committee within the next week.

CHAIR—Thank you.

Resolved (on motion by **Mr Tony Smith**):

That the submission from APRA dated 17 March 1998 be received as evidence in the inquiry and that this committee authorise its publication.

Resolved (on motion by **Mr Tony Smith**):

That this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 4.02 p.m.