

## **Chapter 7**

# **The Copyright Tribunal as an avenue for review to small businesses**

## **Introduction**

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

## **Monopoly status of collecting societies**

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

7.3 The licences offered for background music are 'blanket' licences, meaning that all users pay the same fees for the same licence, regardless of how much music they actually listen to. Users do not have the

opportunity to negotiate the amount of the fees or the conditions of the licence.

7.4 In a recent court decision involving APRA, the Federal Court noted in its judgment that APRA 'enjoys a substantial degree of power – amounting indeed to dominance – in the market for music rights. It would seem that, in practical terms, it would be impossible for a nightclub or discotheque to survive without using music of [APRA]'.<sup>1</sup>

7.5 The Simpson Report summarised the arguments in relation to the monopolistic status of copyright collecting societies in the following way:

All societies argue that they have never attempted, nor would never attempt, to prevent or hinder the entry of any person into any market. They argue that their whole purpose is to facilitate the lawful use of the relevant rights. As such, they supply a service to users which is cost efficient and simple; promotes increased competition in other markets; results in a supply of information to users so they can make informed choices; and promotes industry cost savings and ultimately lower prices. Their opponents argue that collecting societies are by their nature, monopolistic bodies that have the capacity to abuse that monopolistic position particularly through the imposition of restrictive licence terms or the operation of blanket licence schemes.<sup>2</sup>

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1 *Re: Australasian Performing Right Association Limited and Cerindale Pty Ltd* (1991) 13 ATPR 41-074/97, para. 44.

2 Simpson Report, Chapter 33.

## **Early concerns about abuse of power**

7.6 Concerns about the potential for abuse of monopolistic power of collecting societies arose soon after the formation of APRA in 1926. A 1932 Royal Commission concluded that APRA was:

to all intents and purposes, a super-monopoly controlling or claiming to control most of the music which users in public must use and is able to dictate its own terms.<sup>3</sup>

7.7 The Royal Commission went on to recommend that some form of tribunal be established to arbitrate in disputes between APRA and users of music in order to restore and maintain 'harmonious relations' between the parties involved.<sup>4</sup> Following this recommendation, changes were made to the *Copyright Act 1912* to enable voluntary arbitration in disputes between copyright owners and music users. It seems that this procedure was never used<sup>5</sup> though concern continued to be expressed about the need for a compulsory system of arbitration.<sup>6</sup>

7.8 The 1959 Spicer Committee generally concurred with the 1933 Royal Commission's sentiments on APRA's monopolistic position, saying that APRA 'might fairly be described as having monopolistic

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3 *Report of the Royal Commission on Performing Rights*, 1933, p. 44.

4 *Report of the Royal Commission on Performing Rights*, 1933, p. 44.

5 *Report of the Committee Appointed by the Attorney-General of the Commonwealth to consider what alterations are desirable in the copyright law of the Commonwealth* (Spicer Report), p. 66, para. 346.

6 For example, the parliamentary Standing Committee on Broadcasting recommended in 1943 that a system of compulsory arbitration in respect of disputes between APRA and the broadcasting industry be established.

control over the performance of copyright music in Australia'. That committee noted that concern had been expressed about the actual or potential abuse of this monopolistic power.<sup>7</sup> The committee also noted that Canada and the United Kingdom had established tribunals for the purpose of reviewing tariffs and determining disputes between copyright collecting societies and music users.<sup>8</sup> APRA and other parties that appeared before the committee agreed that a system of compulsory arbitration was desirable.<sup>9</sup> The Spicer Committee went on to recommend the creation of the Copyright Tribunal.<sup>10</sup>

## **The Copyright Tribunal**

### **Constitution**

7.9 The Copyright Tribunal is made up of a President and other members appointed under the *Copyright Act 1968*.<sup>11</sup> The President and Deputy President must be members of the Federal Court of Australia.<sup>12</sup> Most applications to the Copyright Tribunal are heard by a single member. In certain circumstances, such as a request by a party to

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7 Spicer Report, para. 343, p. 65.

8 Spicer Report, paras 351 and 352, p. 67.

9 Spicer Report, para. 353, p. 67.

10 Spicer Report, pp. 67–72.

11 Section 138(1) *Copyright Act 1968*.

12 Section 140(1) *Copyright Act 1968*.

proceedings, a matter will be heard by not less than two members of whom one must be the President or Deputy President.<sup>13</sup>

## **Jurisdiction**

7.10 The process of determining the jurisdiction of the Copyright Tribunal from the relevant legislative provisions has been described as 'the stuff that migraines are made of'.<sup>14</sup> Relevant to this inquiry is the Copyright Tribunal's authority to examine licensing schemes for the public performance of musical and literary works and sound recordings. The specific areas of the Tribunal's jurisdiction which are pertinent are:

- (a) the power to arbitrate disputes in relation to the terms of existing and proposed licensing schemes;<sup>15</sup> and
- (b) the power to deal with applications for the granting of licences under a licensing scheme.<sup>16</sup>

### ***Existing and proposed licence schemes***

7.11 A collecting society (as licensor), person or organisation representing people who require a licence can refer an existing licence scheme to the Copyright Tribunal.<sup>17</sup> In the case of a proposed scheme,

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13 Section 148 *Copyright Act 1968*.

14 Shane Simpson, (*Copyright Reporter*) Vol 13 No 2 (October 1995).

15 Sections 154 and 155 *Copyright Act 1968*.

16 Section 157 *Copyright Act 1968*.

17 Section 155(1) *Copyright Act 1968*.

only the copyright collecting society (the licensor) can refer the scheme to the Tribunal. Any person or organisation having a substantial interest in the scheme can be made a party to the matter.<sup>18</sup>

7.12 The Copyright Tribunal can make an order which confirms or varies the scheme as it thinks is reasonable in the circumstances.<sup>19</sup> The power to 'vary' in this situation is not construed broadly. It appears that the Copyright Tribunal's power to 'vary' is limited to making changes which are amendments or alterations, and not so as to substitute an entirely different scheme from the original scheme.<sup>20</sup>

#### ***Applications for the granting of licences***

7.13 The Copyright Tribunal can consider an application by a person who requires a licence and who claims that the relevant licence scheme is subject to conditions or payments that are not reasonable in the circumstances.<sup>21</sup> In this case, if the Copyright Tribunal finds in favour of the applicant, it must make an order specifying changes to the scheme that it considers reasonable.

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18 Section 154(2) and (3) *Copyright Act 1968*.

19 Sections 154(4) and 155(5) *Copyright Act 1968*.

20 Copyright Tribunal Reference by APRA, re ABC 1985 IPR at 458, . ACCC Determination – Authorisation of APRA, Application Nos A30186 – A30193.

21 Section 157(2) *Copyright Act 1968*.

## **Procedure of the Copyright Tribunal**

7.14 The procedure of the Copyright Tribunal is regulated by Division 4 of Part VI and by the Copyright Tribunal (Procedure) Regulations. The former President of the Copyright Tribunal, Hon Justice Ian Sheppard, considered that the procedure was very similar to that of the Federal Court which he described as a 'a very modern procedure for the disposition of its cases, a procedure which is admired and adopted by other courts in this country and, to a degree, in others elsewhere'.<sup>22</sup>

## **Effectiveness as an avenue of review for small businesses**

7.15 As the history behind the its establishment shows, part of the Copyright Tribunal's role is to balance the collective interest of copyright owners with the interests of music users. However, the evidence received by the Committee indicates that small business operators did not consider the Copyright Tribunal to be an effective avenue of review of the copyright royalty licensing schemes.<sup>23</sup> The Committee received evidence that small businesses did not have the knowledge, time or financial resources to pursue issues in the Copyright Tribunal,

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22 'Role of the Copyright Tribunal and its work to date', Paper delivered at a seminar entitled *The Copyright Tribunal: is it working as well as it could?* organised by the Commonwealth Attorney-General's Department, the Australian Copyright Council and the Copyright Society of Australia in June 1995.

23 Ballina Chamber of Commerce and Industry, *Submissions*, p. S313; RCIAA, *Submissions*, pp. S435–35; Townsville Chamber of Commerce *Submissions*, p. S504; AHA, *Submissions*, p. S671, Fair Fitness Music Association, *Submissions*, p. S565.

particularly in light of the amount of the licence fees.<sup>24</sup> Many were not even aware of the Copyright Tribunal's existence.<sup>25</sup>

7.16 The NSW Department of Fair Trading advised the Committee that:

Although some of the complaints received by the Department fall within the jurisdiction of the Copyright Tribunal, it would appear that many small businesses are not aware of the Tribunal's existence or the type of complaints it can hear. Another concern is that many of the complaints received by the Department do not fall within the jurisdiction of the Copyright Tribunal so that there is no avenue for recourse for some complainants.<sup>26</sup>

7.17 Most parties who made submissions to the Simpson Review expressed a view that proceedings before the Copyright Tribunal were expensive, slow and unnecessarily legalistic and as such, were considered to be a last resort.<sup>27</sup>

7.18 Shane Simpson told the Committee that when he was examining the Copyright Tribunal, there was 'a lot of comment about the cost of it, the formality of it and so on. It is a formal body, it does regulate a very complicated series of provisions in the Act. It is headed by a judge. It is an arena for lawyers'.<sup>28</sup>

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24 Ballina Chamber of Commerce and Industry, *Submissions*, p. S311, Ms Connell, SBDC (WA), *Transcript*, p. 19.

25 Ms Connell, SBDC (WA), *Transcript*, p. 19; Mr Power, Townsville Enterprise, *Transcript*, p. 125.

26 NSW Department of Fair Trading, *Submissions*, pp. S699–S700.

27 Simpson Report, para. 32.4.

28 Mr Simpson, *Transcript*, p. 342.



7.19 The ACCC noted that in the case of public performance licensees who 'pay minimal annual fees and may not have large resources, the Copyright Tribunal process may not offer a practicable solution'.<sup>29</sup>

7.20 On the other hand, the Australian Copyright Council submitted that the Copyright Tribunal is the most appropriate forum for small businesses seeking review of licence fees and that there is no need to change the law.<sup>30</sup>

7.21 The collecting societies believed that the Copyright Tribunal is a capable and fair forum for copyright related disputes.<sup>31</sup> The PPCA qualified this statement, arguing that the cost of its proceedings makes it more suitable for broadcast issues and issues involving major industry groups.<sup>32</sup>

## **The Copyright Tribunal and counteracting monopoly status**

7.22 The Copyright Tribunal plays a pivotal role in counteracting the monopoly position of copyright collecting societies. Its success or otherwise in carrying out this role has ramifications for the way in which the collecting societies conduct themselves in their dealings with music users. If APRA or the PPCA are able to exert disproportionate power in

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29 ACCC determination, para. 2.2.22, p. 15. See also para. 8.1.14, p. 74.

30 Australian Copyright Council, *Submissions*, p. S293.

31 PPCA, *Submissions*, p. S360; APRA, *Submissions*, p. S462.

32 PPCA, *Submissions*, p. S360.

their relationships with licensees, small business is at a considerable disadvantage.

### **Authorisation by the ACCC**

7.23 To avoid the possibility of their activities being in breach of the *Trade Practices Act 1974*, both the PPCA and APRA have sought authorisation of their licensing activities from the ACCC.<sup>33</sup> The PPCA gained authorisation in 1985 in respect of the public performance of records.<sup>34</sup> APRA recently made applications for authorisation in relation to a number of its activities, including its licensing arrangements. After issuing a draft determination and conducting a number of discussions with APRA, the ACCC's final determination denied authorisation to APRA in relation to its domestic licensing activities.<sup>35</sup> APRA have appealed this decision to the Australian Competition Commission.

### ***The Copyright Tribunal as a tool in countering APRA's monopoly position***

7.24 The ACCC determination on APRA examined the effectiveness of the Copyright Tribunal in balancing the interests of copyright owners and users. APRA argued in its submission to the ACCC that the

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33 When the ACCC grants an authorisation to a corporation, it means that the corporation can engage in activity which lessens competition because the arrangement is of benefit to the public and that benefit outweighs the detriment to the public caused by the lessening of competition.

34 ACCC Determination – Authorisation of PPCA, Application Nos A30082 – A30087, Australian Trade Practices Reporter, 50-096.

35 ACCC Determination – Authorisation of APRA, Application Nos A30186 – A30193.

existence and jurisdiction of the Copyright Tribunal requires it to behave reasonably. APRA maintained that the Copyright Tribunal is a tool for licensees in their negotiations with APRA.<sup>36</sup> APRA submitted that the powers and functions of the Copyright Tribunal prevents it from exercising monopoly power.<sup>37</sup>

7.25 The Committee notes that APRA's licensees do not all concur with APRA's view that Copyright Tribunal is a 'friend of the music user'. One party suggested that if a person requiring a licence from APRA is unable to reach agreement 'the threat of costly and intimidatory Copyright Tribunal proceedings is often used' by APRA.<sup>38</sup>

7.26 The ACCC examined the ability of the Copyright Tribunal to consider competition issues.<sup>39</sup> It concluded that in some cases, the Copyright Tribunal does have scope to consider competition issues, but in others it is unlikely that it is able to do so. At the most, it has some discretion to examine competition issues, but is not required to do so, and it would be open to the Copyright Tribunal to decide that a scheme is reasonable notwithstanding that it is anti-competitive.<sup>40</sup> The ACCC's determination concludes that:

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36 ACCC Determination – APRA, para. 5.1.9, p. 38.

37 ACCC Determination – APRA, paras 5.1.10 and 5.1.15 p. 38.

38 Entertainment Industry Employers Association (EIEA), *Submissions*, p. S490.

39 ACCC Determination – APRA, paras 2.2.11–2.2.23, pp. 12–15; paras 8.1.11–8.1.14, pp. 73–74.

40 ACCC Determination APRA, para. 2.2.21, p. 15, para. 8.1.13, p. 73.

the Tribunal does not have the power and is not such an accessible resource that it can regulate APRA's activities so as to completely remove any ability APRA may have to abuse its monopoly position, *particularly in respect of small users* and matters such as the types of licensing schemes offered by APRA.<sup>41</sup> [emphasis ours]

7.27 The predecessor to the ACCC, the Trade Practices Commission (TPC) expressed similar concerns about the position of small users thirteen years ago when dealing with the PPCA's application for authorisation. In its determination the TPC stated:

... a small company – such as a hotel – using records in a public performance sense will clearly not have much influence on the general level of the collectively imposed licence fee even if it thought the fee quite high. Whilst the fee payable by such a company may not, in the context of its whole business, seem large, it does have some industry-wide significance in view of the considerable number of such small companies that are involved. The likelihood of such small companies using private or statutory review proceedings is probably minimal.<sup>42</sup>

7.28 During the proceedings, the PPCA indicated that it was prepared to have prior consultations with industry bodies before increasing licence fees.<sup>43</sup> The TPC noted that this went 'some way to satisfying the concern that the Commission has that users, particularly small users, may not be able to influence the level of fees.'<sup>44</sup> The authorisation of the PPCA's arrangements was made subject to the condition that the PPCA give notice of proposed fee increases and that

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41 ACCC Determination – APRA, para. 8.1.14, p. 74.

42 ACCC Determination – PPCA, Australian Trade Practices Reporter, 55,222.

43 Australian Trade Practices Reporter, 55, 223.

44 Australian Trade Practices Reporter, 55, 223.

such notice provides an opportunity for discussion between the PPCA and the relevant industry association.<sup>45</sup>

### **Behaviour of collecting societies as an indicator**

7.29 The ACCC noted that it had received submissions and complaints about the conduct of APRA in its dealings with users. The ACCC believes that this suggested that APRA is able to conduct itself without regard to providing good customer service, and that this may be a reflection of its monopoly position in the performing rights market.<sup>46</sup> FARB's view on this issue is consistent with that of the ACCC's. FARB submitted that:

it is the lack of any alternative to APRA and its complete domination of the market for performing rights in music works, that flavours the Association's practices when dealing with its licences. APRA has no incentive to treat licensees as its customers. Those 'customers' ... have no alternative.<sup>47</sup>

7.30 The Committee also received evidence that indicates the PPCA may have conducted itself without due reference to concepts of negotiation or customer service. There are complaints from business operators in the fitness and hotel/nightclub industries that both the

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45 Australian Trade Practices Reporter, 55, 223.

46 ACCC Determination – APRA, para. 8.2.26, p. 81.

47 FARB, *Submissions*, p. S826.

PPCA and APRA recently raised their licence fees quite considerably without negotiating the changes with the industry.<sup>48</sup>

7.31 The Fair Fitness Music Association has instigated proceedings in the Copyright Tribunal against both APRA and the PPCA in relation to recent price increases.

7.32 The AHA stated that in 1995 the fees for nightclubs increased by 275% and the fees for juke boxes by 49%. The AHA's submission states that:

Other than notification of the increases in late 1995, PPCA did not approach the AHA to discuss and consider the implications of such increases on business, the reasons why such a substantial increase was necessary and possible minimisation of the cost burden upon business, for example, implementing payment by instalments prior to setting the increases.<sup>49</sup>

7.33 The AHA submitted that the increases posed a 'significant hardship' on hotels. The AHA claimed that the increases were inconsistent with undertakings that the PPCA gave during proceedings for authorisation by the ACCC.<sup>50</sup>

7.34 The PPCA maintained that it fulfilled its obligations by notifying the AHA about the increases three months prior to their adoption. The accepted procedure was that once the AHA received such notices, the

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48 Mr Nathan Shafir, *Submissions*, p. S423; Fair Fitness Music Association, *Submissions*, p. S563; AHA, *Submissions*, p. S650; Mrs Van Leeuwen, Fitness Queensland Association, *Transcript*, p. 535.

49 AHA, *Submissions*, p. S650.

50 AHA, *Submissions*, p. S650.

AHA could request consultations with the PPCA. The AHA did not seek such consultations until nine months after it had received the notification. According to the PPCA, the AHA did not oppose the tariff increase generally, but argued that certain types of nightclubs should have a lower rate.<sup>51</sup>

## **Balancing the rights of small users and the power of collecting societies**

7.35 The evidence indicated that small business operators did not believe the Copyright Tribunal was an effective or appropriate avenue for them to seek review of music licensing arrangements. There is a clear need to ensure that in their efforts to act on behalf of their members, copyright collecting societies do not become overzealous in their licensing activities. In the case of small users of music, the Copyright Tribunal may not be achieving this outcome as successfully as it could. The Committee believes that improvements can be made to existing avenues of appeal, and that new mechanisms can be introduced to ensure that the rights of collecting societies and the rights of small users of music are fairly balanced.

## **Broadening the jurisdiction of the Copyright Tribunal**

7.36 Shane Simpson told the Committee he felt that the way in which the legislation currently regulates the types of matters which the Copyright Tribunal can consider is 'unnecessarily restrictive' because a

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<sup>51</sup> PPCA, *Submissions*, p. S913.

person wanting review by the Copyright Tribunal must bring their situation within a specific section of the Act. He suggested that any issue relating to a copyright licensing scheme should be able to be considered by the Copyright Tribunal.<sup>52</sup>

7.37 The Simpson Report recommended that the Copyright Tribunal have 'as wide a jurisdiction as possible in respect of licences and licence tariffs including the variation, approval and interpretation of all licensing schemes ...'.<sup>53</sup>

7.38 Other persons agreed that expanding the jurisdiction of the Copyright Tribunal would be a positive step, with some arguing that the Copyright Tribunal should be able to consider competition issues and regulate the activities of collecting societies.<sup>54</sup>

## **Conclusion**

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

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52 Mr Simpson, *Transcript*, p. 342.

53 Simpson Report, para. 32.5.

54 Mr Jeremy Thorpe, *Submissions*, pp. S133–S135; Copyright Agency Limited (CAL), *Submissions*, pp. S499–S500; Queensland Department of Premier and Cabinet, *Submissions*, p. S532; Mr Peter Lupton, *Submissions*, p. S617; Ms Harmer, VECCI, *Transcript*, p. 446; Mr Shafir, *Transcript*, p. 455.



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

#### **Recommendation 4**

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

### **Dispute resolution**

7.40 Many people suggested that disputes between licensees and collecting societies would be better dealt with through an informal and independent dispute resolution process.<sup>55</sup>

#### **Mediation available through collecting societies**

7.41 The PPCA currently offers a Board of Review process to all licensees. APRA does not have a comparable system, however it indicated that it plans to establish such a system.

#### ***PPCA Board of Review***

7.42 The PPCA's Board of Review (BOR) process is clearly outlined in its licence documentation.<sup>56</sup> A licensee can request a review of any of the

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<sup>55</sup> West Australian Small Business and Enterprise Association, *Submissions*, p. S54; Musicians Union of Australia, *Submissions*, p. S157; VACC, *Submissions*, p. S276; EIEA, *Submissions*, p. S490; NSW Department of Fair Trading, *Submissions*, pp. S699–S700.

terms and conditions in the licence. The BOR consists of a person appointed by the Australian Institute of Arbitrators, (who acts as Chair), a person appointed by the PPCA and a person appointed by the trade association most closely associated with the business in which the licensee operates. The licence stipulates that the proceedings 'shall be conducted in an informal manner without any strict adherence to the rules of evidence'.<sup>57</sup> No legal representatives are to appear in the proceedings and the costs are to be shared equally between the licensee and the PPCA. The arbitration does not prevent a party having the matter considered by the Copyright Tribunal.

7.43 In a submission to the Committee, the PPCA advised that the BOR process 'provides a quick and simple, cost effective arbitration procedure for dealing with disputes'.<sup>58</sup> Up until 1997, no request had ever been made for a BOR. In 1997 a Melbourne licensee that operates a fitness centre requested a BOR. The BOR rejected the arguments that the use of sound recordings by the business were not primary ingredients for aerobics.<sup>59</sup>

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56 Clause 11.

57 Clause 11(f).

58 PPCA, *Submissions*, p. S360.

59 PPCA, *Submissions*, p. S888.

## **APRA**

7.44 At the time the Committee conducted this inquiry, APRA had no dispute resolution procedures available to its licensees. During the course of the ACCC hearing of its application for authorisation and determination, APRA proposed to establish an independent dispute resolution mechanism to determine such disputes.<sup>60</sup>

7.45 APRA's proposal involved scope for licensees to appeal to a mediator who would be a retired senior judicial figure. APRA argued that a three member panel would make the process expensive and could cause delays in hearings due to the difficulty in securing the availability of three people at one time. The cost of the procedure would be shared equally between the parties. APRA maintained that the mediation process should not consider disputes as to whether a particular activity is a public performance, as this is a question of law over which the Federal Court has jurisdiction.<sup>61</sup>

7.46 APRA stated to the Committee that it would notify all licensees of the appointment of the mediator once the position was established.<sup>62</sup>

7.47 In its determination, the ACCC concluded that the PPCA's model was preferable to that proposed by APRA. The ACCC also considers that as the appeal mechanism is necessary primarily for those

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60 ACCC Determination – APRA, pp. 59–61, paras 5.4.5–5.4.18.

61 ACCC Determination – APRA, p. 60, paras 5.4.7–5.4.8,

62 APRA, *Submissions*, p. S467.

users for which the Copyright Tribunal is not a practicable alternative (often small users) that it was appropriate that APRA bear responsibility for the costs of the proceedings including costs incurred by licensees.<sup>63</sup>

### **Independent dispute resolution**

7.48 Dispute resolution through the collecting societies is one avenue of review for licensees unhappy with their dealings over copyright licences. However, as at least one submission suggested, there may be doubt as to the impartiality of a process established by one of the parties involved in the dispute.<sup>64</sup>

7.49 A number of different mechanisms for independent dispute resolution were before the Committee.

7.50 The Simpson Report commented on the need for an independent body from which persons who had unsatisfactory dealings with a copyright collecting society could seek information and assistance. The Simpson Report recommended that an ombudsman of copyright collecting societies be established. The ombudsman could deal with unresolved issues relating to licence applications, inquiries and complaints. The role could be based in the Attorney-General's Department or within an expanded Copyright Tribunal.<sup>65</sup>

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63 ACCC determination - APRA, para. 8.4.27, p. 93. See also APRA's submission, *Submissions*, pp. S466-S467.

64 Arts Law Centre of Australia, *Submissions*, p. S707.

65 Simpson Report, para. 32.1.

7.51 Many witnesses supported the establishment of an ombudsman of copyright collecting societies, or some other independent body to deal with disputes between licensees and collecting societies.<sup>66</sup> While the Simpson Report used the term ombudsman, Mr Simpson told the Committee that the function could just as easily be carried out by the Attorney-General's Department or accommodated within the Copyright Tribunal's structure. He also suggested that once the scheme was operational, it could be funded by the stakeholders themselves.<sup>67</sup> If the problem required more than the provision of information, dispute resolution could be used. Mr Simpson suggested that dispute resolution could be made a precondition for accessing the Copyright Tribunal so as to increase the chance of solving the problem informally.<sup>68</sup>

7.52 APRA supported the proposal of the creation of an ombudsman, but also examined alternative proposals such as the development of its own mediation process (referred to above) and the creation of guidelines. At least one other collecting society did not support the introduction of an ombudsman.<sup>69</sup>

7.53 Hon Justice Sheppard, agreed that broadening the role of the Copyright Tribunal to make it 'more accessible, cheaper and quicker'

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66 Arts Law Centre, *Submissions*, pp. S706–S708; VACC, *Submissions*, p. S276; The Pharmacy Guild of Australia, *Submissions*, p. S579; Mr Woodward, Musicians Union of Australia, *Transcript*, p.28; Ms Harmer, VECCI, *Transcript*, p. 446.

67 Mr Simpson, *Transcript*, p. 342.

68 Mr Simpson, *Transcript*, p. 343.

69 CAL, *Submissions*, p. S500.

was a good idea. He suggested that cases could first be dealt with by a mediator in order to solve cases before they reached formal proceedings.<sup>70</sup>

7.54 Dr Daniels from the Department of Communication and the Arts suggested that a mediation process could be included as part of a code of conduct for copyright collecting societies.<sup>71</sup> The option of a code of conduct is explored more fully below.

## **Conclusion**

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

### **Recommendation 5**

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

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<sup>70</sup> Hon Justice Sheppard, *Transcript*, p. 752.

<sup>71</sup> Dr Daniels, *Transcript*, p. 516–517.

## **Code of conduct**

7.56 The Simpson Report recommended that guidelines be developed regarding the structure, procedures, functions and conduct of collecting societies. The aim of these guidelines would be to protect members, licensees, potential users and owners of the relevant copyright. The recommendation was made on the basis that voluntary guidelines would be developed in consultation with the TPC (now the ACCC). Collecting societies that demonstrated that their activities were consistent with the guidelines would be granted the status of a 'qualified society'. Under the proposal, qualified societies would retain the protection granted by section 51(3) of the Trade Practices Act.<sup>72</sup> This provision exempts certain activities related to granting of copyright licences from anti-monopoly provisions in the Trade Practices Act.

7.57 There has been some discussion by collecting societies and Commonwealth Government departments about developing guidelines or a code of conduct for collecting societies. An interdepartmental committee (IDC) which was established to review the recommendations of the Simpson Report has been examining this option. APRA indicated that there was scope for developing a code of fair conduct for collecting

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<sup>72</sup> Simpson Report, paras 33.6.1–33.7.

societies in relation to their licensing practices.<sup>73</sup> Other organisations agreed that guidelines or a code of conduct would be a positive step.<sup>74</sup>

7.58 Dr Daniels from DOCA told the Committee that the IDC favours the introduction of a voluntary code of conduct in the first instance. The code would be developed in consultation with all interested parties, including collecting societies, user groups and the government. After the code of conduct had been operating for a period of two or three years, a review could take place to determine whether the code was working effectively. If it was found that users and members were dissatisfied with the general operation of the code or with the level of compliance, the code could become mandatory or enforceable under legislation:

The view of the IDC is that light-touch self-regulation within the industry would be a useful first response, with other possibilities after a review, if that were shown not to be working satisfactorily.<sup>75</sup>

7.59 As mentioned earlier in this chapter, Dr Daniels suggested that the code of practice may be the appropriate place to address proposals for mediation between small business and collecting societies.

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73 APRA, *Submissions*, p. S467.

74 Mr Jeremy Thorpe, *Submissions*, p. S134; ALRC, *Submissions*, p. S392; Mr Azzopardi, Tasmanian Chamber of Commerce and Industry, *Transcript*, p. 80; Dr Rothnie, *Transcript*, p. 413; Ms Robb, Arts Law Centre, *Transcript*, p. 742.

75 Dr Daniels, DOCA, *Transcript*, pp. 516–517.



## **Conclusion**

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

### **Recommendation 6**

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