GOVERNMENT RESPONSE TO THE REPORT OF THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

"*DON'T STOP THE MUSIC!* - A REPORT OF THE INQUIRY INTO COPYRIGHT, MUSIC AND SMALL BUSINESS"

BACKGROUND

The House of Representatives Standing Committee on Legal and Constitutional Affairs tabled its report *Don't Stop the Music!* on 1 June 1998. The report arose out of a reference from the Attorney-General, the Hon Daryl Williams AM QC MP, to the Committee on 30 July 1997.

The reference was a result of continuous complaints by small businesses (eg, proprietors of shops, hairdressers, doctors) and their representative bodies to Members of Parliament and Government agencies about a licensing drive by the Australasian Performing Right Association (APRA) and, to a lesser extent, the Phonographic Performance Company of Australia (PPCA) during 1996-97. The licensing drive had surprised and concerned many small businesses who had had no prior contact with APRA or PPCA and had been used to playing a radio or CD without a licence for the public performance of music for many years.

Concerns about the legitimacy of the demands for royalty payments arose because many businesses were unaware of the rights of copyright owners, and because others mistakenly believed that the copyright performance right applied only to performances for which an entry fee was charged.

Some businesses sought information from the Attorney-General's Department and the Department of Communications, Information Technology and the Arts on the bona fides of APRA and PPCA and their right to seek licences for the public performance of music. This indicated that the collecting societies' efforts to educate potential licensees were not as effective as they could have been.

Other businesses questioned why they should be asked to pay APRA for the public performance of musical works on their premises when the radio or television broadcaster had already paid a licence to broadcast the music. They were unaware of, or unsympathetic to, the fact that under the Copyright Act the broadcast right and the public performance right are two distinct and separate economic rights for which a licence is required by different types of users. There was also confusion over why both APRA and PPCA could seek licences for the use of music (although in the case of PPCA a licence is not necessary for sound recordings broadcast on radio or television).

There were also assertions that a licence fee is simply another tax on small business and that it should be abolished. In responding to some of these complaints it was explained that a licence fee is not a Government tax and that collecting societies are not Government sponsored in any way, but are administering private property rights.

In its report, the Committee recognised the importance of the role of copyright in encouraging Australians to create music through the granting of exclusive rights to

creators. The Committee also acknowledged that many creators were themselves operators of small businesses that relied on royalties from the public performance of their works as an important source of income.

OVERVIEW

In dealing with the reference from the Attorney-General, the Committee received over 200 submissions and held public hearings in all capital cities and North Queensland. The conduct of the hearings and a list of the persons and organisations that provided submissions is set out in the Report.

In summary, the Report recommended that:

- APRA and PPCA undertake campaigns to educate small businesses about the law in respect of the public performance right and the role of collecting societies;
- APRA implement a complimentary licence scheme for small businesses of less than 20 employees that play music through the radio or television in circumstances where there is no intention that the music be heard by customers of the business or by the general public;
- the jurisdiction of the Copyright Tribunal be extended, and provide for mediation of disputes; and
- a voluntary code of conduct be developed for collecting societies, which sets out standards of acceptable licensing practices and activities.

The Government welcomes the findings of the Committee and supports the general thrust of the Committee's recommendations. The Committee's recommendations provide a sensible solution to this particular problem of copyright administration in Australia. Importantly, the Committee has carefully balanced the rights and obligations of the affected parties, including music composers, record producers, broadcasters, collecting societies and relevant small businesses, in making its conclusions.

The Government notes that a number of the Committee's recommendations are consistent with recommendations made in the 1994 *Review of Australian Copyright Collecting Societies* (the Simpson Report). The Simpson Report, commissioned by the previous Government and released in 1995, reviewed the history, corporate structure and operations of the five major copyright collecting societies. The Report made a large number of recommendations for improving the efficiency, accountability and accessibility of copyright collecting societies. While the majority of its recommendations were directed to copyright collecting societies, a number were directed to the Government.

The Government considers that the key recommendations of the Simpson Report that were directed to the Government have been addressed or overtaken by the Committee's recommendations (in particular recommendations 3, 4, and 6 of the Committee's report). To this extent, the Government's response to this Report also constitutes its response to those key recommendations of the Simpson Report.

More fundamentally, the Government considers that the activities of copyright collecting societies warrant continued oversight to ensure the societies operate efficiently,

effectively and equitably. In particular, the Government believes there is a public interest in careful scrutiny of the distribution activities of copyright collecting societies and the impact of new and emerging technologies on their operation. The Department of Communications, Information Technology and the Arts and the Attorney-General's Department will continue to undertake this monitoring role. In this regard, the Government notes that the Intellectual Property and Competition Review Committee is currently examining, amongst other matters, the operation of copyright collecting societies in the context of competition policy.

The Government is pleased that the Committee did not recommend that the *Copyright Act 1968* be amended to limit the scope of the public performance right, although the Government notes that this recommendation was subject to APRA fulfilling its commitment in relation to complimentary licences. The Committee gave due recognition to Australia's international treaty obligations under the *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention) and the World Trade Organisation (WTO) *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPs).

The Government is aware that in the United States the *Fairness in Music Licensing Act of 1998* provides specific exemptions for some food and drinking establishments in relation to the public performance of broadcasts of music. This, and a pre-existing exemption, have been the subject of WTO dispute settlement processes, thus demonstrating the appropriateness of the Committee's careful consideration of the issue of treaty consistency. In December 1998, the European Commission ruled that a complaint by the Irish Music Rights Organisation (IMRO), that US legislation is inconsistent with that country's obligations under the Berne Convention and TRIPs, was justified. The European Commission, at the instigation of the IMRO, initiated WTO dispute settlement proceedings against the US and the matter was heard before a panel in November 1999. The panel's decision, handed down on 15 June 2000, found that the "business exemption" in the *Fairness in Music Licensing Act of 1998* was inconsistent with TRIPs. The pre-existing exemption for "home-style" music systems, as narrowed by the 1998 amendment, was found to be TRIPs consistent. The panel recommended that the WTO Dispute Settlement Body request the United States to bring its law into conformity with its TRIPs obligations.

The Government's responses to the specific recommendations in the Report are set out below. Recommendations 1-3 are directed to APRA and/or PPCA, rather than the Government. However, the Department of Communications, Information Technology and the Arts, the Department of Employment, Workplace Relations and Small Business and the Attorney-General's Department have consulted with APRA and PPCA about the implementation of these recommendations. These departments will continue to monitor APRA's and PPCA's implementation of the recommendations.

COMMITTEE RECOMMENDATIONS

Recommendation 1:

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

Response:

The Government understands that this recommendation has been accepted and acted upon by the collecting societies. The following methods and approaches are now used by APRA and PPCA to inform small businesses of their licensing obligations:

APRA:

- updating of their information brochures and licensing information sheets, and inclusion of relevant information on the APRA website.
- contacting peak industry bodies with information about the performance right.
- placing editorials and advertisements in industry journals and in newsletters of peak bodies.
- appointing a client services manager.
- installing a 1800 telephone number for enquiries.
- proposing to create a link between APRA's website and the "Business Entry Point" website. This website is an initiative of the Commonwealth, State, Territory and local governments. It provides government information and transactions for people operating or planning to operate a business in Australia.
- seeking to include reference to APRA's licences in the materials produced by the various State and Territory Business Licence Information Services. This service provides information on the various State, Territory and Commonwealth licences relevant to businesses.
- addresses on copyright to potential future small business operators at TAFE.
- use of a trial telemarketing/direct mail campaign in a specific geographical area, involving prior consultation with peak associations, business advisory groups and the Chamber of Commerce in the selected area.

PPCA:

- use of flyers, newsletters and other publications.
- placing advertisements in publications produced by peak industry bodies and trade associations.
- attending user group meetings and trade fairs to give talks and answer questions on licensing matters and PPCA's general role.
- providing constantly updated information on their website.

The reduction from a significant level of complaint to Government by small businesses to virtually no complaints at all is evidence that a more effective information campaign is being implemented. The Government also notes that APRA has become a member of the Council of Small Business Organisations of Australia. Its membership should ensure there is more effective communication and understanding by small businesses of the role of copyright collecting societies in the future.

The Government is satisfied that these measures are an adequate implementation of this recommendation, although such education and information activities will need to be maintained and preferably extended. The Government also notes that APRA and PPCA would be expected to undertake adequate measures to inform businesses about the voluntary code of conduct developed in response to recommendation 6.

Recommendation 2:

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

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

Response:

The Government supports this recommendation. The Government understands that APRA moved to implement this recommendation immediately after the release of the Report.

This recommendation acknowledges that the use of music by small businesses does fall within the exclusive rights of copyright owners, but that when music is played indirectly by the radio or television for a small number of staff only, it should not be subject to remuneration. This approach also ensures there is some consistency between licences from APRA and PPCA.

By implication, this recommendation recognises that where music is played in a business through direct means such as a CD or a cassette player for the benefit of staff and customers then there is a commercial value to the business which should be reflected in a licence paid to copyright owners. Copyright owners would not otherwise receive remuneration for the playing of music through direct means, whereas they at least receive broadcast royalties for the indirect playing of music through radio or television.

The Committee examined a range of alternatives to this recommendation including a possibility that broadcasters pay for the public performance of broadcast music, a solution adopted in Canada. Evidence before the Committee showed that this requirement has resulted in no payments being made, raising the issue as to whether Canada is honouring its obligations under the TRIPs agreement. Furthermore, broadcasters raised a series of philosophical and practical objections to the proposal, not least of which was that the party who would be fixed with the obligation to pay would not be the party obtaining the benefit. The Attorney-General's Department also advised that such a proposal may be constitutionally invalid.

The Committee also considered the possibility of amending the definition of public performance in the Copyright Act in a way which exempted the use of a radio in certain situations from licensing requirements. However, as recognised by the Committee, any proposal to amend the Copyright Act to limit the scope of the public performance right would need to be carefully considered to ensure that it did not put Australia in breach of its international obligations under the Berne Convention and the TRIPs agreement. Any amendment would be closely scrutinised by Australia's major trading parties and could be subject to challenge before the WTO, as has been the case with the US legislation referred to above.

In arriving at its support for the Committee's recommendation, the Government has taken into account the regulatory impact of the various options considered by the Committee. The Government notes that the implementation of a complimentary licence scheme carries with it some regulatory or semi-regulatory imposts that a complete legislative exemption would remove. A legislative exemption would not require the issue of a licence, nor, from the point of view of users, would Government monitoring be necessary to ensure the adequacy of this administrative solution. However, as noted above, the Government is conscious of the constraints on legislating on this issue, and of the possibility that any legislative response might be challenged in the WTO. Moreover, there are considerable costs associated with making and maintaining legislation and these costs are avoided by pursuing a voluntary arrangement.

The complimentary licence scheme, as proposed by the Committee and acted upon by APRA, provides a common-sense way of balancing the concerns of small businesses, who were aggrieved by the demand to pay for the playing of music where it was for the benefit of their employees only, and the concerns of the collecting societies to maintain the integrity of their licensing and monitoring arrangements. The extent of the scheme's administrative burden on small businesses is limited to the requirement that small business operators apply to the collecting societies for the complimentary licences.

As proposed by the Committee, the Department of Communications, Information Technology and the Arts (DCITA) is monitoring the implementation and operation of the complimentary licence scheme. In addition, the Minister for Communications, Information Technology and the Arts will provide a separate report to Parliament on the extent to which APRA has fulfilled its commitment to issue complimentary licences.

If the complimentary licence scheme fails or is not effectively implemented, the Government may consider legislative options. As discussed above, legislating with

respect to this issue will require careful consideration in view of Australia's international obligations under the Berne Convention and the TRIPS agreement.

Recommendation 3:

The Committee recommends that:

- **the Australasian Performing Right Association and the Phonographic Performance Company of Australia continue to operate separate licensing systems;**

- **the Australasian Performing Right Association and the Phonographic Performance Company of Australia explain in material sent to potential licensees the reasons for the existence of two separate licensing schemes for the playing of music; and**

- **where it is appropriate, the Australasian Performing Right Association, the Phonographic Performance Company of Australia and peak industry bodies negotiate licensing arrangements which cover sectors of business.**

Response:

The Government supports the three elements of this recommendation.

The operation of separate licensing systems is consistent with the similar recommendations made in the Simpson Report. There may be advantages to copyright owners and users of convenience and efficiency in there being only one collecting society to administer the public performance right. However, PPCA and APRA represent distinct and different groups of copyright owners - one represents producers of sound recordings and the other represents music composers. The Government does not propose to interfere with their conclusions that the interests of their respective members are best served through separate representation.

The maintenance of separate licensing systems does not in principle preclude the institution down the track of a system for the single payment of licence fees, thereby reducing the administrative burden on small business.

The Government sought comment from APRA and PPCA about the possibility of implementing a joint invoicing system. This proposal was not intended to conflict with the recommendation that the collecting societies retain separate licensing schemes. Instead, it was aimed at reducing the administrative burden on small business by the payment of one amount for the two licences. Under this proposal, small businesses that require licences from both APRA and PPCA would be issued with one invoice, rather than two. APRA and PPCA have indicated that it is not feasible to implement a joint invoicing scheme at present. They are, however, not opposed to doing so and will continue to explore the possibility of developing a single invoice approach. The Government will monitor developments in this regard.

On the second element of the recommendation, the Government strongly agrees that both APRA and PPCA should explain in relevant material in plain English the existence, nature of and reasons for the two licences required. Desirably both societies should agree on the appropriate language to be used.

The third part of this recommendation encourages APRA and PPCA to seek to negotiate with industry associations on those licenses. The Government is aware that the collecting societies are continuing discussions with industry groups on this point.

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.

Response:

The Government agrees in principle to widening the present scope of the jurisdiction of the Copyright Tribunal. The jurisdiction of the Copyright Tribunal was the subject of a review by the Copyright Law Review Committee (CLRC), which provided its report to the Attorney-General on 28 April 2000. That review was instituted following recommendations in the Simpson Report. The CLRC's report will shortly be made available to the public.

The Government notes that most of the licences proposed or administered by APRA and PPCA are already subject to the Tribunal's jurisdiction. It also notes that the evidence to the Committee indicated that some small business operators did not believe that the Tribunal was an effective avenue of review of licensing schemes for them.

The Government will respond in detail to this recommendation after considering the report of the CLRC.

Recommendation 5:

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

Response:

This recommendation will be further examined following receipt of the CLRC report on the jurisdiction and role of the Copyright Tribunal

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.

Response:

The Government supports this recommendation.

As noted by the Committee, the development of guidelines in relation to the conduct of copyright collecting societies was originally proposed in the Simpson Report. The Simpson Report envisaged that voluntary guidelines would be developed in consultation with the Trade Practices Commission (now the Australian Consumer and Competition Commission) and that their purpose would be to protect members, licensees, potential users and owners of the relevant copyright. The recommendation to develop a code of conduct was also supported by an Inter-Departmental Committee (IDC) established to review the recommendations of the Simpson Report.

Support for a voluntary code of conduct was expressed by a broad range of user groups who met with the IDC to discuss the recommendations of the Simpson Report. Similarly, APRA, the Tasmanian Chamber of Commerce and the Arts Law Centre, expressed support for the proposal in representations made to the Committee's inquiry. The Government is aware that APRA has since developed its own code of conduct for dealing with small business and proposes to develop a similar code for use in relation to all its existing and potential licensees. APRA has also expressed support for developing an umbrella code of conduct for copyright collecting societies.

The development and implementation of this proposal will inevitably involve costs, in terms of time and resources, for Government and copyright collecting societies. Balanced against this cost are a range of benefits accruing to both the members of copyright collecting societies and licensees and potential licensees. Benefits may include, for example, increased access to information about copyright collecting societies, improved standards of service from copyright collecting societies, and access to efficient and low cost dispute resolution mechanisms. Improved relations between collecting societies and their members and licensees will strengthen the ability of collecting societies to attract new members and to promote compliance amongst users of copyright material with licensing schemes.

The Government has also considered whether the immediate development of a mandatory code of conduct enforceable under legislation is preferable. Although such action would be inconsistent with a "light-touch" regulatory approach, it may prove necessary if the collecting societies are unable to agree amongst themselves on the content and terms of a voluntary code. A mandatory code might also provide stronger enforcement mechanisms and, therefore, result in better compliance than might be the case with a voluntary code of conduct.

However, the Government aims to encourage a cooperative resolution to the problems identified by the Committee and considers that this is best achieved through self-regulatory, rather than mandatory, measures. As noted in the response to recommendation 2, there are considerable costs associated with making and maintaining legislation and these costs are avoided by pursuing a voluntary arrangement. Furthermore, a negotiated and agreed code is more likely to be conducive to the efficient operation of the collecting societies. For these reasons, the Government favours the development of a voluntary code of conduct, while recognising the need, as considered

by the Committee, to make the code enforceable under legislation if collecting societies do not develop, or do not comply with, a voluntary code of conduct.

There are some existing mechanisms to ensure that collecting societies adhere to equitable and transparent practices. These include the Attorney-General's guidelines concerning the declaration of collecting societies for statutory licences. In order to address this issue more broadly, the Attorney-General and the Minister for Communications, Information Technology and the Arts will write to each of the major collecting societies to strongly encourage them to develop and adopt an industry-wide voluntary code of conduct. Such a code of conduct should be developed in consultation with the Government and interested parties such as copyright users and members of the collecting societies. The Government will monitor and assist, as appropriate, the collecting societies to develop and implement such a code.

As indicated above, the Government will consider the development of a mandatory code if a voluntary code of conduct is not effectively implemented or if there is significant dissatisfaction amongst copyright users and members of collecting societies with the code and its operation.