

COPYRIGHT TRIBUNAL OF AUSTRALIA

1. Shortly after APRA and its overseas counterparts commenced operations, the potential for abuse of monopoly power was recognised. Nearly eighty years of legislative and other scrutiny has recognised that:
 - (a) collecting societies are the only practical means of administering certain copyright rights. There has been, in particular, recognition that this is especially the case in the music industry because it involves a large numbers of works that are required by large numbers of users, the works are often incapable of being identified in advance and the users of the works are practically impossible to monitor by copyright owners; and
 - (b) supervision of the terms of licences granted by collecting societies is appropriate (culminating in Australia in the establishment of the Copyright Tribunal under the 1968 Act).
2. The definition of licence in section 136(1) of the *Copyright Act* includes licences to perform musical and literary works in public and to electronically transmit them for a fee. Accordingly, all of APRA's licences are subject to the jurisdiction of the Copyright Tribunal.
3. The Copyright Tribunal is an effective mechanism that prevents APRA from imposing unreasonable terms (including price) under its licence schemes.
4. The Copyright Tribunal was established under the *Copyright Act* following a recommendation of the Spicer Committee that a tribunal be established to deal with disputes between bodies authorised to grant licences for the public performance of works and persons desiring licences. A copy of the Spicer Report is available on request.
5. The main function of the Copyright Tribunal was said, at the time of its establishment, to be to arbitrate in disputes between owners of copyright and persons who wished to perform in public or to broadcast copyright works. Presenting the bill to Parliament, the then Attorney General said:

So that composers may collect royalties for the public performance or broadcasting of their works, it has long been the practice both in Australia and elsewhere to form collecting organisations having power to grant licences for the public performance or broadcasting of the music on behalf of the copyright owners and to collect royalties from those who use music for these purposes. It is, of course, obviously impossible for each composer to do this for himself. The collecting organization in Australia is the Australasian Performing Right Association Limited, commonly known as APRA ... in practice, it has a monopoly in this field.
6. Part VI of the *Copyright Act* establishes the Copyright Tribunal.
7. The current President of the Copyright Tribunal is the Honourable Justice Perram of the Federal Court of Australia. The Copyright Tribunal also has a Deputy President, the Honourable Justice Jagot, also of the Federal Court. The Tribunal's other members are Ms Catherine Riordan, Dr Rhonda Smith and Dr Hugh Sibly.

8. Section 154 of the *Copyright Act* permits a licensor to refer a scheme to the Copyright Tribunal.
9. Sections 155 and 156 of the *Copyright Act* permit licensors and licensees to refer disputes to the Copyright Tribunal.
10. Section 157 of the *Copyright Act* permits a licensee or a person desiring a licence to apply to the Copyright Tribunal for a determination of reasonable terms on which a licence should be granted.
11. Under sections 157A and 157B of the *Copyright Act*, in proceedings concerning voluntary licences and licence schemes, the Copyright Tribunal must, if requested by a party to the proceedings, consider relevant guidelines (if any) made by the Commission. The Tribunal may also make the Commission a party to the proceedings (if the Commission asks to be made a party and the Tribunal is satisfied that it would be appropriate to do so).
12. Under section 159 of the *Copyright Act*, when the Copyright Tribunal has made an order in relation to a scheme, a person who complies with the terms is in effect deemed to have the necessary licence. Accordingly, APRA cannot unreasonably refuse a licence or unreasonably impose its terms.
13. It is a fundamental basis of this application that the Copyright Tribunal is a practical and working alternative for licensees, for the following reasons:
 - (a) there is no filing fee, which ensures relatively quick and easy access;
 - (b) it is not necessary for parties to have legal representation, which again facilitates access for the public to the relevant regulator of the terms of APRA's licences (section 169 of the *Copyright Act*);
 - (c) in practice, the Copyright Tribunal is prepared to hear evidence and submissions by telephone or video and to travel to take evidence and submissions in cities throughout Australia, which again shows that access is not constrained by physical or geographical impediments (sections 154(3), 157(4), 157(5) and 164 of the *Copyright Act*);
 - (d) the Copyright Tribunal is not bound by the rules of evidence and is directed under the *Copyright Act* to conduct proceedings with as little formality and with as much expedition as the requirements of the *Copyright Act* and a proper consideration of the matters before the Copyright Tribunal permit; and
 - (e) although the Copyright Tribunal has the power to award costs, it does not in practice.
14. In addition, APRA notes that a number of its licensees, indeed those whose licence schemes have most often been the subject of Copyright Tribunal proceedings, are sophisticated and well resources music users, who are more than capable of participating in large scale litigation of the kind that can occur in the Tribunal.
15. In APRA's submission, the 2006 introduction of the Copyright Tribunal's alternative dispute resolution (**ADR**) processes has resulted in the Tribunal

becoming an even more practical and working alternative for licensees.¹ ADR processes are defined by s. 10(1) of the *Copyright Act* to include conferencing, mediation, neutral evaluation, case appraisal and conciliation but exclude arbitration. The Copyright Tribunal's ADR processes are set out in ss. 169A to 169G of the *Copyright Act*. APRA is very much in favour of the use of the Copyright Tribunal's ADR processes and is actively seeking to do so in its present reference to the Copyright Tribunal in relation to its licence scheme for Digital Music Services.

16. The existence and jurisdiction of the Copyright Tribunal ensures that APRA will continue to conduct its operations in a reasonable manner. In addition, it is a powerful practical tool for licensees in their negotiations with APRA.
17. Since 1968, APRA has been involved in 12 matters (not including related matters where more than one reference was made) before the Copyright Tribunal, each following years of negotiation.
18. The references to the Copyright Tribunal in which APRA has participated include matters relating to licence schemes for the ABC, commercial television, commercial radio, fitness centres, background music in retail centres, discos, ringtones, and digital music services. A complete list of matters and copies of reported judgments are available on request.
19. The Tribunal made determinations in relation to the 1985 ABC matter, discotheques, aerobics (twice) and commercial radio. The 1985 SBS proceedings and the 1992 ABC proceedings were settled by the parties by negotiation (the former on the basis of the 1985 ABC proceedings and the latter in accordance with its principles). The commercial television proceedings were settled commercially between the parties following years of litigation. A licence scheme for music in cinemas was agreed after reference to the Tribunal. Background music schemes were settled immediately prior to hearings in relation to hospitality and, fitness centres, and a short hearing was held for retail and general background music. Joint licences offered by APRA and AMCOS for ringtone services were referred to the Tribunal in 2006, but the references were settled commercially.
20. As at the date of this application, the only APRA licence scheme currently before the Copyright Tribunal is APRA's licence scheme for Digital Music Services, to which reference the Commission is a party.
21. APRA is not obliged under the *Copyright Act* to refer its licence schemes to the Copyright Tribunal for approval. However, it is APRA's policy and practice to make references to the Tribunal when industry agreement cannot be reached regarding the appropriate licence terms or level of fees after extensive negotiations and/or alternative dispute resolution.
22. The Copyright Tribunal is, in effect, a specialist regulatory body for copyright and collecting societies in Australia. Apart from specialist knowledge, the Tribunal offers procedural and substantive access to the public. In addition, it has broad

¹ Provision for the use by the Copyright Tribunal of ADR was recommended by both the Ergas Report and the CLRC report on the *Jurisdiction and Procedures of the Copyright Tribunal* (December 2000) and was inserted in the *Copyright Act* by the *Copyright Amendment Act 2006*.

ranging powers that enable it to modify and amend licence schemes as it sees fit to ensure that the central principles of copyright are upheld.

23. The Copyright Tribunal was established to prevent APRA from abusing its monopoly position, and effectively does so. In requesting authorisation, APRA acknowledges that the jurisdiction of the Copyright Tribunal over its licensing schemes is comprehensive, and extends to the terms and amounts of its licences.