

Access to and use of the Tribunal

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Do people without legal representation need greater access to the Tribunal?

What does "access" mean in this context? Clearly, people without legal representation have access to the Tribunal in the sense that it is open to entry: people are allowed to appear before the Tribunal unrepresented. The question must be, therefore, whether people without legal representation find the Tribunal approachable.

I don't think that the Copyright Tribunal is any less accessible in this sense than any other legal forum. However, there is little doubt that the Tribunal must be intimidating to those who aren't trained to appear in that or a similar environment. This is no reflection on the members or staff of the Tribunal, who in my experience go out of their way to assist unrepresented parties and people enquiring about matters before the Tribunal. But we have to remember that it's a system we are all very familiar with. It has been noted that individuals have appeared before the Tribunal without appearing to be intimidated. I believe that such people are in the minority. The whole system set up by the legal profession is alienating on many levels, and is not an accessible system.

If we accept that to this extent the Tribunal is not particularly accessible, we should ask whether this is a bad thing. I think that accessibility is desirable, not only because of the obvious value of having a system which does not alienate a huge percentage of the population, but also because it would assist the process of collective licensing (I am coming from the position of believing collective licensing to be a good thing). It would do this by making the owners/administrators of rights subject to greater scrutiny by licensees, which I think would tend to give the licence schemes a greater level of acceptance - my experience of many copyright licensees suggests that there is an overwhelming feeling that collecting societies are simply another company trying to sell something. If such people could be told that there was a Tribunal which could be approached in relation to matters to do with copyright licensing, I believe they would accept licence schemes more readily. Further, the licence schemes are more likely to run smoothly if licensees have participated in the development of the scheme (and may even benefit from their input!).

There are downsides to greater accessibility - it is likely to cause delay because individuals don't know the procedures, and it isn't their top priority to comply with timetables. Some delays are also caused by the Tribunal's greater level of tolerance for delay on the part of people without legal representation. This tolerance may be the only way of making the Tribunal seem accessible, but I believe that if some of the suggestions in this paper could be adopted, it would no longer be necessary. There is also the problem of how to deal with information which has not been presented in accordance with the rules of evidence.

I was involved, on behalf of APRA, in the Copyright Tribunal References relating to the licences for discos and fitness centres. My observation was that there were many members of the public who wanted to express opinions about the proposed licence schemes. They did this mostly by writing to the Tribunal. Their letters could not form part of the evidence in the case and most did not wish to be made parties to the reference. Because of the rules of the Tribunal, all that could be done was to notify

those people that if they wanted to file evidence they would have to be made parties to the proceedings. The Tribunal was obviously concerned about the opinions of these people, but little could be done. APRA certainly was concerned, and attempted to get as much response as possible from potential licensees. I understand that many letters were also received after the decision of the Tribunal was handed down, particularly after the disco case. Another problem was that of representative bodies who purported to represent the majority of the various industries, but who clearly did not. A great deal of time was spent simply trying to ascertain the membership of those groups.

So, what can be done to make the Tribunal more accessible?

1. *Recognise at the beginning of the proceedings the nature of the matter.* If the parties are large corporate licensors and licensees (like APRA, CAL or AVCS and FACTS or AVCC), I see no reason why the proceedings should not be run as any other large scale litigation. These parties are represented either by law firms or in house solicitors, and always brief counsel. Informalities which might assist individual members of the public would be inappropriate in matters involving such parties, except by consent.

2. *Spend money on public education/awareness programs.* The existence and function of the Copyright Tribunal could be advertised in relevant trade journals. People who contacted the Tribunal for information could be given an information sheet which advised them of the types of licences over which the Tribunal has jurisdiction, the identity of Tribunal members, the function of the Tribunal, the likely length of any proceedings, etc.

3. *Set up registries of the Tribunal in each registry of the Federal Court.* This would make the filing of documents much easier. Although people are always assured that they can do this now, staff of the registries themselves are not always completely aware of the existence of the Tribunal (even in Sydney).

4. *Make forms available and easy to use.* The Industrial Relations Court and the Residential Tenancies Tribunal both have printed forms enabling anyone to commence proceedings or enter an appearance. The Copyright Tribunal could have printed affidavit forms (if evidence was to be given by affidavit) with instructions on how to execute the document; printed summons forms with instructions; printed instructions for bodies which believe themselves to be representative, setting out how they might go about demonstrating their representativeness, etc.

5. *Either make detailed rules about procedure, or make the procedures of the Tribunal completely discretionary.* The Tribunal could consider issues such as whether everyone who appears before the Tribunal should have to be a party; whether evidence could be given in the form of a statutory declaration; whether oral submissions could be made; how the Tribunal is going to deal with correspondence (whether it can be noted by the Tribunal, whether it can go on the record, etc); what representative bodies will have to do before they will be accepted as parties, etc.

6. *At the first directions hearing, state how the above matters are to be dealt with.* Make detailed directions about the procedures to be followed in the particular matter.

Should there be additional members of the Tribunal?

If there is a problem with members of the tribunal at the moment, it does not seem to be the number, but rather the availability of members. This is difficult to avoid - the members have been appointed because they are busy experts in the field. Obviously, if the jurisdiction of the Tribunal expands as many people seem to want, more members may be required.

The problem of availability could be alleviated by:

Setting aside certain periods in each year when members of the Tribunal must be available to sit. Tribunal matters are rarely urgent enough to require unscheduled hearings. The Tribunal could conduct a callover to allocate hearing dates. This would also enable parties to plan ahead for their Tribunal matters, and might avoid the problems caused by parties who say at the last minute that certain dates are not convenient.

Does the Copyright Tribunal have sufficient resources?

This is a question for the Tribunal.

Should non presidential members of the Tribunal have a greater role?

The advantage of always having a judicial member of the Tribunal sitting is that the judicial members are trained and experienced in case management.

However, the members of the Tribunal are expert in various areas of copyright, and that expertise could be utilised if the Tribunal were to perform a mediation role.

The delays caused in the absence of the President of the Tribunal could be avoided if summonses could be returnable before the Secretary of the Tribunal. Non contentious directions hearings could perhaps be before the Secretary, or non Presidential members of the Tribunal.

7. All Tribunal members should be trained as mediators, and mediation offered as a service of the Tribunal (as it is in Federal Court).

8. Summonses should be returnable before the Secretary of the Tribunal.

9. Consideration should be given to whether non presidential members of the Tribunal should be able to sit on non contentious directions hearings particularly in the type of case which involves parties experienced in litigation.

Are the procedures for using the Tribunal too complex?

The procedures are not particularly complex, just somewhat obscure. The procedures of the Tribunal should be reviewed and set out far more clearly, for example, in relation to the need for a full Tribunal to sit on a hearing of an application for interim orders once a full Tribunal has been requested for the final hearing.

Do applications take too long to finalise?

The only delays are caused by the unavailability of Tribunal members, and by concessions made to people without legal representation. Each of these problems can be overcome. Otherwise, Tribunal applications seem to progress at a similar rate to matters in the Federal Court.