

Summary of other contributions

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I have summarised here some of the additional arguments and comments made by speakers and participants during the seminar.

1. Presentation by Brett Cottle (dealing with complaints against, collecting societies)

By way of introduction, Mr Brett Cottle, the chief executive of APRA, noted that the nature of the problem with the Tribunal might be demonstrated by the fact that members of APRA had never complained of being overpaid, while APRA's licensees had never complained that they had paid too little for an APRA licence. He then went on to suggest that a distinction needs to be made between the way issues between licensees and collecting societies are approached, and the way complaints by members of collecting societies are resolved.

1.1. Dealing with complaints from licensees

Mr Cottle noted that the jurisdiction of the Tribunal under section 157 of the Copyright Act is potentially very wide. For example, under subsection (2) of the section, a prospective licensee may make an application to the Tribunal in the event that a condition under a licence scheme is "unreasonable"; a potential licensee may thus ask that elements of the licence such as the sampling system, the termination clauses, or the exclusion clauses be examined by the Tribunal. As a result of the application, the Tribunal might order certain conditions to be inserted in the licence, or that other conditions be altered or removed. However, Mr Cottle noted that any order by the Tribunal would be binding only upon the licensor, and that the Tribunal cannot bind a licensee to take out a licence, whether in the old form, or as amended as a result of the Tribunal application.

Mr Cottle noted that in the 26 years during which the Tribunal has operated, there had never been an application concerning any condition of a licence other than those conditions which deal with the amount of money payable by various classes of licensee. Further, there have only been two applications to the Tribunal by licensees - all other applications have been made by licensors - and the majority of those applications have been made by APRA.

Mr Cottle stated that, given the potentially wide jurisdiction of the Tribunal, APRA opposed the suggestion that complaints by licensees should be referred to an ombudsman (as suggested by Mr Shane Simpson). In Mr Cottle's view, such a suggestion was unrealistic, and would become a nightmare in practice. Firstly, Mr Cottle pointed out that APRA has some thirty thousand licensees; secondly, societies themselves should handle complaints, as they either own the relevant copyright or represent the copyright owners; thirdly, the availability of an ombudsman would give rise to potentially endless trivial complaints; fourthly, the Tribunal jurisdiction is already available to determine complaints in respect of fees and other conditions of licences; and fifthly, it is in the interest of collecting societies to deal with complaints concerning licensing efficiently and directly, as this ensures that licence fees are paid on time.

Lastly, in relation to the suggestion that the collecting societies themselves should pay for an ombudsman, Mr Cottle put the view that there would be a revolution amongst composers if they had to pay, for example, for the processing of complaints emanating from the radio and television industries.

1.2. Dealing with complaints by members of collecting societies

In Mr Cottle's view, the internal arrangements between members of collecting societies are a private issue; to suggest that the Tribunal be given jurisdiction over complaints by members against the rules of the society would be to underestimate the democracy represented by the societies - the rules are set by members acting collectively. Mr Cottle asked why authors, composers, and publishers should not decide the rules amongst themselves? While the process of setting the internal rules of any collecting society will involve some degree of compromise between the various interests of the members, Mr Cottle contended that if members are unhappy with internal rules and "scream", a society will jump and listen.

Mr Cottle stated that he had some theoretical sympathy for the idea of an ombudsman to investigate complaints by members, but indicated that he had practical hesitations in endorsing the idea, in that he was not sure that an ombudsman procedure might not be administrative overkill. He noted that, from some eighteen thousand APRA members, only one had been concerned enough about the running of APRA to complain to Mr Simpson during Mr Simpson's inquiry into the collecting societies. Further, Mr Cottle noted that APRA had now established a formal complaints procedure, as a response to the review conducted by Mr Simpson.

2. Presentation by the Hon Justice Sheppard (access to Tribunal)

Mr Justice Sheppard noted that the applications which had come before him as a member of the Tribunal were generally matters involving large corporations or entities and large sums of money -in every sense, his Honour noted that an application before the Tribunal is generally "large litigation". For example, the pending case between APRA and the commercial television stations concerning the annual licence fees for the broadcasting of protected music involved multi-million dollar sums; and the Australian Broadcasting Corporation case related to an amount of about half a million dollars per year. Similarly, the Copyright Agency Limited case (in which the level of remuneration for the copying of print material within educational institutions was set) involved payments of licence fees in many millions of dollars.

His Honour pointed out that when such large sums are involved, one cannot expect the parties involved to "take it quietly". Such parties will want to have full discovery; they will want a full hearing; and they will wish to lead all the evidence they can which might be relevant to the decision. Further, such parties can generally afford to pay for the preparation and mounting of such a case.

Nonetheless, his Honour stated that the operation of the Tribunal must be efficient and economical.

His Honour noted that the real issue concerning access to the Tribunal related not to the cases involving the collecting societies, commercial organisations and government bodies, who generally were well able to look after their own interests. Rather, the focus on the access issue should be on cases such as that of Professor Kessell (who was present

at the seminar). Professor Kessell had devised a modelling system which was used by government departments. Those departments failed to inform him that his copyright material was being used, and subsequently also failed to negotiate "equitable remuneration" for the use of his property (as under section 183 of the Copyright Act they were obliged to do if the material was being used for the services of the Crown). In his Honour's opinion, the real worry for the law was how to make it easier for a person such as Professor Kessell (and for those with far less capacity to represent themselves) to bring an application before the Tribunal.

His Honour noted that while judges might take their wigs off; while proceedings may be put on television; and more money put towards Legal Aid generally, it is unlikely that any of these measures would in fact address the issue of access to the Tribunal. His Honour indicated that he personally had no answer to the issue, although the issue was a matter of concern both to himself and to his colleagues on the Tribunal.

His Honour briefly referred to ways in which procedures before the Tribunal might be streamlined; for example, by only allowing limited cross-examination and limited time for address, and by requiring that more material be presented in written form. Running through his Honour's speech was a plea that those within the profession should assist the Tribunal with suggestions as to how access to the Tribunal might be made easier.

His Honour then made a number of comments on the question of whether an ombudsman procedure should be put in place in relation to disputes concerning matters currently before the Tribunal. His Honour noted that much of the success of any such scheme would depend upon the personality of ombudsman. His Honour nonetheless did note that he was a believer in mediation to resolve disputes - for example, a team of mediators might be provided to assist parties, without cost to either side - provided free in the same way that a judge is provided freely to resolve disputes. Such a system might be formalised within the current dispute resolution procedures. However his Honour stated his opposition to the idea that the commencement of proceedings before the Tribunal should be blocked until mediation had been completed.

His Honour expressed sympathy for Mr Simpson's view on the jurisdiction of the Tribunal, and for the suggestion that Part VI of the Act be broadened to apply to a wider range of licensees and licensors than is currently the case.

His Honour also raised the issue of the tension between a copyright owner's right not to licence his or her work, and the obligation upon copyright owners to make their works available - in his Honour's opinion, how to resolve this tension requires further thought, particularly insofar as dealings with copyright material emanating from overseas is concerned. Referring to other areas of property law, his Honour noted that the owner of a house or the owner of a block of land is not compelled to lease it to others in the name of the public good.

Insofar as the current operations of the Tribunal are concerned, his Honour indicated that currently there was not a need for new members to be appointed. However, if the jurisdiction of the Tribunal were extended, further resources would be needed. His Honour also noted that the time required as a member of the Tribunal may be a problem where that member is a judge. His Honour suggested that a presidential member who is not a serving member of the bench might be appointed for a term. His Honour also suggested that non-presidential members should have a greater role, as they do in the Administrative Appeals Tribunal. Reconsideration of the role of non-presidential

members would be particularly important if the jurisdiction of the Tribunal were widened.

3. Presentation by David Catterns QC (access to Tribunal)

Mr Catterns noted that the Tribunal has a number of purposes. In respect of its jurisdiction over voluntary collective licensing schemes, it had a role in controlling monopolies; insofar as section 183 is concerned (the provision dealing with use of copyright material by the Crown for the services of the Crown), the Tribunal had a role in determining "equitable remuneration"; and the Tribunal had a separate role in respect of the statutory licence schemes and the licence schemes of the collecting societies generally.

In Mr Catterns' view, broadening the role of the Tribunal so that it dealt with a general grab bag of copyright issues was not advisable. Mr Catterns stated that in his view section 157(3) is already phrased widely enough to enable *any* copyright user to bring an application before the Tribunal in respect of licensing provisions - whether or not any collective administration of that right exists. Mr Catterns also rejected the notion that a simpler procedure was necessary, insofar as the matters before the Tribunal involved a great number of works and a great deal of money. In his experience, non-lawyers were not frightened by the Tribunal or by its procedures, and the non-lawyer was treated well by the Tribunal.

Mr Catterns suggested that the discussion regarding access to the Tribunal was over-concerned with the individual user of copyright material, as most problems were dealt with by representative associations. Insofar as individuals were involved, generally the individuals were gyms or discos who were not happy paying licence fees to APRA. In Mr Catterns' view, the problems of such users of copyright material should not be over-dignified in the discussion - why should a massive structure be put in place just to support one or two individuals who are dissatisfied.

Insofar as the current operation of the Tribunal is concerned, Mr Catterns stated that the Tribunal should not sit as a three member tribunal. Rather, applications should be heard by one member. However, a fuller right of appeal to the Federal Court should be instituted, similar to that pertaining to matters before the Administrative Appeals Tribunal, rather than the current clumsy procedure for the referral of questions of law to that court. He also suggested that the procedures before the Tribunal should be informal, involving round table discussions with the Tribunal.

Mr Catterns stated his opposition to the appointment of an ombudsman to investigate complaints relating to copyright licences. In his opinion, there were already sufficient controls within the Copyright Act insofar as the balance between private rights of ownership and public rights of access were concerned. Mr Catterns noted that any statutory licence represented a massive derogation from copyright owners' rights. There should not be a further derogation of rights through powers being given to an ombudsman.

Insofar as internal disputes within collecting societies are concerned - for example, disputes by members concerning sampling techniques or shares of licensing fees - Mr Catterns was succinct: "mind your own business!". In his view, there was no reason to have an external body review the internal arrangements of collecting societies.

Commenting on Mr Cottle's point that currently a Tribunal decision is binding only upon a *licensor* and not on the *licensee*, Mr Catterns stated that it would only be fair that

applicants to the Tribunal be compelled to take a licence on the terms decided by the Tribunal.

4. Presentation by Peter Banki (conclusions for the day & future action)

Mr Banki spent some time during his speech detailing the operation of the CLRC over the next two and a half years, and what sort of matters might be examined under the reference. In particular, Mr Banki noted the breadth of the reference, and commented that almost everything that had been discussed during the seminar would come within the CLRC's brief.

Mr Banki noted that if, for policy reasons, CLRC decides something ought to be changed in the way the Tribunal operates it might suggest amendments to the current Act or regulations. Alternatively, it might suggest that the Act not be merely amended but that it be recast, and that it should strike out in entirely new directions, and recommend perhaps that the Tribunal assume new roles - such as an educative function. On the other hand it would be within the CLRC brief to recommend that an ombudsman for collecting societies be appointed, either as a separate institution or as part of tribunal, or as part of the Attorney- General's department.

In particular, Mr Banki commented on the tension between the rights of owners which have traditionally been recognised and protected in copyright law, and the pressures of changing technology which push owners to deal with rights in certain ways. Mr Banki noted the effect to date of compulsory licensing upon copyright owners, and the effect on traditional rights if the Act were to be amended to give multimedia users mechanisms to use copyright material without obtaining permission on a case by case basis. Mr Banki stated that the question of balancing these tensions was a big issue in terms of the reference to the CLRC.

Mr Banki also summarised the issues which struck him as having been raised in the seminar: namely, the question of jurisdiction, and the broad acceptance by the participants at the seminar that the jurisdiction of the Tribunal should be reviewed or reconsidered; the question of what alternative dispute mechanisms were appropriate within the context of the Tribunal's jurisdiction in particular, and within copyright disputes generally; the issue of whether there was a need for a person or body to provide independent review of copyright licensing - an ombudsman-type person who would have powers to deal with "glitches" in the system; and the question of whether any such ombudsman figure should have substantive power, or should merely perform educative functions.

Finally, Mr Banki noted that an open forum such as the present seminar fits in well with the consultative way the CLRC sees it should go about arriving at its recommendations.

5. Other comments by speakers & participants

The following comments, which appear in almost random order, attempt to capture some of the diverse points made during the day in response to the various papers and speeches which were presented.

5.1. Points concerning the jurisdiction of the Tribunal

In Mr Simpson's view, the Tribunal should not become a forum for general complaints about copyright licensing. In particular, it should not become a consumer complaints tribunal. In his view, the rationale behind any expansion of jurisdiction should be closely examined. Further, the resource implications of extending jurisdiction would need to be closely looked at, particularly from the collecting societies' point of view. One option might be for the CLRC to look at the issue. Mr Simpson suggested that the question was one of providing simple procedures. The role of the Copyright Tribunal within the community needed to be assessed - the question is one of resolving disputes with all due process, while fostering respect for other people's property within the intellectual property part of the system of justice. He also expressed concern as to the extent any external body should interfere with what is essentially a private bargain. Mr Simpson also raised the possibility of the Tribunal dealing with moral rights issues.

Mr Chris Creswell, from the Commonwealth Attorney-General's Department also raised the issue of where the line should be drawn between convenience to owners and users in having recourse to some form of arbitration and the right of authors and owners to refuse to licence someone. Mr Creswell questioned whether any inroads on the "right to say no" would be made if the jurisdiction of the Tribunal were universal.

A further point made in discussion was that collecting societies provide considerable protection to individual copyright owners, who are otherwise at the mercy of more powerful commercial interests; the protection given to individuals via the collecting societies should not be compromised by allowing those commercial interests any wider ability to have the terms and conditions of collective licensing reviewed within the Tribunal or via an ombudsman.

5.2. Procedural matters: standing, composition of the Tribunal and costs

Mr Charles Alexander suggested that the Tribunal have more representation from groups representing users of copyright material. Mr Alexander expressed concern that the Tribunal not be open to others without a *direct* interest in the outcome of an application.

Mr Simpson noted that there is a role for representative organisations to handle disputes rather than individuals, and that a Tribunal application by a representative organisation is generally a more efficient way of proceeding than by individuals, and that giving standing to representative organisations may overcome the psychological and economic barriers of going to the Tribunal.

On the matter of costs, Ms Jocelyn Scutt drew attention not only to the costs of losing in copyright actions generally, but also to the costs of winning and then not getting the costs paid by the other side. She noted how the other side can stonewall, and drag proceedings out by taking procedural points, and thus create a pressure to settle a matter. Ms Scutt suggested that we need to think more creatively about costs, and particularly about the problem for people who win, but have to pay their own costs.

Mr Banki raised the possibility that many procedural changes could be implemented by the Tribunal itself.

5.3. The idea of an Ombudsman

A number of people supported the idea of either an ombudsman or some other avenue of dispute resolution which would be cheaper than going to the Tribunal.

Mr Shane Simpson noted that the Tribunal operates only on a part-time basis, and that in his report on collecting societies, he had recommended that any ombudsman would only be appointed on a part-time basis. Mr Simpson stated that, although an ombudsman may only be modestly used, the role would nonetheless be important in promoting the appearance of justice being done, as well as ensuring that parties received actual justice. (Mr Simpson later questioned whether an ombudsman would be as modestly used as the Copyright Tribunal has been). Mr Simpson also noted that the real role for an ombudsman would be to act as a mediator, and not as an arbitrator. Generally, the holder of the office might be an independent person with the ability to ask the right sort of question and to resolve a problem before the matter changed to a major grievance. Generally, in his view, an ombudsman's role would be involved with fact finding.

Mr Martin Cooper, solicitor, stated that it was naive to suggest that the appointment of an ombudsman in this context was appropriate. The institution of an ombudsman was a feature of European regulatory law, the function of which was to ensure that bureaucrats acted fairly. Rather, the type of dispute resolution mechanism that was being suggested in the discussion was some sort of commercial mediation. Alternatively, he suggested that there should be some sort of appeal structure within the collecting societies' own structures in order to resolve licensing disputes.

Mr Cottle expressed qualified support for an ombudsman to deal with disputes between collecting societies and their members. He also indicated a preference that an ombudsman deal with such disputes rather than the Tribunal. The point was also made during discussion that disputes between members and collecting societies were not justiciable in the sense that if a member, for example, has a complaint concerning the way surveys are carried out or payments made to members, no issue of law is involved. Rather, the question is one of how the members themselves have decided to balance their respective interests, while containing administrative costs.

The point was also made that a membership ombudsman would have a constructive role, in that an ombudsman might provide an independent point of view, and act to disseminate information to members concerning the operations of the relevant society. Further, as collective licensing is generally an "all or nothing" arrangement, it would be useful to have an independent third party to whom reference could be made in respect of particular terms or conditions of membership of a collecting society. The point was also made that the question of whether a "membership ombudsman" was necessary should not be determined merely by reference to a theoretical role that they might play, but also in light of the fact that currently very few internal complaints appear to be made.

5.4. Collective licensing

Mr Simpson stated that it is important for an individual to retain power over copyright - that such power is the basic element of a copyright system. Once a move to collective administration of rights is made, different factors will apply.

Ms Meredith raised the issue of joining a collecting society, but still being able to authorise that society to deal collectively only with some works, while other works would still be administered by the copyright owner on an individual basis. One of the difficulties of the current practice in respect of collective licensing was that it was generally an "all or nothing" arrangement.

Ms Caroline Morgan noted the fact that in the United Kingdom a copyright owner can choose *not* to join a collective licensing scheme.