

**COPYRIGHT LAW REVIEW COMMITTEE
JURISDICTION AND PROCEDURES OF THE COPYRIGHT TRIBUNAL**

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED
AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS' SOCIETY LIMITED**

1. Introduction

- 1.1 In February 2000 the Committee released a draft report, and has sought submissions relating to that report.
- 1.2 In 1998 Australasian Performing Right Association Limited (APRA) entered into a contract with Australasian Mechanical Copyright Owners Society Limited (AMCOS) under which APRA manages the business operations of AMCOS.
- 1.3 APRA made submissions to the Committee in relation to this reference. AMCOS did not; however several of the issues raised in the draft report are relevant to AMCOS and accordingly AMCOS now wishes to make submission.
- 1.4 APRA and AMCOS make the following submissions in response to the draft report.

2. Chapter 11

- 2.1 It is the submission of both APRA and AMCOS that the Tribunal should have jurisdiction over all licence schemes that they administer. As noted in APRA's initial submissions, there can be little doubt that the Tribunal has jurisdiction under the current *Copyright Act* over all aspects of APRA's licences.
- 2.2 The Tribunal has jurisdiction over the licence administered by AMCOS under Division 6 of the Act.
- 2.3 APRA and AMCOS believe it is important that the Tribunal should have jurisdiction over their licences and licence schemes. In particular, the Tribunal is an important factor in APRA's ability to demonstrate to licensees (and others) the reasonableness of its licence schemes. However, APRA reiterates the matters set out in paragraph 2.2 of its initial submissions, to the effect that the Berne Convention provides only a very limited justification for interference with the copyright owner's ability to enter into licensing arrangements. Both APRA and AMCOS would be concerned if the Tribunal's jurisdiction were to be extended in a way which would impact on the rights of copyright owners to deal with their works as they see fit (subject of course to competition laws).

- 2.4 The Copyright Tribunal was established to prevent collecting societies from exerting monopoly power over licensees or persons requiring a licence. APRA and AMCOS believe that this purpose should be the focus of any inquiry into extending the Tribunal's jurisdiction.
- 2.5 In APRA's and AMCOS' view the focus for any extension of jurisdiction should not be the voluntary or statutory nature of the licenses concerned, but rather on the extent of the works controlled by the Society and in particular the effect on competition of the intended license. The Tribunal clearly was established with a view to controlling the exertion of monopoly power. In APRA's respect for submission, the view of the dissenting member in relation to transactional licenses, depending of course on the definition of transactional licence. If a transactional license is one that applies to the exercise of the right in one work only, it is APRA's view that this is unlikely to course a problem for competition.
- 2.6 In this context, and particularly bearing in mind the fact that all of APRA's licences are voluntary, APRA and AMCOS support the recommendation at paragraph 11.12.
- 2.7 AMCOS supports the recommendation at paragraph 11.22 that sections 55(1)(d)(2)(b) and 59(5) and the regulations made under those provisions be repealed and the Tribunal's jurisdiction to determine the manner in which the royalty is payable in the absence of agreement between the parties be the basis for determining a dispute between the parties.
- 2.8 Copyright Agency Limited (CAL), which administers the licence contained in Part VB of the Act, has certain arrangements with AMCOS relating to the copying of print music under that Part. Accordingly, APRA and AMCOS support CAL's submissions in relation to the recommendations in paragraphs 11.28 and 11.38 to 11.41.
- 2.9 APRA and AMCOS support the recommendation contained in paragraph 11.68.
- 2.10 Neither APRA nor AMCOS generally administer licences of the kind described in the draft report as transactional (that is, licenses in relation to individual works or the works of an individual author). Were they to do so, APRA and AMCOS would not object in principle to such licences being within the Tribunal's jurisdiction. Insofar as it relates to APRA and AMCOS, therefore, we would support the recommendations at paragraph 11.69.
- 2.11 However, we acknowledge that the submissions of CAL on this point do have force, and we note that CAL has practical experience and prospects of administering such licences. APRA and AMCOS do not believe that the jurisdiction of the Tribunal should be used to fetter the exclusive rights of individual copyright owners to license on terms, or to withhold licenses; neither should the jurisdiction of the Tribunal be a disincentive to authors to license through collecting societies (including, for example, as against

privately owned rights administrators). It would be unfortunate if the Tribunal's jurisdiction effectively rendered some aspects of the licensing process uncommercial.

- 2.12 APRA and AMCOS have nothing further to say in relation to the recommendations in paragraph 11.97, 11.103 and 11.104.
- 2.13 APRA and AMCOS support the recommendation in paragraph 11.109, notwithstanding the fact that the suggestion for such a register is attributed to APRA.
- 2.14 APRA and AMCOS do not support the recommendation in paragraph 11.122, and repeat the comments above in relation to the limited scope under the Berne Convention for interference in the copyright owner's rights.
- 2.15 APRA does not support the recommendation at paragraph 11.127. In APRA's submission, sections 154, 155 and 156 of the Act are intentionally limited in scope, to the "confirm or vary" jurisdiction discussed in *Re Reference by APRA; Re ABC*. Each of the circumstances set out in sections 154 to 157 is different, and in APRA's view the legislature has acted deliberately in differentiating the extent of the relevant jurisdiction in each case. The objections raised by FACTS and FARB could be easily overcome in any circumstances by those bodies making an application under section 157. Section 157 provides ample opportunity for any licensee or intending licensee to propose an alternative scheme to the Tribunal, and for the Tribunal to make orders as to the charges, if any, and conditions which the Tribunal considers reasonable in the circumstances.

3. Chapter 12

APRA and AMCOS support the recommendation in paragraph 12.14.

4. Chapter 13

APRA and AMCOS note the relationship between AMCOS and CAL as described above, and support CAL'S submissions in relation to the recommendations contained in paragraphs 13.13 and 13.14.

5. Chapter 14

APRA and AMCOS support the recommendations contained in paragraph 14.15.

6. Chapter 15

- 6.1 APRA and AMCOS note the relationship between AMCOS and CAL as described above, and support CAL's submissions in relation to the recommendations in paragraphs 15.12 and 15.13.

6.2 APRA and AMCOS support the recommendation in paragraph 15.17.

7. **Chapter 16**

APRA and AMCOS support the recommendation contained in paragraphs 16.14.

8. **Chapter 17**

APRA and AMCOS note the relationship between AMCOS and CAL as described above, and support CAL's submissions in relation to the recommendations in paragraphs 17.08, 17.15 and 17.17.

9. **Chapter 18**

APRA and AMCOS support the recommendation in paragraph 18.16, noting the need for the applicant to have made adequate and proper searches for the copyright owner.

10. **Chapter 19**

APRA and AMCOS support the recommendation set out in paragraph 19.09. In particular, we support the Committee's recommendation that care should be taken to ensure representation of copyright owners as well as copyright users on the Tribunal.

11. **Chapter 20**

APRA and AMCOS support the recommendations in paragraphs 20.26 to 20.29.

12. **Chapter 21**

APRA and AMCOS support the recommendations set out in paragraphs 21.22 to 21.24, although we have some doubts as to the likely success in most cases of compulsory participation in ADR.

13. **Chapter 23**

APRA and AMCOS support the recommendation in paragraph 23.05.

14. **Chapter 24**

APRA and AMCOS support the recommendation in paragraph 24.04. APRA as a matter of course notifies licensees and intended licensees about the jurisdiction of the Tribunal (and now about its recently developed ADR procedure). However, while APRA and AMCOS would encourage the broadest possible public knowledge of the Tribunal and its procedures, it must be noted that various licensees, intended licensees, and other bodies

have interpreted such notification as somehow threatening or otherwise inappropriate.

Thank you for the opportunity to make these further submissions.

Kate Haddock

For AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED

And AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS' SOCIETY LIMITED