



**COPYRIGHT LAW REVIEW COMMITTEE
REFERENCE ON
“JURISDICTION AND
PROCEDURES OF THE
COPYRIGHT TRIBUNAL”**

**SUBMISSION OF
THE FEDERATION OF AUSTRALIAN COMMERCIAL TELEVISION
STATIONS**

JULY 1999

**SUBMISSION OF FACTS
RE
COPYRIGHT LAW REVIEW COMMITTEE
REFERENCE ON “JURISDICTION AND PROCEDURES OF THE
COPYRIGHT TRIBUNAL”**

Summary

In summary:

1. Certain provisions at Part VI of the Act unreasonably confine the Tribunal’s arbitral function. The Tribunal should have broad powers of a sufficiently general nature to give it latitude to effectively resolve disputes between copyright owners and copyright users.
2. The Act should be amended to provide for a simple procedure that could be availed by both copyright owners or copyright users where the terms of a licence (as defined by the Act), which is collectively administered, are in dispute. The Tribunal should be empowered to consider all matters relevant to the case, including an express power to consider competition issues.
3. Consideration should be given to expanding the Tribunal’s powers to consider the input arrangements of collecting societies, where those societies are subject to statutory prescription.
4. The Tribunal’s jurisdiction should be expanded so that it has the power to make such orders as it determines appropriate in the circumstances of any matter coming before it, to the extent that the orders relate to:
 - the setting and method of calculation of licence fees;
 - the setting of other terms of the licence scheme;
 - the operation of any licence scheme.
5. Collecting Societies, as traditionally understood, should be subject to the jurisdiction of the Copyright Tribunal whether they are voluntary or statutory.
6. To the extent that appointees to the Copyright Tribunal have a background relating to the interests of users or creators, the composition of the Tribunal must be appropriately balanced.
7. Orders for discovery should be permitted only in exceptional circumstances. In most cases, a system of informal interrogatories, under Tribunal supervision, would be of greater benefit to the parties and the Tribunal.
8. The procedures of the Tribunal would benefit from a review to ensure that the nature of the parties’ case is appropriately identified prior to hearing.

FACTS

1. This submission is made by FACTS. FACTS is the industry association of commercial television broadcasters and all 46 services licensed under the *Broadcasting Services Act 1992* are members of FACTS.

INTEREST OF THE FACTS' MEMBERS

2. The public administration of copyright is integral to the interests of commercial television broadcasters. FACTS members depend upon the ability to broadcast programming material, which is subject to intellectual property rights.
3. Generally speaking, copyright subsisting in television programs is pre-cleared at the point of production. This practice has developed internationally because a television program or film contains many different copyright elements and a broadcaster could not identify and administer multiple rights at the point of broadcast (particularly where the broadcast takes place many years after production). A distributor must, therefore, be able to supply the program with appropriate warranties regarding copyright.
4. The only exception to this practice has been the administration of copyright in musical works contained in programs and, more recently, some sound recordings, which are collectively licensed at the point of broadcast. In the case of musical works, collective licensing at the point of use developed largely as a result of the historical practices of music publishers and composers, at an international level. The broadcast of a musical work is not subject to a statutory licence. The broadcast of a sound recording is subject to a statutory licence which may be collectively licensed, where the broadcaster relies upon the statute.
5. In addition, the broadcaster, as a program producer, may acquire collectively the reproduction right in musical works and certain sound recordings.
6. The terms upon which collective licensing occurs, therefore, are very important to television operators. Without an appropriate licence, the broadcaster cannot transmit its programs, even though it may hold the relevant permissions in all other subsisting copyright material. As a program producer, the broadcaster may have difficulty in selling programs unless appropriate warranties can be given in relation to reproduction and some broadcast rights.
7. FACTS presently is a party to three proceedings before the Copyright Tribunal ("Tribunal") involving the terms of collective licensing. Proceedings were commenced by the Australasian Performing Right Association ("APRA") in 1993 under section 154 of the *Copyright Act 1968* ("Act"), following a breakdown in negotiations as to the terms upon which APRA licenses FACTS members to broadcast musical works within the APRA repertoire. Shortly thereafter, FACTS made application to the Tribunal under section 157 of the Act in respect of the same issue. Both the APRA Reference and the FACTS Application are to be heard together but the proceedings have been adjourned, for reasons discussed below.
8. FACTS is also respondent to an application made by the Phonographic Performance Company of Australia ("PPCA") under section 152 of the Act to

determine the rate payable by the FACTS members for the broadcast of sound recordings, the copyright in which is owned or controlled in Australia by the PPCA members. These proceedings were commenced in 1996 but questions of law were referred to the Federal Court of Australia and, on appeal, the High Court of Australia. The decision of the High Court was handed down in May 1998 and proceedings in the Copyright Tribunal are now underway. A hearing date has not been set and it is unlikely that the matter will be heard for some months.

9. FACTS, therefore, has had first hand experience in matters arising under Part VI of the Act and makes the following submissions against this background.

FACTS' SUBMISSIONS

10. Whilst the concepts underlying Part VI of the Act are relatively simple, the legislation itself is technical and in FACTS' view, has consequences not readily apparent on a superficial analysis.
11. FACTS believes that a key question in any consideration of the jurisdiction of the Tribunal is whether presently it is adequately empowered to deal with the matters coming before it, in the way contemplated by the Parliament.
12. The provisions enacting the Tribunal were introduced in the Act of 1968. The then Attorney-General, Mr Lionel Bowen, said in the second reading speech:

"I now come to those provisions of the Bill which establish the Copyright Tribunal and define its functions. Briefly stated, the main functions of the Tribunal will be to arbitrate in disputes between owners of copyright and persons who wish to make public performances and broadcasts of copyright works" [Hansard 16 May 1968 1535].

13. FACTS submits that there was a clear intention on the part of the Parliament to provide the Tribunal with powers of a sufficiently general nature to enable it to arbitrate in disputes arising between copyright owners and copyright users.
14. FACTS suggests that certain provisions at Part VI of the Act unreasonably confine the Tribunal's arbitral function and result in unnecessarily complex and expensive proceedings. FACTS believes that when the provisions of Part VI (relevant to the broadcast right in works) are examined, the Tribunal's real capacity to arbitrate is shown to be quite restricted. Whilst the following analysis is technical, FACTS believes this is necessary to appreciate the present limitations on the Tribunal's jurisdiction.

The Operation of Section 154 of the Act

15. Section 154 permits a licensor who proposes to bring a licence scheme into operation to refer the scheme to the Tribunal. A licence scheme is defined at s.136(1) as meaning:

"a scheme (including anything in the nature of a scheme, whether called a scheme or tariff or called by any other name, formulated by the licensor or licensors and setting out the classes of cases in which

the licensor or each of the licensors is willing, or persons on whose behalf the licensor or each of the licensors acts, are willing, to grant licences and the charges (if any) subject to which, and the conditions subject to which, licences would be granted in those classes of cases”.

16. A licence means, inter alia:

in the case of a literary, dramatic or musical work – a licence to perform or broadcast the work or make a record or film of it for the purpose of broadcasting or transmitting over a diffusion service, or

in the case of a sound recording – a licence to cause the work to be heard in public or to take a copy for the purpose of broadcasting the recording.

17. Relevantly:

A licence scheme is something which is “formulated by the licensor”. Therefore, it is the licensor who determines the nature of the scheme referred to the Tribunal.

18. The Tribunal has limited powers to change the scheme. It may make an order “confirming or varying” the scheme (s154(4)). “Variation” has been interpreted by the Tribunal as meaning the following:

“the word “variation” in section 154 is not to be construed so widely that it would empower the tribunal to substitute for the scheme which is referred under the section a scheme of an entirely different kind in cases where the Tribunal concluded that the referred scheme was wholly unreasonable. In such a case, the only course is to make no order on the application. Notwithstanding the absence of any express power to take this course, it seems clear to us that the Tribunal must, by implication, have this power if it is not satisfied that the scheme is reasonable. It follows that the Tribunal’s power to vary a scheme will be limited to making variations in the sense of amendments or alterations, but not so to change it as to substitute an entirely different scheme for the one referred” [Copyright Tribunal: Reference by APRA; RE: ABC 1985 IPR at 458].

19. In the proceedings between FACTS and APRA presently before the Tribunal, APRA first referred its proposed new licence scheme to the Tribunal under s.154. FACTS wished a substantially different licensing arrangement with APRA. Because of the terms of the legislation which appeared to limit the Tribunal’s orders under s.154 and the Tribunal’s own previous comment on its powers, FACTS did not believe the Tribunal could impose a licence of the type proposed by FACTS (or, indeed, any licence which amounted to more than a variation to the scheme proposed by APRA). FACTS therefore made an application to the Tribunal under s.157.

Section 157

20. Section 157 contains a number of subsections which, essentially, permit a licensee to apply to the Tribunal.

21. Sections 157(1) and (2) apply where a licence scheme is in place. If a licensor operating a scheme has failed to grant a licence in accordance with the scheme, a person may apply under s.157(1). If the grant of the licence in accordance with the scheme would be “*subject to payment of charges or to conditions that are not reasonable in the circumstances*”, the person may apply under s.157(2).
22. If a licence scheme is not in place, a person may apply under s.157(3), where a licence has been refused or granted subject to conditions which are unreasonable in relation to the applicant. A similar provision to s.157(3) exists at s.157(4) in relation to an applicant that is a representative organisation. The representative organisation can only apply where there is no licence scheme in force.
23. The orders that the Tribunal may make differ under each subsection. If the application is made under subsection (1) the Tribunal may make an order specifying “*the charges, if any, and the conditions that the Tribunal considers to be applicable in accordance with the licence scheme in relation to the applicant*” (s.157(6)). It is arguable that the scope of an order in these circumstances is limited by the definition of “licence scheme” (that is to say, it is a scheme which must be formulated by the licensor) and the requirement that the order be “*in accordance with*” the scheme.
24. An application made under s.157(2) or 157(3) may be susceptible to broader Tribunal discretion in that it may make an order specifying “*the charges, if any, and the conditions that the Tribunal considers reasonable in the circumstances in relation to the applicant*”. Similarly, if the application is made under s.157(4) the Tribunal may make an order that the Tribunal considers reasonable in the circumstances in relation to persons represented by the applicant.
25. Sections 157(3) and (4) however, may be rendered inoperable by a licensor bringing into operation its licence scheme under s.154(6), something it may do at any time once it has been referred to the Tribunal. Hence, an applicant is left only with the option of putting its position to the Tribunal under s.157(2). An applicant under s.157(2) bears an onus of establishing that the licensor’s scheme is, inter alia, unreasonable and the orders that the Tribunal may make on the application appear, as discussed above, to be confined by the definition of “licence scheme”, something determined by the licensor (and not the Tribunal).
26. FACTS initially made application to the Tribunal under s.157(4). The application proposed licence arrangements substantially different to that proposed by APRA. APRA subsequently brought its licence scheme into operation and asserted that FACTS was precluded from bringing its application under subsection (4). Whilst that issue has not finally been determined, each FACTS member thereafter made application under s.157(2), which was considered the only course for abundant precaution. The applicants thereby bear the onus of establishing that APRA’s licence scheme is unreasonable vis-à-vis their individual operations. Establishing that a licence scheme is “unreasonable” is, in practice, a very difficult task for an applicant. The Tribunal has held that a licence scheme which is reasonable

cannot be displaced by a scheme that the Tribunal considers, nonetheless, to be more reasonable [Reference by APRA: Re ABC]

27. In the case between FACTS and APRA, where FACTS is seeking a totally different licence and method of calculating the licence fee, it has been faced with a further hurdle caused by APRA's constitution, over which the Tribunal has no jurisdiction and no capacity to make orders. Where a collecting society has effectively acquired 99.9% of all available copyright product in a market and by its input arrangements, precludes any other party from dealing with its members directly (as APRA has), then prima facie it is not unreasonable to have a licence scheme which contemplates that all use of the relevant product will be use which is controlled by the society. FACTS believes it is particularly onerous to establish to the satisfaction of the Tribunal that a licence scheme is unreasonable within the meaning of s.157(2) in these circumstances. The difficulty is circular. The situation which arose in the APRA proceedings is provided only as an example and there may be a number of circumstances relating to the case in instance where the applicant is faced with a substantial challenge in proving the licence scheme is unreasonable.
28. In its Statement of Case in the proceedings, FACTS asserted that APRA's input arrangements were anti-competitive and possibly in breach of the *Trade Practices Act 1974* ("TPA"). APRA's response to these claims, in part, rejected the Tribunal's jurisdiction to deal with issues arising under the TPA. In these circumstances, and given that the Act provides no clear indication of the Tribunal's jurisdiction in this regard, FACTS formed the view that the questions of competition law should be dealt with by the Court, rather than at the conclusion of long and expensive proceedings before the Tribunal, as a point of law. As the CLRC may be aware, a FACTS member's application to the Federal Court challenging certain of APRA's arrangements under the TPA was subsequently adjourned, following APRA's application for authorisation under the TPA. The decision of the Competition Tribunal, on APRA's application for review, has recently been handed down [16 June 1997]. The Federal Court and Copyright Tribunal proceedings remain adjourned pending resolution of matters before the Competition Tribunal.
29. FACTS has provided this fairly detailed analysis of the effects of the legislation, as FACTS has experienced it, not for the purpose of criticising the conduct of any licensor, including APRA, but to give the CLRC an understanding of the shortcomings, in FACTS' view, of the present terms of the legislation and how it impedes the Tribunal's ability to act as a true arbitrator in disputes between owners and users. Under the present terms of the legislation, FACTS has genuine reservations as to its capacity to provide resolutions which address licensee's concerns. In addition, the technical and complex nature of the provisions adds to the cost and length of proceedings. Some many months have been spent by the parties in the FACTS/APRA proceedings interpreting and counter pointing the action of the "opposing" party. In FACTS' view, this not only adds to the costs of the parties but also those of the Tribunal.

Should the jurisdiction of the Tribunal be increased and if so, what should be the scope of that expansion?

30. Based on FACTS' experiences in proceedings commenced under Part VI of the Act, FACTS submits that the jurisdiction of the Tribunal presently is inadequate to enable it to perform the task contemplated by the Parliament in 1968.
31. FACTS questions why it is necessary to have the rather technical distinctions between sections 154 and 157 and in particular, the limitations on the orders which the Tribunal may make in each case. Presently, proceedings under s.154 or s.157 do not provide licensees with an effective forum.
32. FACTS believes it would be beneficial if the Act were amended to provide for a simple procedure that could be availed by both copyright owners or copyright users where the terms of a licence (as presently defined under the Act) which is collectively administered, are in dispute. The Tribunal should be empowered to consider all matters relevant to the case, including an express power to consider competition issues.
33. In this regard, FACTS notes that the National Competition Council's recent review has recommended that s.51(3) of the TPA, which exempts certain conduct from the scope of Part IV of the TPA, be retained. As such, it is FACTS' understanding that the Australian Competition & Consumer Commission has no jurisdiction over such matters. It is appropriate in these circumstances that the Tribunal have express power to consider competition issues relevant to collective licensing.
34. The recent decision of the Competition Tribunal in the APRA matter makes it clear that the Competition Tribunal believes the Copyright Tribunal is the appropriate body to consider competition issues in licensing arrangements. FACTS does not believe this entirely addresses the difficulties faced by it which led to the APRA authorisation proceedings. However, insofar as FACTS is aware, most voluntary collecting societies do not acquire their copyright product on an exclusive basis, so as to prevent direct licensing. Collecting societies created under the statute are prevented from doing so.
35. FACTS submits that there may also be merit in expanding the Tribunal's powers to consider the input arrangements of collecting societies, where those societies are not subject to statutory prescription. The terms upon which a collecting society offers to administer the rights of its members are critical to the members themselves and to users in certain circumstances.
36. FACTS submits that the Tribunal's jurisdiction should be expanded so that it has the power to make such orders as it determines appropriate in the circumstances of any matter coming before it, to the extent that the orders relate to:
 - the setting and method of calculation of licence fees;
 - the setting of other terms of the licence scheme;

the operation of any licence scheme, including interpretation and compliance with its terms, whether or not the scheme is in force as a result of an order of the Tribunal or by agreement between the parties. Notwithstanding that a licence scheme constitutes a contractual arrangements between the licensor and licensee (and therefore may be subject to the general law governing contracts), the scheme is a special form of contract reflecting the terms of the copyright licence. In most cases, schemes relate to particular industry sectors, such as commercial television broadcasters. In FACTS' view disputes as to particular aspects of the scheme, such as logging requirements or use (where a fee depends on use of copyright), are more appropriately handled by a specialist tribunal than the courts.

What sorts of licences should come within the Tribunal's jurisdiction?

37. The policy rationale behind the development of the Tribunal in Australia and similar forums in comparable countries, appears to be recognition of the need to balance public and private interests in copyright administration. Generally, it is submitted that a need for regulatory supervision arises in relation to the collective licensing of any work or subject matter.
38. Presently, a collective licensing agreement entered into voluntarily by the parties is not subject to Tribunal jurisdiction (s162). Clearly where the parties have negotiated matters such as rate, it is inappropriate for the Tribunal to interfere with their decision. It may be however, that the Tribunal should have jurisdiction in respect of the operation of a licence scheme entered into voluntarily, for reasons canvassed at paragraph 36.

What would constitute a collectively administered licence scheme for these purposes?

39. Traditionally, collecting societies have been purpose orientated, non-profit organisations, restricted under their constitution to the activity of licensing copyright material of a particular description or form, owned or licensed by various third parties. Essentially, they have been co-operatives to facilitate access to an extensive range of copyright which would otherwise be difficult to administer. FACTS believes organisations which meet this general description should be subject to the jurisdiction of the Tribunal, whether they are voluntary or statutory.

Could any expansion of jurisdiction be vested in the Tribunal or require vesting in a judicial body?

40. In addition to expanding the Tribunal's jurisdiction to enable it to regulate effectively the matters coming before it, FACTS can see that there may be advantages in having a forum which is able to operate at different levels of formality. For example, where it is necessary to resolve minor disputes between licensor and licensee relating to the operation of a licence scheme, as distinct from issues relating to fees.. In these circumstances, disputes may usefully benefit from initial mediation. FACTS believes however, that such a course would have to be optional, having regard to the nature of the dispute
41. FACTS has no concluded view on the appropriate model if this approach was adopted but can see no difficulty per se in any expanded jurisdiction vesting

in the Copyright Tribunal. FACTS assumes that any mediation process, by definition, would be non-binding. As such, there would appear to be no difficulty in a mediation being conducted by a non-presidential member of the Tribunal. There would need to be appropriate safeguards to ensure that mediation was not availed as a “dress rehearsal” to establish the parties case. FACTS would not envisage that mediation would be availed in major disputes between licensors and licensees. It is possible, however, that changes in copyright legislation and use of technology may give rise to an increase in disputes that centre on the scope and operation of a licence scheme. Initial mediation may be appropriate in these circumstances.

Structure of the Tribunal

42. In order to be an effective forum for resolving disputes, it is important that the Tribunal has the confidence of all parties appearing before it. Matters coming before the Tribunal to date usually have involved significant commercial interests. In FACTS’ experience, over and above an understanding of copyright law, the task confronting the Tribunal is to apply its statutory functions within the framework of particular industries. Therefore, rather than benefit from the appointment of accountants, economists or other professionals per se, FACTS believes the Tribunal may benefit from the inclusion of non-presidential members who have an understanding of copyright and its application within particular industries, subject to the following comment.
43. If the Tribunal is to be perceived as an effective regulator of disputes between copyright owners and copyright users, it is critical that it be regarded as favouring neither interest. This is an important principle in any statutorily based arbitration but particularly so, in FACTS’ submission, where a specialist tribunal deals with the same participants on a regular basis. FACTS believes that the appointments made to the Tribunal play an integral part in its effectiveness and its apparent effectiveness. Presently, Tribunal appointments are part time and Tribunal members have professional responsibilities outside their Tribunal role. FACTS does not believe that the matters coming before the Tribunal presently justify a full time appointment. If, however, members are simultaneously engaged in professional activities of a kind which predominantly involve copyright from a perspective of use or ownership, (which is quite possible, given the relatively limited pool of persons with the necessary qualifications), the composition of the Tribunal must be appropriately balanced.
44. FACTS is of the view that it would be inappropriate to have a person without legal qualifications sitting alone as the Tribunal (other than in the context of a mediation). A single member that is to make a reviewable determination must be constituted by a presidential member, in FACTS’ view. Given the range of matters required to be considered by the Tribunal in any major dispute between a collecting society and a major industry sector, FACTS believes it is appropriate the parties have some discretion as to whether the Tribunal is constituted by one or three members. In most comparable jurisdictions, FACTS understands the copyright tribunal is comprised of three members. In the majority of cases, FACTS believes a three member Tribunal is to be preferred.

Practice and Procedures of the Tribunal

45. The provisions relating to the Copyright Tribunal at Part VI and within the Copyright Tribunal (Procedure) Regulations are simple in form. The practices which have developed before the Tribunal tend to be more formal than the legislative expression suggests. However, the matters referred to the Tribunal to date generally have been complex matters involving particular industry practices and substantial interests on both sides. In these cases, FACTS believes that the Tribunal must have some level of formality in order to structure the proceedings. Proceedings involving substantial issues, such as those between collecting societies and industry sectors, invariably will be conducted by legal representatives on behalf of the parties because of the specialist nature of the law of copyright. Allowing the Tribunal discretion to determine its procedures permits appropriate variations in formality, depending on the matter in hand, in FACTS' view.
46. FACTS believes, however, that there has been a tendency on the part of the Tribunal to follow Court practices which do not always suit the nature of the proceedings. Of particular concern to FACTS is the application of very extensive and wide-ranging discovery in proceedings before the Tribunal. In proceedings with APRA, this aspect alone occupied many months and considerable expense and delays in progressing the matter. FACTS is of the view that orders for discovery should be permitted by the Tribunal only in exceptional circumstances. In FACTS' experience, what has been sought primarily under discovery is fairly extensive documentation about systems, routines and industry practices. In FACTS' view, this has often been of questionable value to the proceedings and has required production of substantial quantities of documents. In many cases, it appears that it is information that is required by a party rather than documentation. Therefore, FACTS believes that, although discouraged in Court proceedings, a system of informal interrogatories under Tribunal supervision, would be of greater benefit to the parties and to the Tribunal in these cases.
47. In addition, FACTS believes the Tribunal would benefit from a review of its procedures generally to clarify the purpose and status of particular processes. Presently, each party under an application or reference files a Statement in Support of its Case. The evidence is then filed in the form of affidavits, subject to examination on the hearing. Neither party appears bound by the matters raised in the Statement of Points (although FACTS is not aware of the Tribunal's formal view of its status) and the Statement often provides no more than a general expression of the matters in issue. This may be very appropriate to the arbitral process but it means that the issues in contention are not truly refined until the hearing. A party may not be fully aware of the other party's case until evidence is filed. FACTS concedes that until the parties focus on the preparation of evidence, the issues may be hard to define with any greater precision, having regard to the nature of the disputes. FACTS suggests however, that the Tribunal's procedures may benefit from a review, having regard to its objectives, to ensure maximum efficiency.

29 July 1999