

**Submission to the Attorney-General's
Department**

By

**Phonographic Performance Company of
Australia**

**Response to Review of One Per Cent Cap
on Licence Fees Paid to Copyright Owners
for Playing of Sound Recordings on Radio**

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1. Executive Summary

This submission is made by Phonographic Performance Company of Australia (PPCA) on behalf of Australian record labels and Australian recording artists.

This review process concerns the appropriateness of retaining a statutory price cap introduced over 35 year ago in relation to the use of sound recordings by the commercial radio sector.

Specifically, section 152(8) of the *Copyright Act 1968* provides that the Copyright Tribunal may not fix an annual licence fee in excess of 1% of gross revenue of a commercial radio broadcaster for that broadcaster's use of published sound recordings.

As this submission makes clear, the statutory price cap for commercial radio use of sound recordings was introduced in the late 1960's to provide protection for the commercial radio industry having regard to the 'special circumstances' that existed at that time. While the nature of such 'special circumstances' was not clearly defined, it would appear that they were related to the desire of the government of the day to maintain the profitable operation of the commercial radio sector. In the face of the introduction of the broadcast right in sound recordings (and the consequent obligation to pay licence fees). The central issue to be considered by this review is whether or not such special circumstances still exist and, in any event, whether or not commercial radio should still continue to be afforded the protections of a statutory price cap.

In economic terms, the price cap is distortionary and has the effect of imposing an annual penalty on the sound recording industry (record labels) and Australian recording artists while providing an annual subsidy to the commercial radio industry. Within the commercial radio industry, additional distortions are created in that music-format (typically FM) stations are being subsidised in relation to one of their key input costs (i.e sound recordings) whereas talk-format (typically AM) stations pay market rates for on-air talent, which constitutes their key input costs. Such distortions create unjustified competitive disadvantages within the commercial radio industry itself.

PPCA strongly contends that there are ***no circumstances presently existing that justify the continued retention of the statutory price cap*** in section 152(8) of the Act. Specifically:

- The commercial radio sector, particularly the FM segment which drives its business through the use of sound recordings, is in a very healthy financial position. This is confirmed by the radio sector itself and independent industry data produced by the Australian Broadcasting Authority (ABA).
- At the beginning of the 21st century, there is no case based on 'special circumstances' of the commercial radio sector that can be made justifying the continued existence of the cap.
- The statutory cap is either unnecessary, because fair market rates are below 1%, or it is creating an unjustified subsidy by one sector (creators) of another (commercial radio) because fair market rates are in excess of 1%.
- The existence of a statutory cap is anomalous in relation to:

- Australian competition and industry policy. It is clearly inconsistent with the economic efficiency objectives underpinning Australia's National Competition Policy.
 - Australian copyright law relating to other copyright material – there is no other example of a statutory price cap for copyright material (music or otherwise) in the *Copyright Act*.
 - The treatment of sound recording copyright in other jurisdictions, where no statutory cap exists in relation to the broadcasting licence fee (or any other copyright material).
- As a consequence, the statutory cap should be repealed and the parties entitled to negotiate a fair market rate for the use of sound recordings by commercial radio. In this regard, it is important to note that PPCA does not seek the Government to express any view as to what the rate ought to be – simply that the parties be entitled to negotiate a fair market rate or, if this is not possible, for a rate to be determined by the Copyright Tribunal as the 'independent umpire' in relation to copyright matters.
 - Two previous independent reviews commissioned by the Australian Government, one in 1995 and the other in 2001, concluded that the cap was unjustified and should be repealed.

With the previous long-term PPCA/CRA industry agreement on broadcast licence fees having expired as at 30 June 2003 (and extended several times on an interim basis, most recently to 30 June 2005), it is an appropriate time for the Government to remove the statutory price cap in relation to the broadcast fees paid by commercial radio. Recognising the limited financial resources of the community broadcast sector, PPCA is prepared to support retention of the cap in section 152(8) with respect to community radio licence holders (as defined in the *Broadcasting Services Act 1992*). In addition, on the basis that the Government has said that it does not intend to make any changes to the separate cap in section 152(11) relating to the ABC, PPCA makes no submissions for change in this regard.

2. Introduction to PPCA

Established in 1969, PPCA, is a national, non-government, non-profit organisation representing the interests of record labels and Australian recording artists.

The board of PPCA is representative of the interests of the organisation's stakeholders and comprises five representatives of record labels and three representatives of the recording artist community.

PPCA grants licences for the broadcast, communication or public playing of recorded music (e.g. CDs, tapes, records) and music videos. Licensees include businesses and other organisations that derive economic benefit from the utilisation of sound recordings, including radio broadcasters, television broadcasters, pubs and clubs, fitness centres, retail stores etc. The organisation distributes the net proceeds from licence fees it collects to the record labels and Australian recording artists registered with it, under its distribution policy. Based on its constitution as a non-profit organisation, PPCA annually distributes all the funds it collects to its record label and Australian recording artist stakeholders, after the deduction of administrative expenses.

For the purposes of this review, one of the rights administered by PPCA (and, hence, one of the licences it grants) is in respect of the broadcast of sound recordings by commercial radio. Importantly, PPCA is a **non-exclusive** licensee which means that its licensors (i.e. record labels, which currently number over 400), could choose to deal directly with commercial radio operators for the licensing of sound recordings. Equally, commercial radio could choose to deal directly with each of PPCA's licensors and negotiate separate licence agreement with each.

The **Direct Artist Distribution (DAD) Scheme** is an important element of PPCA's distribution policy. Under the DAD Scheme, PPCA makes annual payments directly to Australian recording artists in respect of the approximately 35-40% of PPCA's annual licence revenue attributable to Australian content on radio. DAD Scheme payments are made without reference to, and irrespective of, the contractual arrangements between copyright owners and Australian recording artists. Where an eligible Australian artist has registered an entitlement, PPCA divides the distribution that relates to a track between the artist (47.5%), the licensor (50%, which is then typically treated as 'other income' under an individual recording contract and may be distributed under the terms of that contract between the record company and the artist) and the PPCA Performers Trust Foundation (2.5%). Where an Australian artist is not registered, the full amount for distribution (less the 2.5% allocated to the PPCA Trust) is paid to the licensor who is responsible for accounting to the recording artist in accordance with the relevant recording contract.

The PPCA Trust is a charitable trust formed for the purpose of making grants to performers and the allocation of such grants is overseen by representatives of PPCA, the Media Entertainment and Arts Alliance and the Musicians Union.

3. Introduction to Sound Recording Copyright

As with any creative industry, the viability of the record industry depends on its ability to protect the copyright in its product and to achieve satisfactory financial returns from the sale and licensing of this product. In common with most other developed nations, and based on a number of international intellectual property agreements and conventions, the Australian *Copyright Act* recognises two distinct rights associated with the broadcasting of music:

- Copyright in a ***sound recording***. (PPCA takes non-exclusive licences from the owners of virtually all sound recordings commercially released in Australia, and grants licences to various users including, relevantly, the commercial radio sector).
- Copyright in the ***'musical work' or song***. (The collecting society, Australian Performing Right Association, APRA, serves a similar role to PPCA on behalf of music publishers and songwriters). The broadcast licence fees payable in respect of this copyright are not constrained by any legislative price cap.

This means that users of recorded music in Australia typically require two licences – one from APRA and one in respect of sound recordings. Importantly, the latter does not have to be with PPCA given that PPCA is a non-exclusive licensee. In contrast, APRA is actually the owner of the broadcast right in the musical work and users have no choice but to deal with APRA.

The commercial radio sector currently has licensing schemes in place with both PPCA and APRA. The APRA scheme, resulting from a 1999 decision of the Copyright Tribunal, is based on the user pays principle and comprises a sliding scale of licence fees based on music use (i.e. high music-use stations pay a higher rate than low music-use stations). Further detail on the APRA scheme is provided in Section 5, below.

4. PPCA Licensing of Commercial Radio

Significantly, the framework established in the *Copyright Act* modifies the copyright owner's exclusive rights by providing for a statutory right for radio broadcasters to broadcast sound recordings without the consent of copyright owners (i.e. a **statutory right to broadcast**), provided that broadcasters pay a fee to the copyright owner (section 109 of the Act). In other words, there is no ability for PPCA or any copyright owner to withhold a licence from any radio station to broadcast sound recordings.

This means that the only matter for negotiation or determination between PPCA (and/or copyright owners) and commercial radio is the rate or fee for this broadcast licence.

As with a range of other copyright material, the Act empowers the **Copyright Tribunal** (constituted under the auspices of the Federal Court) to determine a rate where the parties cannot agree and one of the parties chooses to submit the issue to the Tribunal. The Act provides for the Tribunal to act in this role of 'independent umpire' in section 152, which is also the section that constrains the Tribunal's power to set a rate through the imposition of the statutory price cap.

Over the last 21 years, PPCA has had a number of long-term agreements with Commercial Radio Australia (CRA), previously known as the Federation of Australian Radio Broadcasters, representing the interests of Australia's commercial radio broadcasters, in relation to the broadcasting licence fee. These industry agreements have been made in the context of the statutory price cap in section 152(8) of the Act. For its part, CRA has a **collection agreement** with its members, under which quarterly payments are made by radio stations to CRA, and by CRA in turn to PPCA.

The most recent of these long-term industry agreements between PPCA and CRA expired on 30 June 2003. This agreement provided for a licence fee of **0.4% of annual gross industry revenue of CRA's members** as reported to the Australian Broadcasting Authority.

The current rate has increased from less than 0.2% to 0.4% over the last 21 years, and is the product of a **negotiation process that has been framed by the terms of the legislative cap in section 152(8) of the Act** (see further, Section 5, below). Clearly, the bargaining position of PPCA and its stakeholders has been very limited as a result, and the incentives very low for the commercial radio sector to move towards international norms on the level of the broadcasting licence fee.

The terms of this most recent agreement have been extended on an interim basis on several occasions, most recently through to 30 June 2005. PPCA believes that the period leading up to 30 June 2005 provides an appropriate and necessary timeframe for the Government to clarify the context for future negotiations between the parties – from PPCA's perspective to remove the 1% price cap as a determining factor for future fees.

5. Operation of the Cap

As set out in Section 4, above, the current broadcast licence fee paid by the commercial radio industry to PPCA and its stakeholders is an amount of 0.4% of the aggregated annual gross revenue of CRA's members. Given that the statutory price cap is 1% of a broadcaster's revenue, the superficial question arises as to why there is any need to remove the cap in the current context.

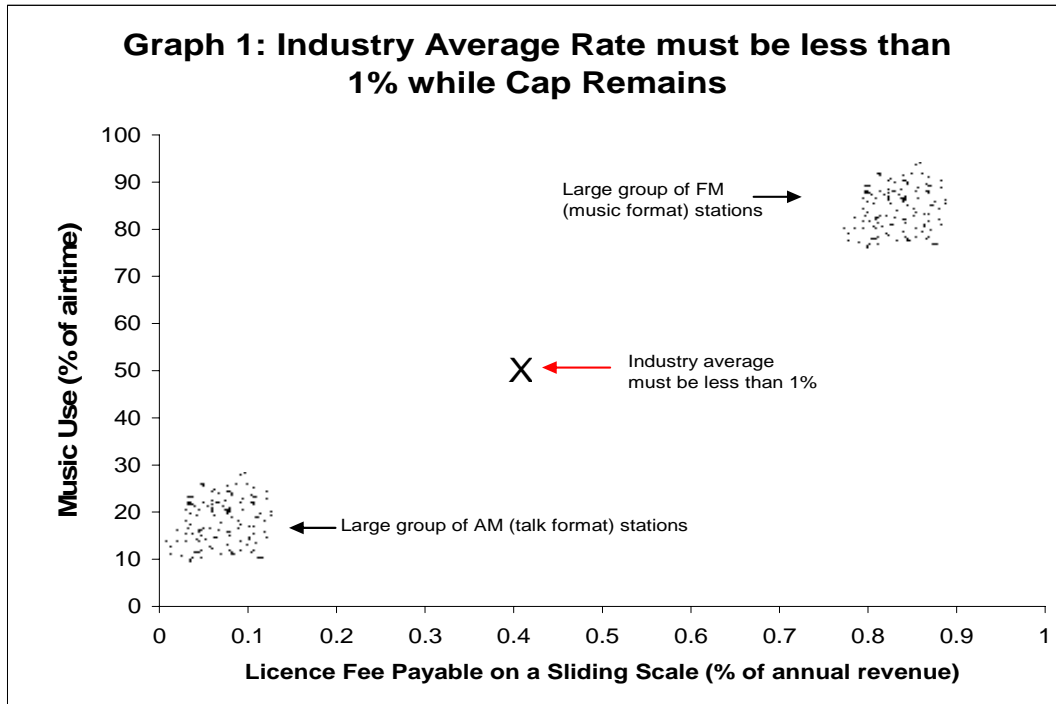
Yet this question fundamentally misunderstands what section 152(8) of the Act actually provides and how it must be applied.

As an initial point, it is important to understand that there is no direct comparison that can be made between the industry rate of 0.4% and the manner in which the 1% cap is applied. The former is an industry average whilst the cap applies to individual broadcasters. Specifically, the current structure of section 152 ensures that an **overall industry rate of 1% (or, in all likelihood, a rate near 1%) cannot be achieved while the cap is in place**. The principal reason for this is that it is the logical outcome of the need to apply the 1% cap on a broadcaster-by-broadcaster basis (as required by the legislation). This is explained as follows:

- Under section 152(2), the Copyright Tribunal can only make an order in respect of a specific broadcaster. In other words, the Tribunal **does not have the capacity to set an industry-wide overall rate** in the manner of the arrangement that PPCA has negotiated with CRA. Rather, the 1% cap must be applied by the Tribunal in respect of an order concerning a specific broadcaster, not on an industry-wide basis.
- In order to efficiently discharge its obligations, the Tribunal needs to consider a mechanism which allows for particular rates to be determined for each broadcaster. It has recently employed this methodology in the *APRA v FARB*¹ case in relation to the broadcasting fees payable for musical works. The key element of that Tribunal-determined scheme was a **sliding scale of revenue percentages** (from 0.5% to 3.5%) based on music use - for instance a talk radio station with 10% music use or less attracted a licence fee of 0.5% revenue.
- Based on information available to PPCA, this user pays principle appears to accord with the methodology currently used by CRA to collect licence fees from its members to pay PPCA under the legislative cap (i.e. high music-use, typically FM, stations pay a higher percentage of revenue than low music-use, typically AM, stations). Additionally, it is PPCA's expectation that the Tribunal will refer to its own decision in the *APRA* determination in considering a scheme to be utilised in any PPCA/CRA proceedings to determine the rates payable by individual broadcasters.
- If the same or a similar scheme was applied by the Tribunal in relation to sound recordings there would be a range of rates determined based on music use. On this basis, **low music-use stations** (i.e. talk stations) could be expected to continue to pay a relatively low percentage of revenue as a licence fee (i.e. **well below 1%**). However, the rates for **higher music use stations** (in essence the commercial FM music stations) would be **capped at 1%**.

¹ *Australasian Performing Right Association v Federation of Australian Radio Broadcasters Ltd* [1999].

- **As a matter of logic, this must produce an industry average of something less than 1%.** While PPCA is not in possession of the relevant data to enable us to estimate what this rate might be (i.e. individual station music use and revenue figures), it must be likely that the industry average would be in the order of no more than 0.4% to 0.5% of industry revenue for as long as the cap remains in place – **effectively a status quo position or close thereto.** This is illustrated conceptually in Graph 1, below.



Note to Graph 1: Dots relating to individual radio stations are for illustrative purposes only

The above discussion relates to the operation of the cap (i.e. on a broadcaster-by-broadcaster basis), whereas the current 0.4% licence fee results from industry-based negotiations between PPCA and CRA that provides a blanket licence for the benefit of all CRA members. This negotiated outcome reflects the need to accommodate the varying degrees of music usage within the commercial radio sector – ranging from talk stations that play little or no music (and hence pay minimal sound recording licence fees) through to high music use stations such as the commercial FM sector.

Indeed, it is instructive to note that on the single occasion when the broadcast licence fee for sound recordings was considered by the Copyright Tribunal in the MMM case², the 0.45% rate determined for the high-music use station in question (2MMM) was used as the basis for a negotiated industry arrangement of 0.2% of gross industry revenue (taking into account those stations that used little or no music). In determining the 0.45% rate for 2MMM, the statutory price cap in section 152(8) was a relevant consideration for the Tribunal, which acknowledged the constraints imposed by the price cap. However, in a decision which even further disadvantaged sound recording copyright owners, the Tribunal, while not explaining its reasoning in any detail, appeared to approach section 152(8) as determining the upper bound of the licence fee rather than a ceiling or cap. In other words, rather than interpret it as a price cap (which would require the Tribunal to

² *WEA Records Pty Ltd and Others v. Stereo FM Pty Ltd* 48 ALR 91 (1983).

cap the rate at 1% if, and only if, it determined the fair market rate to be in excess of 1%), it seems that the Tribunal interpreted the 1% cap as a ceiling or upper bound against which any and all available discount factors were to be applied. As such, it would seem that not only will an industry based rate never approach 1% as long as the cap remains in place, but that an individual station rate will also be less than 1%.

The actual level of fee paid by individual radio stations (i.e. their individual contributions to the overall industry payment) is determined under the CRA Collection Scheme, details of which are not available to PPCA. However, it is clear that they all pay differing percentages of their revenues and that, in particular, CRA does not simply collect 0.4% of their individual revenues. Information obtained by PPCA seems to clearly indicate that CRA's collections from individual stations are based on their respective levels of music use (i.e. the more music you play, the more you pay). As such, it is PPCA's understanding that the percentage of revenues paid by individual stations varies significantly above and below 0.4% of the station's revenues (although PPCA understands that no station is currently contributing more than 1% of its revenues to CRA's collections).

6. History of the Cap

PPCA broadly concurs with the history of the broadcast right set out in the Discussion Paper (pp. 6-9).

In the *Copyright Bill 1968*, section 152 gives effect to the broadcasting licence fee but imposes the cap such that the Tribunal may not fix an annual licence fee in excess of 1% of gross revenue of a commercial broadcaster (and in the case of national broadcasters, in excess of 0.5 cents per head of population). At the time of the introduction of the statutory price cap in section 152(8) the Attorney-General said that ***“the limits have been fixed in the light of the special circumstances now existing in Australia in relation to the broadcasting of records and are not intended to imply that any particularly royalty or rate of royalty is appropriate for the broadcasting of musical copyright works”*** (Attorney-General’s second reading speech, 16 May 1968, House of Representatives Hansard, page 1535).

Significantly, the Bill also included a provision for the review of the maximum broadcasting licence fee cap after the Act had been in operation for a period of five years (proposed section 153). This allowed a variation to the broadcasting licence fee cap upon a prime facie case being made to the Attorney-General, who could then refer the matter to the Copyright Tribunal for determination. Ultimately, section 153 was deleted in committee stage on motion of the Attorney-General, on the basis that it should be left to the parliament to make any change in the cap.

Since the commencement of the Act, section 152(8) has been the subject of examination by two independent inquiries.

In the 1995 *Review of Australian Collecting Societies (‘Simpson Report’)*, commissioned by the Federal Government, Shane Simpson recommended the removal of the legislative cap. He found that

“broadcasters are in no need of the protection offered by the present cap. They are sufficiently well represented to be able to negotiate market rates without the protective arm of government interfering in that process. Experience has shown that the best way of setting rates is by inter-partes negotiation with access to the Copyright Tribunal to determine matters that cannot be resolved in that way” (see section 13.1.5 of the Simpson Report).

The Simpson Report concluded that the “artificially low fee broadcasters pay PPCA (under s.152) simply means that the fees are unfair to copyright owners”.

In the context of the subsequent review of copyright laws for the Federal Government by the *Intellectual Property Review Committee (the Ergas Committee)*, PPCA commissioned The Allen Consulting Group to prepare an economic analysis of the 1% cap. They concluded that its key economic impacts included:

- **Reduced efficiency.** There is no market failure that is addressed by the current legislative cap. The legislative cap creates distortions in relation to:
 - Volume of music broadcast (by artificially creating non-market based incentives for broadcasters in relation to increasing music use at the expense of non-music formats such as talk).

- Revenue received by copyright owners and Australian recording artists is significantly reduced. PPCA has estimated that the impact on copyright owners is broadly in the order of \$5 to \$10 million per annum.
 - Creation of less new Australian recordings than might otherwise be the case, because of the artificially diminished returns to Australian artists from the use of their sound recordings on commercial radio and the loss of incentive.
 - Product (music) quality might be less than would otherwise be the case, again because the returns to the producers of the sound recordings are artificially depressed.
- **Lack of equity.** Principally through the effective subsidy by record companies and artists to commercial radio stations and (indirectly) advertisers. Such a subsidy is not imposed on the providers of any other inputs used by commercial radio.

The Allen Consulting Group concluded that retention of the 1% cap on rates payable by broadcasters represents an unjustified subsidy for commercial radio, a highly profitable sector of the economy, paid for by recording companies and Australian recording artists.

That view was accepted by the Ergas Committee, which examined the issue of the 1% cap on broadcast licence fees. The Committee accepted that the 1% cap was included in the Act to “ease the burden” on the radio industry but, noting the substantial change in economic circumstances for the radio industry since the introduction of the cap, the Committee did not believe that capping remained warranted.

The Ergas Committee made the following recommendation:

“To achieve competitive neutrality and remove unnecessary impediments to the functioning of markets on a commercial basis, the Committee recommends that s.152(8) of the *Copyright Act* be amended to remove the broadcast fee price cap.”

In its response to the Ergas Report, the Government announced that it had decided not to take action “at this stage”. Acknowledging that the fees payable were the subject of contractual arrangements, the Government expressed the view that the 1% ceiling provided certainty for broadcasters, that the national broadcasters and community broadcasters would need additional funding if the cap were removed, and that retaining the cap reassured rural and regional commercial radio broadcasters that significant increases in payments would not impinge on their viability.

PPCA believes that its current policy reform proposal as outlined in Section 10, below, combined with the detailed financial analysis of the commercial radio sector in Section 9, below, comprehensively addresses any enduring concern in relation to the factors identified by the Government in responding to the Ergas Report. While it is clear that a number of significant circumstances have indeed changed since the Government’s response to the Ergas Report (e.g. the financial circumstances of regional and rural radio as detailed in Section 8 and Appendix 4; as well as the fact that the most recent long-term agreement between PPCA and CRA has since expired), even if this were not the case PPCA does not believe that there would be any persuasive or intellectual value in the contention that ‘nothing has changed since 2001 and therefore the Government should not revisit the issue’.

7. Impact of the Cap

The value of broadcast licence fees due to PPCA in 2003/2004 will be approximately **\$2.75 million**, out of total commercial radio revenues of approximately **\$773 million** (this is a 2002/2003 figure, sourced from the Australian Broadcasting Authority's most recent 'Broadcasting Financial Results: 2002/2003'). Splitting out the FM sector, which drives its business from the use of sound recordings, fees paid to PPCA total \$2.45 million out of total revenue of \$545 million. Together with the licence fee payment made to Australian music publishers/songwriters (collected by APRA), this effectively represents the total annual payment that will be made by the Australian radio industry for its **most important content input**.

Put simply, PPCA strongly contends that, in the absence of the legislative price cap, copyright owners and Australian recording artists would be entitled to substantially increased revenues.

This contention, of course, is ultimately a matter for negotiation between the parties (unconstrained by the cap) or, in the absence of an agreement, determination of the Copyright Tribunal as the independent umpire under the Act. (PPCA does not seek any view from the Government as to what the rate ought to be). CRA's determination to oppose the repeal of the cap implicitly confirms that they similarly would expect licence fees to increase were the cap to be repealed.

The question whether, as a matter of fact, PPCA will obtain a higher rate (and, therefore, revenue) if the cap is removed is in some ways to miss the point. There are only two possibilities:

- If licence fees are currently at fair market rates then the cap should be removed because it is irrelevant and unnecessary.
- If licence fees are below a fair market rate then the cap should be removed because it creates an unjustified subsidy by one industry to another.

Having made this point of principle, PPCA believes that the case for it to obtain a significantly higher rate in the absence of the statutory cap is a compelling one. In the first place, Australia is the **only nation to PPCA's knowledge where the broadcasting licence fee is subject to a statutory cap**. Significantly, across this range of comparable countries market rates vary from **1.75% to around 4.5%**. Details of these international comparisons are set out in Appendix 1. In response to this information, it is sometimes mistakenly suggested that the United States has zero-rated its broadcasting licence fee. In other words, the proposition is put that overseas rates, in fact, vary from 0% to around 4.5% of revenues. However, this is an entirely fallacious proposition - the US is not a relevant point of comparison because it does not recognise the broadcasting right in sound recordings in the first place. In other words, the US "licence fees" are only zero because there is simply no copyright right which requires a broadcaster to obtain a licence. As a result of the decision by the US government not to recognise such a right, the broadcast of US recordings in Australia similarly does not require a licence from the owners of copyright in sound recordings.

In terms of real dollar comparisons, PPCA notes from its counterpart organisation in the United Kingdom (PPL) that broadcast licence fee revenue collected in the UK in 2004 equates to GBP 23.8 million, or approximately **A\$60 million**. Even allowing for the obvious difference in population/market size (i.e. the UK is approximately three times larger than Australia), the size of the economic distortion is obvious. Discussions with the

UK industry make it clear that broadcast licence fee revenue has a significant impact on the overall health of the recording industry, investment in local talent, and the financial viability of recording artists.

While PPCA acknowledges that there may be some difference in local circumstances between particular countries, the fact is that the preponderance of examples from comparable countries illustrated in Appendix 1 have resulted in broadcast licence fee rates (either negotiated or submitted to independent arbiters constituted along similar lines to Australia's Copyright Tribunal) ranging from four to ten times those currently being paid in Australia is clearly of substantial persuasive value. In this regard, it is instructive to note the position of the Copyright Tribunal itself in regard to international comparisons:

“Despite the difficulty in comparing rates as between different countries, a broad comparison may provide a helpful pointer as to what may be reasonable, particularly in relation to an industry with international ramifications.” (Australasian Performing Right Association Ltd v Federation of Australian Radio Broadcasters Ltd [1999] ACopyT 4 (17 September 1999), 18.

A second major indicator suggesting the broadcasting licence would increase substantially if the cap was removed is evident from the rates achieved by APRA in relation to the broadcast of musical works (this right is explained in Section 3, above). The APRA right is unconstrained by any legislative price cap. It also relates to material from all nations whereas, under the Act, PPCA is only able to collect in relation to material from the many countries (with the notable exception of the US) that recognise the sound recording right.

An independent determination of the market rate for this licence occurred in the APRA v FARB case, discussed above. The Tribunal decision in that case provided for a sliding scale of licence fees based on music use. The scale ranged from 0.5% of a radio station's annual revenues where a station plays less than 10% music (i.e. typically an AM 'talk format' station) up to 3.5% for stations playing greater than 80% music (i.e. typically an FM music format station).

Even allowing for some adjustment on the basis that 'unprotected' US recordings constitute a significant proportion of music played on Australian radio, the APRA v FARB case provides an interesting reference point for how the Tribunal might approach the consideration of an application by PPCA in the absence of the statutory cap (i.e. if PPCA were not able in the first instance to negotiate an acceptable agreement with CRA).

Impacts on Copyright Owners and Australian Recording Artists

The international and Australian comparative information presented above goes to PPCA's contention that over at least the last 25 of the 36 years during which the cap has been in place (i.e. since the emergence of FM radio in Australia in 1980), there has been a very significant transfer of income from one industry to another.

In relation to Australian recording artists and as set out in the Discussion Paper, the adverse impact results in large part from the discounted distribution that these artists receive from PPCA under its DAD Scheme (detailed in Section 2, above).

Based on the recent 2003/2004 distribution to Australian recording artists under the DAD Scheme, it is clear that the actual payments received by artists are very low. While it is

not possible for privacy reasons to reveal individual payments to particular artists, the following figures are illustrative:

- Only 3.65% of registered artists received a DAD Scheme payment ***in excess of \$2,000*** for the 2004 year attributable to the commercial radio broadcasting licence fee revenue.
- Only 7.43% of registered artists received a DAD Scheme payment ***in excess of \$1,000*** for the 2004 year attributable to the commercial radio broadcasting licence fee revenue.
- Over 63% of registered artists received a DAD Scheme payment ***less than \$100*** for the 2004 year attributable to the commercial radio broadcasting licence fee revenue.

This means that for Australian recording artists, already low incomes for most artists are further and artificially depressed by the impact of the legislative cap on the income stream they obtain from broadcasting licence fees. The broader situation with respect to Australian artists (i.e. across all arts sectors) is widely acknowledged to be characterised by low incomes and this is verified by the recent national study commissioned by the Australia Council, *'Don't Give Up Your Day Job'* (2003, David Throsby and Virginia Hollister, Division of Economic and Financial Studies, Macquarie University). Key findings are presented in Appendix 2.

As a matter of common sense, the level of earnings of those who invest in the creation of new recordings must have a significant impact on the level of this investment. While, by definition, it is impossible to quantify the impact of removing the cap (and, therefore achieving a fair market rate) on investment in new recordings, it seems reasonable to suggest that the ***impacts of a removal of the cap*** would include:

- Increased financial returns for both Australian recording artists and Australian record companies (including large international labels, medium-size Australian companies and independent labels).
- Increased investment by record companies in Australian recording artists and local artist rosters.
- Increased investment in the promotion of Australian sound recordings to offshore territories.
- Increased opportunities for Australian artists to produce commercially released recordings and associated career development opportunities.

Impacts on Commercial Radio Stations: Fees Currently Paid to PPCA

While PPCA does not have details of the agreement between CRA and its members on the precise basis upon which fees are calculated and paid by individual radio stations, PPCA has received data from CRA on the dollar amounts actually remitted in broadcast licence fee payments by individual stations to CRA for aggregation and subsequent payment of PPCA. Tables relating to the 2004 year are set out in Appendix 3 and are provided on a confidential basis. These tables have been broken down by PPCA into the geographic categories used by the ABA in its annual 'Broadcasting Financial Results' (BFR) publication:

- Capital Cities (all State and Territory capitals, but excluding Canberra)
- Large Regional (licence area populations above 100,000, excluding capital cities)
- Medium Regional (licence area populations between 40,000 and 100,000)
- Small Regional (licence area populations less than 40,000)

Table 1 analyses the amounts paid by commercial radio operators to PPCA in 2004 for broadcasting licence fee purposes:

CATEGORY	TOTAL FEES PAID (\$)	AVERAGE FEE
		PER STATION (\$)
Capital City		
AM	114,050	7,128
FM	1,720,726	68,829
Total	1,834,776	44,751
All Regional		
AM	204,848	2,355
FM	726,137	5,952
Total	930,985	4,454
Large Regional		
AM	70,403	3,061
FM	545,296	10,692
Total	615,699	8,320
Medium Regional		
AM	85,990	2,529
FM	127,379	3,266
Total	213,369	2,923
Small Regional		
AM	48,455	1,615
FM	53,462	1,671
Total	101,917	1,644
GRAND TOTAL	2,765,761	

Note to Table 1: The annualised figures contained in this table are based on quarterly licence fee data for radio stations provided to PPCA by CRA.

The key conclusions to be drawn from Table 1 are that:

- Capital city FM stations pay the majority of licence fees across the sector (a little over 62% of total licence fees). Even so, the average licence fee payable for these financially robust stations whose formats are typically music-driven (i.e. 80% plus music content) is less than \$70,000 per year.
- FM stations across all geographic areas pay the bulk of the fees (\$2.45 million or 88.5% of the total), relative to AM radio (\$320,000 or 11.5%).
- Even for larger AM operators in capital cities, the average licence fee payment is very small in real dollar terms – a little over \$7,100.

- There is clearly a very substantial difference between the licence fees payable by AM and FM stations in capital cities (AM average: \$7,128 and FM average: \$68,829) and a smaller, but still significant difference, in regional markets (AM average: \$2,355 and FM average: \$5,952).
- Within regional markets, there is a very substantial difference between the licence fees payable by stations in large regional areas (AM average: \$3,061 and FM average: \$10,692) compared to medium regional markets (AM average: \$2,529 and FM average: \$3,266) and small regional markets (AM average: \$1,615 and FM average: \$1,671).
- The data overall is consistent with the conclusion that radio stations are currently paying licence fees through CRA on the basis of radio station revenue and percentage of music use (i.e. a user pays basis). In other words, it appears that CRA and its members already function on the basis that licence fees should be calculated and paid relative to the proportion of air time devoted to sound recordings (albeit currently constrained by the impact of the legislative cap).

Impacts on Other Parties

PPCA believes that the existence of the price cap has indirect adverse impacts on a number of other parties, albeit that these are not quantifiable in precise dollar terms for the same reason as those listed above in relation to copyright owners and Australian recording artists. These impacts, which PPCA acknowledges to be marginal in some cases, include:

- Individuals and organisations involved at other levels of the Australian recording/music industry value chain. These include parties as diverse as artist managers, suppliers of goods and services to the Australian recording industry and recording artists and music retailers. An indirect adverse impact arguably arises from the fact that less funds than would otherwise be the case are invested in the development of Australian artists by record labels, which has knock-on effects to a range of other parties in the industry.
- Australian community at large, which is affected in a number of ways. For instance, a legislative price cap of this sort by its definition creates distortions in economic behaviour at a variety of levels (e.g. those contemplating a career as a recording artist; those investing in record companies or commercial radio stations). In an entirely different context, the effect of the cap in dampening investment by record companies in Australian recording artists, combined with the diminished incomes available to those artists, arguably has an impact in terms of the diversity of Australian music available to the general community, as both consumers and radio listeners.

It is clear that the removal of the cap will have a positive impact on these various interested parties, albeit that it is difficult to quantify.

8. Financial Position of Commercial Radio

While the parliamentary debates at the time of the introduction of section 152(8) speak of the “special circumstances” then existing in relation to Australian commercial radio, PPCA submits that it is not possible to make such an argument at the beginning of the 21st century. This is strongly supported by the ABA’s most recent BFR report (for the financial year 2002/2003) which comprehensively verifies the financial scale and robustness of the commercial radio sector – summary tables and analysis are included in Appendix 4.

Key conclusions that emerge from the BFR data include the following:

- The commercial radio sector’s revenues as a whole are currently \$773 million per annum, out of which \$108 million is profit. This represent approximately a **14% operating profit margin** across the sector.
- Overall, the commercial radio sector has recorded **solid revenue growth** over the last five years (21.7%), although profitability over the last few years has clearly been impacted by start-up losses incurred by a new FM operator in a number of major metropolitan markets.
- In revenue terms, the **music-driven FM sector’s revenue** is just over 70% (\$545 million) of the overall commercial radio industry and makes approximately 92% (\$99 million) of the industry’s overall profit. The average profit margin in this sector is closer to 18%. This sector is also the group that would be primarily impacted by the repeal of the cap.
- In 2002/2003, **capital city** radio stations earned 68% (\$526 million) of the total commercial radio sector’s revenue and 54% (\$58.4 million) of its overall profit.
- Taken as a whole, **regional commercial radio** has significantly increased its revenue (on both a one year and five year view) and even more so its profitability over both time periods. Regional commercial radio is currently recording revenues totalling \$247.2 million generating a profit of \$49.4 million – an operating profit margin of 20%.
 - The **regional AM radio** segment faces tighter conditions in terms of both major financial indicators but has improved its fortunes in the most recent year with a return to profitability (\$2.6 million). Interestingly, in 2002/2003 AM radio operators in medium and small regional areas outperformed those operating in large regional areas.
 - **FM regional radio**, at over twice the size of the AM segment, is thriving in terms of both revenue growth (64% over the last five years) and profitability (143% increase over the last five years). The operating profit margin for the regional FM radio segment exceeds 26%. This exceptional financial performance of the regional FM radio segment is reasonably consistent through large, medium and small areas in terms of both revenue and profit.

In the context of these financial indicators, it is also significant to note the economic distortion the cap produces within the commercial radio sector itself. While high music-use (typically FM) stations are obtaining their key content input at a subsidised price, low music-use (typically AM) stations are paying market rates for all of their key business

inputs. As such, the existence and operation of the price cap creates an **unjustified competitive disadvantage for AM talk stations** compared to the FM music sector.

While the 2002/2003 year remains the most recent BFR produced by the ABA, subsequent statements by the radio industry, individual radio operators and independent analysts indicate quite clearly that the industry's fortunes have improved in a significant way since June 2003. This material is detailed in Appendix 5 and establishes:

- **Record profit results** for Australia's listed radio companies. For example:
 - Australian Radio Network recorded a 13% increase in earnings before interest and tax (EBIT) for full year 2003 (\$56.2 million), on revenue that fell 7.7% to \$213.4 million.
 - Southern Cross Broadcasting reported a 35% rise in net profit to \$46.2 million for the year to 30 June 2004.
 - In the words of its chairman, Austereo reported a "world class" EBIT margin of 32%, with EBIT of \$71.2 million for the 2003/2004 financial year.
- The **substantial growth of radio as an advertising medium** relative to television and print in a 'rampant' national advertising market.
 - 12% growth in advertising revenue for metropolitan radio to \$520 million for the year ending 30 June 2004.
 - An increase of 15% in overall radio industry advertising revenue for the six months to 30 June 2004.
 - A 14.8% increase for calendar year 2004 in the advertising revenue attracted by metropolitan commercial radio stations to \$556.6 million.
- The strong views of radio proprietors that their medium is one that is very much in the ascendancy.
- 2004 as the industry's best performance in many years in terms of advertising revenues.

Daily Mail Group (DMG) from the UK, owner and operator of the new Nova FM network itself provides compelling evidence of the financial health of the sector and the commercial attractiveness of simply being able to acquire the licence to establish music-based radio stations. DMG has spent **\$534 million buying all or part of eight capital city FM radio licences** since 2000, including a licence in Brisbane and second licences in Sydney and Melbourne in 2004. There is no question that each of the radio station enterprises that have been and will be established by DMG will be driven off the playing of sound recordings.

9. PPCA Proposal

PPCA believes that there is an overwhelming case to support the conclusion that the commercial radio sector is no need of special protection. Accordingly, PPCA urges the Government to introduce legislation to ***repeal the legislative price cap in section 152(8) in relation to commercial radio.***

PPCA is, however, willing to accept the retention of the existing statutory price cap for the ***community radio*** sector, as these licensees are defined in the *Broadcasting Services Act 1992*, on the basis that it is and remains a not for profit sector. PPCA believes that it would be a reasonably simple and straightforward legislative drafting exercise to effectively amend section 152(8) so that it applies only to the community radio sector.

If and when the legislative price cap is removed, PPCA will commence negotiations with CRA in relation to future licence fee arrangements. PPCA will approach these discussions on the basis of what is essentially a 'user pays' concept – in other words, stations who drive their business through the use of sound recordings (i.e. principally FM music format stations) should pay the bulk of the overall fee. As PPCA has noted previously in this submission, this user pays concept underpins the approach adopted in most comparable international jurisdictions, by the Tribunal in the APRA case, and it would also appear to be the way in which CRA currently collects fees from its members (albeit subject to the cap).

In accordance with the Discussion Paper, PPCA limits its submission to the commercial radio sector and makes no submissions for change in relation to the separate cap under within section 152(11) relating to the ABC.

10. Economic and Other Impacts of PPCA's Proposal

Clearly, it is not possible to anticipate with certainty what rates will be agreed between PPCA and CRA, or determined by the Tribunal, if and when the cap is removed. As outlined in the last section, PPCA will pursue a user pays approach to the broadcasting licence fee, which is consistent with existing practice in a range of comparable circumstances.

If PPCA and CRA cannot agree on a rate, and the issue goes to the Tribunal, given the relatively recent consideration by the Tribunal of the other music-related copyright in the APRA case, it is highly likely that the Tribunal will have regard to its own previous determination in this area. Should this be the case, a sliding scale of rates based on music use and station revenue would be a potential outcome from a future Tribunal proceeding involving PPCA and CRA. The matter of the fair economic value of the sound recording right vis a vis the musical works right is a matter for expert economic analysis and future submissions by the parties to any such proceeding. The fact that the broadcast right in sound recordings in Australia relates to a narrower category of material than the corresponding right in musical works, will be relevant to the Tribunal's decision.

Assuming that PPCA's contention is correct that the removal of the cap will lead to the agreement or determination of rates significantly higher than 0.4%, the **key impacts** can be anticipated to include:

- Higher incomes for Australian recording artists and greater economic incentive for these artists to remain in the industry.
- Increased income for record labels and an increased ability to invest in Australian recording artists.
- Increased export opportunities for the Australian music industry based on this larger investment in local talent.
- Enhanced cultural opportunities for the community resulting from increased investment in local talent.
- An adverse economic impact on commercial FM radio broadcasters, based on the user pays scenario described above. This adverse impact is effectively the end of a long-term subsidy arrangement that has benefited FM radio for the last 25 years and the introduction of fair market valuation of its key business input (i.e. music). As is clear from Section 7, these would be fee increases off a very low base and would be predominantly borne by large capital city FM operators.
- A minimal impact on commercial AM radio, based on the user pays scenario described above.
- Rates charged by radio stations to advertisers will continue to be set by market forces. PPCA notes, based on the analysis provided in Section 8 and Appendix 5, that commercial radio's advertising revenues have grown significantly over at least the last two years.
- No significant adverse impact on the Tribunal. Clearly, the Tribunal has been established for the very purpose of determining these sorts of issues. Should it not be possible for PPCA and CRA to negotiate future broadcasting licence fee

rates then it is likely that the Tribunal will be called upon to determine the matter on motion of either party.

- No impact in relation to the level of Australian sound recordings played on commercial radio. PPCA expects that the removal of the cap will not lead to any change in behaviour by the commercial radio sector in relation to the playing of Australian recordings. In the first place, there is an ABA Code of Practice relating to minimum levels of Australian content that commercial radio in Australia is obliged to play. Secondly, in terms of the overall revenue of a commercial radio station, the cost impact of an increased broadcast licence fee for sound recordings will have little or no impact on programming decisions. Finally and perhaps most importantly, there will clearly be a strong continuing demand from Australian consumers to listen to Australian recordings in particular, and that demand will determine playlist content.
- No impact in relation to Australia's obligations with respect to relevant international copyright treaties. Indeed, as set out in Appendix 6, it could be argued that on a strict interpretation of Article 16.1(a) of the Rome Convention, a statutory cap in the form of section 152(8) would not be allowed.

Clearly, if PPCA's contention is wrong and the fair market rate for any broadcaster (irrespective of the level of sound recording use) is 1% or less, then there will be no impact of any kind from removal of the cap.

11. Analysis of CRA Arguments

The Discussion Paper sets out a number of arguments apparently made by CRA in favour of retaining the cap. The purpose of the following matrix is to re-cap on the rebuttal that PPCA makes in relation to each of these assertions.

CRA Assertion	PPCA Rebuttal
<p>The cap balances the monopoly position of PPCA and provides certainty for commercial and community broadcasters.</p>	<p>PPCA holds no monopoly position. It is a non-exclusive licensee of the sound recording right. As such, commercial radio broadcasters could choose to deal directly with each of PPCA’s licensors (record labels) for the licensing of sound recordings. PPCA is not aware of any approach by CRA or its members to individual record companies, which in itself confirms the benefits and convenience of the blanket licence PPCA offers.</p> <p>In any event, even if PPCA was a monopoly (which it clearly is not), the Copyright Tribunal provides the required balance in setting tariffs which could not be agreed between the parties involved (as it does with respect to all other copyright subject matter). There is no need or justification for any statutory price cap in addition to the independent arbitration role undertaken by the Copyright Tribunal.</p> <p>The certainty that the cap provides to commercial radio broadcasters is unjustified and anomalous. Certainty is not in itself a necessary or sufficient objective in the context of an industry to industry negotiation of the rate. In the case of the community sector, PPCA is willing for the cap to remain in place on the basis that it is and remains a not for profit sector.</p> <p>In this context, it is interesting to note that no statutory price cap applies to the broadcast of musical works (controlled by APRA, which is a monopoly). The absence of such a cap does not create any difficulty for either the Copyright Tribunal or the commercial radio sector in determining a fair market rate.</p>
<p>The cap has a regulatory role similar to price caps imposed by regulators in other industries such as gas, electricity and telecommunications – which are used to curb the potential abuse of monopoly power while ensuring the supply of services to consumers at reasonable and cost reflective prices.</p>	<p>This assertion confuses price regulation by a regulator with the regulator itself. Even if there were an accurate analogy between sound recordings and essential utility services (which there is not – see below), price controls in relation to the latter are determined by a legislatively-constituted regulator/arbitrator not a legislative price cap.</p>

	<p>In terms of the sectoral analogy, price regulation in the utilities sector typically seeks to prevent abuse of dominance over inputs into different stages in a vertical chain of production of essential goods or services. This is distinct from the regulation of licence fees between two industries in which the output of one is either an optional input to the business model of the other, or is a necessary input, but in which the output can be obtained by ultimate consumers through various channels. Utilities regulation also does not typically proceed by way of ex ante price caps. It typically proceeds by reference to principles of efficiency (and cognate concepts), from which benchmarks are inductively established, thereby preserving contextual regulatory discretion.</p> <p>The ability to negotiate or otherwise determine a 'reasonable and cost reflective' price is precisely what the cap prevents. Removal of the cap will permit a fair market price to be determined between the parties or by the Tribunal.</p>
<p>The cap provides certainty to both parties on the possible limits to the bargaining outcome. Bargaining parameters and outside determination mechanism are similar to the 'negotiate and arbitrate' access regimes under Part IIIA of the <i>Trade Practices Act</i>. This assists makes bargaining fair and efficient.</p>	<p>The cap does provide a degree of certainty – but again this is certainty for one party in a two-sided bargaining situation, at the expense of the other party. PPCA contends that the cap provides a substantial subsidy to commercial radio. at the direct expense of artists and the record industry.</p> <p>The cap means that bargaining is neither fair nor efficient. There is no fairness in a price control that unjustifiably sees one industry subsidising the business input costs of another. The process is inefficient because of the distortion that the cap creates meaning that the parties cannot negotiate without an arbitrary and artificial constraint.</p>
<p>There is no need to remove the cap while the parties have in place a voluntary licence scheme that sets fees across all stations well below the cap.</p>	<p>There is currently an interim industry arrangement in place between PPCA and CRA, following the expiration of the previous long-term agreement in June 2003. PPCA has agreed to extend the terms of this agreement on a short-term basis to allow the Government the opportunity to examine the legislative price cap.</p> <p>In any case, there is no relationship between a decision to remove the statutory cap and an industry agreement on the rate. CRA has previously argued that it would be inappropriate to consider repeal of the cap in any of the following circumstances:</p>

	<ul style="list-style-type: none"> • while an industry agreement is in place; • while negotiations towards a new industry agreement are taking place; or; • if Tribunal proceedings were commenced. <p>In other words, applying the logic of that proposition, it would never be an appropriate time to consider a repeal of the cap. This is a nonsensical argument.</p> <p>The fact that the negotiated rate under the current industry agreement is well below the cap is a direct result of the manner in which the statutory cap operates.</p>
<p>Protection is still needed by broadcasters. The commercial sector has experienced a major decline in profitability. The cap is particularly needed to protect regional broadcasters affected by volatile competition for advertising revenues.</p>	<p>It is clear that the financial performance of commercial radio does not justify the continued existence of the cap at any level, including the regional segment. It is simply false to suggest that commercial radio has experienced a major decline in profitability.</p> <p>Even if it had experienced such a decline, that does not justify the continued subsidy of the industry by Australian record labels and Australian recording artists.</p>
<p>The cap is a trade-off for the mandatory minimum Australian program content requirements imposed on radio stations to broadcast minimum quotas of Australian sound recordings. These quotas limit the unprotected content commercial radio may choose to broadcast and guarantee revenue for PPCA from commercial radio.</p>	<p>The cap was introduced in 1969, prior to the introduction of Australian content quotas and decades before the current scheme of voluntary Australian music quotas for radio were agreed as part of the relevant ABA Commercial Radio Code of Practice. As such, it is nonsensical to suggest that any trade-off was negotiated or agreed in relation to the cap.</p> <p>The proposition suggests that radio wouldn't broadcast Australian recordings but for the quota, which is clearly untrue.</p> <p>The proposition also implies that the playing of Australian recordings has a detrimental effect of revenue and profitability, which is nonsensical.</p>
<p>In September 2001, the Government decided not to repeal the fee cap in light of the Ergas Report. The Government's decision noted that the cap provides a reassurance to rural and regional broadcasters that significant fee increases will not impinge on their viability.</p>	<p>Independent financial data collected and published by the ABA makes clear that rural and regional commercial radio is not under threat. Regional FM operators, whose very low licence fees would be likely to rise if the cap is repealed, are recording high levels of revenue and profit growth.</p> <p>CRA did not raise any concerns in relation to regional radio in the APRA case which clearly</p>

	suggests that the concerns expressed by Government in 2001 are not shared by the radio industry itself.
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APPENDIX 1: Broadcast Licence Fees in Comparable Jurisdictions

Country	Rate Payable by commercial radio stations	Comments
Australia	0.4% of gross revenue.	Legislative price cap in section 152(8) of the Copyright Act.
Austria	5% of total income minus rebates	Rate can be reduced to 4% after deductions
Canada	2% on the station's first \$625,000 in annual advertising revenues 4% on the station's annual advertising revenues greater than \$625,000 and less than \$1,250,000 6% on the station's annual advertising revenues of \$1,250,000 or more	
Finland	4% to 8% of advertising income	Rate within this range depends on the amount of protected music
France	4.25% of gross revenues	<p>The base consists of all revenues associated with radio broadcasting including income from advertising without deductions for advertising fees, subventions, and donations, but after four deductions:</p> <ul style="list-style-type: none"> • Irrecoverable debts • Advertising exchanges during three years for new broadcasters • 22% of the base when the radio broadcast includes at least 5 hours of news and news magazine edited by journalists or a local program created by the broadcaster <p>10% of the base when the broadcaster forward documentation and a declaration prior to six months after financial year end, and application of the yearly phonogram use rate as a fraction of total broadcasting.</p>
Germany	4.5% of net advertising income	
Hong Kong	4.5% of gross advertising income less 15% agency commission.	
New Zealand	1.75% of advertising revenue; all rates subject to CPI.	
Spain	2.35% of gross income; 0.35% of gross income for dubbing	

<p>Sweden</p>	<p>5% of total income minus 20%, which equals 4% of the station's total income but with a minimum fee per year</p> <table border="1"> <thead> <tr> <th>No. of people (000)</th> <th>Swedish Krona</th> </tr> </thead> <tbody> <tr><td>0-75</td><td>107,000</td></tr> <tr><td>75-150</td><td>140,000</td></tr> <tr><td>150-225</td><td>174,000</td></tr> <tr><td>225-300</td><td>207,000</td></tr> <tr><td>300-375</td><td>240,000</td></tr> <tr><td>375-450</td><td>274,000</td></tr> <tr><td>450-525</td><td>307,000</td></tr> <tr><td>525-600</td><td>340,000</td></tr> <tr><td>600-675</td><td>374,000</td></tr> <tr><td>675-750</td><td>407,000</td></tr> <tr><td>750-825</td><td>440,000</td></tr> <tr><td>825+</td><td>474,000</td></tr> </tbody> </table>	No. of people (000)	Swedish Krona	0-75	107,000	75-150	140,000	150-225	174,000	225-300	207,000	300-375	240,000	375-450	274,000	450-525	307,000	525-600	340,000	600-675	374,000	675-750	407,000	750-825	440,000	825+	474,000	
No. of people (000)	Swedish Krona																											
0-75	107,000																											
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825+	474,000																											
<p>United Kingdom</p>	<p>Fees are determined as a percentage of net broadcasting revenue (NBR), where NBR is 85% of annual gross valuable consideration</p> <p>GBP520 for NBR less than GBP26,000</p> <p>2% up to GBP499,465</p> <p>3% for GBP499,466 to GBP998,930</p> <p>5% for GBP998,931 and above</p>																											

These international comparisons have been provided to PPCA by the International Federation of Phonographic Industries (IFPI). Should further information be required in relation to any of the arrangements that exist in other countries, PPCA would be happy to obtain further details or facilitate contact with IFPI.

As noted in the Discussion Paper, the US is not a comparable jurisdiction, as US copyright law does not recognise the broadcast rights in sound recordings which are protected under copyright law in Australia and most other developed countries. (Interestingly, however, the direction of US developments in this regard may be apparent from the recent introduction of licence fees in the US for online transmission of sound recordings).

Over time, the range of international sound recordings that are protected in Australia (i.e. that have copyright protection in Australia for broadcast fee purposes) has steadily increased. In the last 20 years alone, 21 countries have been added to the list of

countries whose recordings are protected, with Canada being among the most recent round of additions in March 2001.

APPENDIX 2: Key Findings of Study into Australian Artist Incomes

The recent national study commissioned by the Australia Council, *'Don't Give Up Your Day Job'* (2003, David Throsby and Virginia Hollister, Division of Economic and Financial Studies, Macquarie University) made the following findings relevant to this submission:

- Most important factors inhibiting the professional development of artists are lack of work opportunities and lack of financial return from creative work (Table 22, page 26).
- On average, Australian artists spend only 21 hours per week on their principal artistic occupation (musicians: 18 hours), another 14 hours in other arts work (musicians: 13 hours) and non-arts work a further eight hours (musicians: 9 hours). (Table 27, page 40).
- The main factor preventing artists spending more time at arts work is insufficient income from that work (Table 30, page 42).
- Median earned income in 2000/2001 for all artists was \$15,700 for arts income (musicians: \$20,000) and \$30,000 for total income (musicians: \$35,800). (Table 34, page 45). The study then compares these figures with median incomes for other Australian occupation groups: managerial/administrative (\$55,800), professional (\$48,900), associate professional (\$40,200) and all occupation groups (\$36,600). (Table: 35, page 46).

Significantly, the Throsby and Hollister study specifically address the importance of copyright to Australian artists:

“If artists are to gain the full economic benefit to which their creative endeavour entitles them, their intellectual property in their work must be adequately protected against unauthorised exploitation or appropriation. The copyright held by writers, visual artists, craft practitioners and composers in the literary, dramatic, artistic and musical works that they create is essential to their economic survival. Furthermore, performers such as actors, dancers and musicians, as well as stage directors and choreographers, may hold copyright in particular performances that they create” (page 56).

**APPENDIX 3: 2004 Broadcast Licence Fee Payments Made by
Commercial Radio to PPCA (*Confidential*)**

[Confidential].

APPENDIX 4: Financial Performance of the Commercial Radio Sector

The following data on the financial performance of the commercial radio sector is sourced from the Australian Broadcasting Authority, 'Broadcasting Financial Results: 2002/2003'.

Table 2, below, sets out in summary form the financial performance of commercial radio in terms of revenue and profitability in the 02/03 year and shows the percentage change from the previous year and over the last five years.

CATEGORY	REVENUE			PROFITABILITY		
	02/03 (\$M)	% Change 99 to 03	% Change 02 to 03	02/03 (\$M)	% Change 99 to 03	% Change 02 to 03
Total	773.5	21.7	5.9	107.7	0.2	-2.1
AM	228.9	-5.2	2.4	8.9	-31.8	970*
FM	544.6	38.2	7.5	98.8	4.7	-11.1

Notes to Table 2:

- Blue shading indicates positive change; pink shading indicates negative change.
- Asterisk * indicates where ABA compares a negative profit (loss) figure in one year with a positive figure in a future year. While in its analysis the ABA shows this as a negative percentage change this clearly represents a positive change in financial circumstances. As such, it is represented as a positive percentage change in this table.
- 'Revenue' refers to total service revenue as defined in the BFR.
- 'Profitability' refers to service profit/loss as defined in the BFR.

The key conclusions to draw from the data in Table 2 is that:

- The commercial radio sector's revenues are currently \$773 million per annum, out of which \$108 million is profit. This represents approximately a 14% operating profit margin across the sector.
- The commercial radio sector has recorded solid revenue growth over the last five years (21.7%), although profitability over the last few years has clearly been impacted by the emergence of a new FM operator in a number of major metropolitan markets. For instance, losses incurred by new capital city FM operator, DMG, in the year to September 2003 were \$15.3 million and \$24.3 million in the preceding year (source: 'BRW', 6 May 2004, page 34).
- In revenue terms, the music-driven FM sector is just over 70% of the overall commercial radio industry and makes approximately 92% of the industry's overall profit.
- While on a five year view, the AM sector has experienced a small decline in revenue and a significant decline in profitability, the last year has seen a turnaround in this trend, particularly in relation to profitability.

Table 3, below, represents a revenue and profitability summary of the ABA's 2003 BFR data for the capital city radio segment of the commercial radio industry.

CATEGORY	REVENUE			PROFITABILITY		
	02/03 (\$M)	% Change 99 to 03	% Change 02 to 03	02/03 (\$M)	% Change 99 to 03	% Change 02 to 03
Total Cap City	526.3	22	4.2	58.4	-22.9	-25.9
AM Cap City	158.6	9.3	4.8	6.3	1019	1573*
FM Cap City	367.7	28.5	4	52	-30.8	-34.3

Notes to Table 3 as per Table 2.

Table 3 shows a number of significant characteristics of the financial performance of commercial radio in Australia's capital cities:

- In 2002/2003, capital city radio stations earned 68% (\$526 million) of the total commercial radio sector's revenue and 54% (\$58.4 million) of its overall profit.
- The capital city AM segment bounced back in 2002/2003 in terms of both revenue and profitability on both the one year and five year view. Profitability for AM (operating profit margin of only 4%) is starting from a very low base (i.e. AM radio has been marginal from a profitability point of view in recent years).
- The capital city FM segment has seen significant growth in revenue on both the one and five year time periods, but its profitability has declined significantly over both time periods. As explained above, it is clear that this is primarily or wholly due to the emergence of a new FM capital city operator who has itself incurred substantial losses in its establishment phase. Yet even after experiencing this decline in profitability, the capital city FM segment earned profit of \$52 million on revenues of \$367.7 million – an operating profit margin of 14.1%.

The final geographic component of the 2002/2003 ABA BFR relates to the financial performance of regional radio and is set out in Table 4:

CATEGORY	REVENUE			PROFITABILITY		
	02/03 (\$M)	% Change 99 to 03	% Change 02 to 03	02/03 (\$M)	% Change 99 to 03	% Change 02 to 03
All Regional						
Total	247.2	21.1	9.7	49.4	55.4	57.6
AM	70.3	-27	-2.7	2.6	-79.5	532.7*
FM	176.9	63.9	15.6	46.8	143.1	46.7
Large Regional						
Total	160.5	40.1	14.4	34.6	73.9	51.7
AM	25.2	-21.2	-6.1	-2.7	-163.4	11.8
FM	135.3	63.7	19.2	37.3	137	48
Med Regional						
Total	61.9	-4.3	1.4	10.4	3.5	39.6
AM	31.1	-33.4	-2.2	3	-56.8	60.5
FM	30.8	71.7	5.2	7.4	142.5	32.5
Small Regional						
Total	24.8	-0.4	3.8	4.4	141.9	311.5
AM	14	-20.2	2.7	2.2	67.4	2228*
FM	10.9	46.2	5.3	2.2	341.8	85.9

Notes to Table 4 as per Table 2.

While some of the percentage change figures in relation to the financial performance of regional radio need to be read with care due to the relatively low real dollar numbers involved in some cases, Table 4 shows that:

- Taken as a whole, regional commercial radio has significantly increased its revenue (on both a one year and five year view) and even more so its profitability over both time periods. Regional commercial radio is currently recording revenues totalling \$247.2 million generating a profit of \$49.4 million – an operating profit margin of 20%.
- The regional AM radio segment faces tighter conditions in terms of both major financial indicators but has improved its fortunes in the most recent year with a return to profitability (\$2.6 million). Interestingly, in 2002/2003 AM radio operators in medium and small regional areas outperformed those operating in large regional areas.
- In contrast, FM regional radio, at over twice the size of the AM segment, is thriving in terms of both revenue growth (64% over the last five years) and profitability (143% increase over the last five years). The operating profit margin for the regional FM radio segment exceeds 26%. This exceptional financial performance of the regional FM radio segment is reasonably consistent through large, medium and small areas in terms of both revenue and profit.
- PPCA notes the very substantial degree of cross-ownership of AM and FM licences in regional licence areas that arises out of the historic allocation process for FM radio licences in non-capital city areas (i.e. these licences were first offered to the incumbent AM operator in a given licence area).

APPENDIX 5: Financial Data and Statements from Commercial Radio Operators – 2004/2005

PPCA has sourced the following selection of data, statement and analysis from CRA, individual commercial radio operators and independent commentators on the recent performance of the sector and its constituent companies:

- “The strategy is working; ARN is one of the most profitable radio companies in Australia. According to the financial statements of shareholder APN News and Media, ARN recorded a 13% increase in earning before interest and tax for calendar 2003, to \$56.2 million, on revenue that fell 7.7% to \$213.4 million.” (‘BRW’, 6 May 2004, page 34).
- “Metropolitan radio is firming as the nation’s fastest-developing advertising medium, stacking on 12 per cent growth to \$520 million in the year to the end of June [2004].....a PriceWaterhouseCoopers study shows that radio has rebounded, putting on 16 per cent growth in the first six months of 2004 – well ahead of an already rampant total advertising market.” (‘The Age’, 13 July 2004, page 5).
- “Southern Cross Broadcasting says forward advertising bookings through until October are well ahead of the same period last year, allowing it to build on a 35 per cent rise in net profit to \$46.2 million for the year to June 30 [2004]. The regional TV and metropolitan radio operator capitalised on unexpectedly high revenue performances across both media in the second half of the financial year and managing director Tony Bell said similar advertising growth rates had continued into the first half. ‘I won’t give an outlook for the company, but from an industry point of view the advertising market across both television and radio continue to be strong,’ Mr Bell said. “I would think it will achieve double-digit growth for the half, and for the full year it should achieve somewhere around 8 per cent growth’.” (‘The Age’, 26 August 2004, page 5).
- “Radio has performed strongly in attracting advertising revenue this year with an increase of nearly 15 per cent for the six months ended June 2004 to \$382.4 million, according to Commercial Economic Advisory Service of Australia (CEASA) figures released today.....’Compared to increases in other mediums like television (13.1%) and print (7.8%), the growth in radio advertising (14.8%) for the first six months of this year is extremely pleasing and augurs well for one of the best years on record,’ Ms Warner said. ‘The industry looks well on track to better the full year 2003 CEASA figures which showed growth of 4.9 per cent to \$736.09 million for radio – which would be a very pleasing result.’” (CRA, media release, 16 September 2004).
- “Commercial radio broadcasters have reported their ninth straight month of double-digit advertising revenue growth as the medium’s share of ad revenue surges above 9 per cent.....Across the five capital cities advertising revenue grew by 17.7% to \$142.9 million.” (‘The Australian’, 14 October 2004, page 19).
- “The group [Austereo] held its place as the most successful capital city radio operation in Australia, in audience, sales and profit terms.....The audience results flowed through to a solid sales outcome, with sales revenues increasing over the previous year to \$240.4 million. The capital city radio industry also grew in the period, up 11.7%. The EBIT result of \$71.2 million declined 5.6%, but focus on EBITDA margins saw them maintained at a world class 32%. Profit after tax was \$41.9 million, similar to that of the previous year of \$43.9 million.....The

commercial radio industry is a great and growing force in the media world. In the six months to June 2004, radio's share of advertising was 9.3%, up from 8.9% in the previous corresponding period. This augers well for the future.....Austereo is the leader in an industry which, itself, is a leader in growth in the media sector." (Chairman's address to 2004 AGM of Austereo Group Limited, 11 November 2004).

- "Data released recently by PriceWaterhouseCoopers showed that metropolitan commercial radio stations attracted \$556.6 million in advertising revenue in 2004, a 14.8% increase over 2003 and the industry's best performance in many years." (CRA, media release, 1 February 2005).
- "The figures [referring to those released by CRA, above] defy expectations that radio advertising would slow this year, showing metropolitan advertising grew strongly in December, up 14.7 per cent to \$50.3 million compared with the same month last year. DMG chief executive Paul Thompson said revenue for the group's three Nova stations in Sydney, Perth and Melbourne was up 35 per cent in December, off a smaller base than Austereo, following the start of national ad campaigns booked on Nova, including its test station in Brisbane." ('The Australian', 18 January 2005, page 19).
- "Our main rival isn't 2UE; it is the FM stations, which have done a much better job of selling themselves and radio in general. The radio industry attracted a lot of new revenue and new advertisers last year, but I don't think AM stations got their share of that revenue." (Angela Clark, Chief Executive, Macquarie Radio Network, quoted in 'Australian Financial Review', 7 February 2005, page 48).
- Capital city radio stations boosted their advertising revenue 9.6% to \$39.9 million during January 2005, according to figures from PriceWaterhouse Coopers ('Australian Financial Review', 10 February 2005, page 19).
- Austereo half-year results to December 2004 shows increased EBIT of 7% to \$44.6 million, and a 10.2% increase in net profit to \$39.8 million (Austereo, Announcement of Half Year Results to December 2004, released to ASX 17 February 2005).
- ARN Australian radio revenue for full year 2004 has grown 20% to \$138 million over the last year, and profit 22% to \$43.5 million. (APN News and Media, 2004 Full Year Results, released to ASX, 22 February 2005).

APPENDIX 6: Analysis of Australia's International Treaty Obligations

1. International Convention for The Protection Of Performers, Producers Of Phonograms and Broadcasting Organisations (Rome Convention, 1961)

Article 12 of the Rome Convention 1961 provides as follows:

"If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonogram, or to both. Domestic law may, in the absence of any agreement between these parties, lay down the conditions as to the sharing of this remuneration".

The obligation in Article 12 is limited by the terms of Article 16 which allows Contracting States (which include Australia) to lodge reservations in respect of certain obligations, including the obligations set out in Article 12. Relevantly, in relation to Article 12, Article 16.1 provides as follows:

- (a) "as regards Article 12:
 - (i) it will not apply the provisions of that Article;
 - (ii) it will not apply the provisions of that Article in respect of certain uses;
 - (iii) as regards phonograms the producers which is not a national of another Contracting State, it will not apply that Article;
 - (iv) as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the latter State grants protection to phonograms first fixed by the national of the State making the declaration; however, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection."

Australia lodged a reservation under this Article in respect of the obligations contained in Article 12. It is that reservation which gives rise to the fact that US recordings are not protected (a reservation under Article 16.1 (a)(iv)).

However, on a strict interpretation of Article 16.1(a), it would seem that a statutory price cap in the form of section 152 (8) would not be allowed. Under the terms of that Article, it seems as though the discretions afforded to a Contracting State relate to whether or not protection will be afforded at all. However, once a decision is taken to afford protection, there does not seem to be any right under Article 16.1(a) which would allow a limitation on the obligation under Article 12 to ensure that equitable remuneration is paid for the protected used.

2. WIPO Performances and Phonograms Treaty (WPPT, 1996)

Article 15 of this treaty is in similar terms to Article 12 of the Rome Convention. The Article also contains the right to make reservations of a kind similar to those found in Article 16.1 of the Rome Convention.

Article 15 (1) of the WPPT provides as follows:

“Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of a phonogram published for commercial purposes for broadcasting or any communication to the public”.

The right to make reservations is found in Article 15(3) and, as the Discussion Paper makes clear, is in similar term to Article 16.1(a) of the Rome Convention.

It will be noted that Australia has not yet acceded to the WPPT – the obligation to do so forms part of the US/Australia Free Trade Agreement. However, the actual accession has yet to place.

As such, it is PPCA’s contention, contrary to the views expressed in the Discussion Paper, that the 1% cap may be contrary to the obligations of both the Rome Convention and the WPPT.