



**COPYRIGHT LAW REVIEW COMMITTEE**

# **Jurisdiction and Procedures of the Copyright Tribunal**

**June 1999**



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## Overview

The Copyright Law Review Committee (CLRC) has been asked to report to the Attorney-General on the need for changes to the jurisdiction and procedures of the Copyright Tribunal under Part VI of the *Copyright Act 1968*. The Committee's terms of reference are at Appendix A.

The purpose of this paper is to invite submissions on the matters raised in the Committee's terms of reference. This paper identifies and describes the key elements of the current Copyright Tribunal regime, as well as identifying many of the issues associated with an expansion of its jurisdiction and of any changes to the procedure of the Copyright Tribunal. The Committee does not endorse any particular views or arguments outlined in this paper. Rather, the Committee seeks the views of interested parties on the issues raised.

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Comments should be made by 23 July 1999.

Submissions that are received by the Committee in electronic form will be placed on the Committee's website. All submissions will be made public unless marked confidential. Guidelines for the format of submissions can be found on the Committee's website at <http://www.law.gov.au/clrc>. Submitters not having access to Internet facilities may contact the Committee's Secretariat on 02 6250 6076 for a copy of the Guidelines and any additional information they require.



# The Copyright Tribunal

## History and background

1. The Copyright Tribunal was established by s.138 of the *Copyright Act 1968* (the Act) in response to a perceived need to control the exercise by collecting societies or organisations of the rights given to them by copyright owners in respect of the public performance and broadcast of their musical works and sound recordings. Pressure for a Tribunal began in 1926 with accusations by users of musical works that the Australasian Performing Right Association (APRA) was unfairly exploiting its monopoly position. The ability of collecting societies to fix and alter royalties and their ability to grant licences subject to restrictive conditions continued to cause concern in both the United Kingdom and Australia in the 1950s. This was highlighted in the 1959 Report of the Australian Copyright Law Review Committee (the Spicer Committee). This led to the creation of a Copyright Tribunal with jurisdiction to determine royalties and remuneration in respect of certain copyright licences, in addition to a number of other related matters.

2. Since its creation, 31 applications have been made to the Tribunal. The applications have been made almost entirely by collecting societies or other equally large bodies such as record companies or universities. Approximately one half of the applications made involved the referral to the Tribunal of a proposed licence scheme, or an application in respect of a refusal to grant a licence or to grant a licence upon unreasonable terms or conditions. Interested parties may wish to consult a table outlining the details of all applications received by the Tribunal to date, which may be viewed at the Committee's website at <http://www.law.gov.au/clrc>.

## International considerations

3. The protection of intellectual property rights such as copyright is regulated by a number of international conventions. In particular, Australia must comply with the terms of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement) to which it is a party. The TRIPS Agreement provides that members of the World Trade Organization must comply with the substantive provisions of the Berne Convention for the Protection of Literary and Artistic Works, to which Australia is also a party, with the exception of provisions relating to moral rights. The text of the Berne Convention may be viewed at [http://www.wipo.org/eng/iplex/wo\\_ber0\\_.htm](http://www.wipo.org/eng/iplex/wo_ber0_.htm).

4. The Berne Convention provides that authors of original literary and artistic works shall enjoy a variety of exclusive rights. These rights are provided in Articles 8, 9, 11, 11*bis*, 11*ter*, 12, 14 and 14*bis*. A proposal in 1948 to amend Article 11 (right of public performance and communication to the public of dramatic and musical works) engendered concern in the UK and other countries that the provision of exclusive rights might prevent the enactment of domestic legislation to prevent the abuse of such rights. The Australian delegation, holding such concerns, associated itself with a British declaration accepting the amendment on the basis that the UK government remained free to enact such legislation as it might consider necessary to prevent or deal with any abuse of the monopoly rights conferred upon copyright owners. This

position was accepted at the Stockholm Revision Conference of 1967 and, as stated by Australia, was noted in the Geneva Diplomatic Conference on Copyright of 1996. The prevention of abuse is today a feature of the copyright regimes of a large number of overseas countries. It therefore appears that the establishment of a Copyright Tribunal or like body does not conflict with Australia's international obligations.

## **Jurisdiction of the Copyright Tribunal**

### **Jurisdictional issues**

5. The Copyright Tribunal is an administrative body. Its jurisdiction and any expansion thereof is limited by the constraints imposed by the doctrine of separation of powers. The Committee notes that the case law on this topic has not provided a comprehensive definition of judicial power. However, the Committee is aware that there are ongoing developments in this area. The recent decision of the Federal Court in *Breckler & Ors v Leshem* (unreported, Federal Court of Australia, 12 February 1998) relating to the Superannuation Complaints Tribunal is presently under appeal to the High Court. It is likely that the High Court's decision in that case will impact on the scope of the jurisdiction that may be vested in the Tribunal.

### **Current role**

6. The jurisdiction of the Tribunal is provided for in Division 3 of Part VI of the Act. While the jurisdiction provided is complex, the Tribunal generally speaking has the function of determining remuneration payable under the statutory licence schemes provided for under the Act, and further has jurisdiction in respect of licence schemes falling within the definition of a 'licence scheme' in s.136 where the scheme has been referred to it by a party.

7. The Act provides for a number of statutory or compulsory licences whereby acts which would otherwise constitute an infringement of copyright are permitted in specified circumstances. A number of these statutory licences are subject to the payment of equitable remuneration for the exercise of the right. The amount payable may be determined by agreement between the person exercising the right and the holder of that right. In the context of the statutory licences in respect of which the Tribunal has jurisdiction, the relevant rights will often, although not invariably, be under the control of a collecting society, being agencies that collectively administer rights comprised in copyright. The relevant rights may be assigned or licensed to the society. In the absence of agreement between the user and owner of the copyright, the Act provides that an application may be made to the Tribunal for an order determining the equitable remuneration to be paid to the owner of the copyright for the exercise of the exclusive right.

8. The matters in respect of which applications may be made to the Tribunal are set out in Division 3 of Part VI of the Act. The provisions of Part VI are extremely detailed. A comprehensive description of the Tribunal's jurisdiction is included at Appendix B.

9. In summary, applications may be made to the Tribunal for an order determining the amount of equitable remuneration payable in respect of statutory licences provided in the Act for the:

- making of an ephemeral recording or film of a work or of an adaptation of a work for the purpose of broadcasting the work (s.149);
- broadcast of a literary or dramatic work by the holder of a print disability radio licence (s.149A);
- making of a copy of a sound recording for the purpose of broadcasting the recording (s.150);
- public performance of a sound recording (s.151);
- broadcasting of a published sound recording (s.152);
- manufacture of a record of a musical work (s.152A);
- making of a copy of a broadcast by a body administering an educational or other specified institution (s.153A);
- making by a body administering an educational or other institution of copies of works (s.153C); and
- the doing of an act comprised in a copyright where the act is done for the services of the Crown (s.153E).

10. Applications may also be made to the Tribunal for:

- an order determining the manner of payment of royalty payable by the manufacturer of a record of a musical work (s.152B);
- an order apportioning the amount of royalty payable in respect of a record between the owner of the copyright in the musical work and the owner of the copyright in the literary or dramatic work (s.153);
- an order determining a sampling system in respect of statutory licences for copying of transmissions by educational institutions (s.153B);
- an order determining a sampling system in respect of a statutory licence for the copying of works by educational institutions (s.153D);
- a declaration that a company be a collecting society for the purposes of Part VII - Crown use of copyright material (s.153F);
- the revocation of a declaration made under s.153F that a company is a collecting society (s.153G);
- a method for working out payment for government copies (s.153K); and
- a review of a declaration that an institution is an educational institution within the meaning of the Act (s.153L).

11. Further, proposed or existing licence schemes may be referred to the Tribunal by the operator of the scheme or any person or organisation requiring a licence to which the scheme applies seeking an order varying or confirming the scheme under ss.154 and 155 of the Act. Section 157 provides for the review of a failure or refusal to grant a licence and the imposition of unreasonable terms. As noted in paragraph 6, the licences and licence schemes in respect of which such an application may be made

are defined in s.136. Broadly speaking, the licences and licence schemes encompassed are those for the public performance or broadcast of sound recordings of works and of literary, dramatic or musical works or an adaptation thereof.

### **Scope for expansion**

12. The scope of the Tribunal's jurisdiction has been the subject of considerable comment in recent years. In particular, attention has been drawn to the fact that the Tribunal's jurisdiction is dependent on the nature of the copyright material. In his report *Review of Australian Copyright Collecting Societies* (the Simpson Report, accessible via the Committee's website) Mr Shane Simpson suggests that the Tribunal should have jurisdiction over all collectively administered licence schemes whether the rights were administered under a voluntary or statutory licence. Collecting societies consulted in the preparation of the Report indicated support for such a proposition. A recommendation to this effect was also made by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its report *Don't Stop the Music! - A report of the inquiry into copyright, music and small business* issued in May 1998.

13. In his report Mr Simpson recommends 'that the Tribunal have as wide a jurisdiction as possible in respect of licences and licence tariffs including the variation, approval and interpretation of all licensing schemes whether the relevant rights are administered under voluntary or statutory licence' and 'that the definition of licence in s.136(1) be amended'. In particular, Mr Simpson suggests that the following matters should be within the Tribunal's jurisdiction:

- the setting of licence fees;
- the setting of any non-financial terms of agreements with licensors; and
- the equity or otherwise of sampling schemes and other methods for the quantification of payments.

14. In relation to sampling schemes, it has been suggested that the jurisdiction of the Tribunal to hear such matters be extended to enable it to hear grievances with respect to processes employed by collecting societies to identify rights owners and quantify royalty payments. At present, the jurisdiction to determine sampling systems is limited to copying performed in educational institutions, and the possible parties to an application are restricted to the educational institution and the collecting society. A rights owner is at present unable to bring a grievance with respect to a sampling system before the Tribunal. It has further been suggested that the jurisdiction with respect to sampling be extended beyond statutory licence schemes to include commercially negotiated schemes.

15. At the 1995 seminar *The Copyright Tribunal: is it working as well as it should?*, (the papers from which are published in (1995) 13 *Copyright Reporter* Number 2) the question was raised whether the Tribunal should deal with individual members of copyright collecting societies and anyone who requires a licence to use copyright materials. This question stems from concerns about the absence of a mechanism to deal with the grievances of members of collecting societies regarding the collecting societies' terms of operation. The Committee also notes the opposing view put at the seminar that arrangements between members and collecting societies are a private

issue, and that it is inappropriate for the Tribunal to be given jurisdiction over complaints by members with respect to the rules of the society. The Committee invites comments on this issue.

### **Costs and benefits of expansion of the Tribunal's jurisdiction**

16. An important issue in the consideration of any modification or expansion of the jurisdiction of the Tribunal is the costs that such a change might impose. In particular, it is noted that the Tribunal is currently operated on a part time basis, with members having obligations external to their roles within the Tribunal. A significant increase in the role of the Tribunal may require a reassessment of the structure of the Tribunal. Further, it is likely that an expansion of the jurisdiction of the Tribunal will result in an increase in the number of matters coming before the members, therefore increasing the general costs associated with the administration of the Tribunal.

17. A further issue is the benefit that business, consumers, and the wider community may derive from an expansion of the jurisdiction of the Tribunal. In particular, it has been suggested that the expansion of the Tribunal's jurisdiction to cover a wider range of licensing schemes would be of benefit to businesses facing difficulties in negotiations with both owners and collecting societies. A related question is whether the jurisdiction of the Tribunal should be expanded to cover new and emerging uses of copyright material.

### **18. The Committee invites comment on the issue of the Tribunal's jurisdiction. In particular, the Committee seeks views on:**

- **whether the jurisdiction of the Tribunal should be increased, and if so the scope of that expansion;**
- **the sorts of licences the Tribunal should have jurisdiction over;**
- **what would constitute a collectively administered licence scheme for these purposes;**
- **whether any proposed expansion could be validly vested in the Tribunal, or would require the vesting of functions in a judicial body;**
- **the potential benefits to business and consumers of an expansion of the Tribunal's jurisdiction and whether such expansion might lead to any additional costs;**
- **the manner in which the Tribunal's need for additional resources due to an expansion of its jurisdiction might be dealt with; and**
- **whether the powers of the Copyright Tribunal and any expansion thereof might more appropriately be exercised by another body.**

# Structure, Constitution, Rules and Practices of the Copyright Tribunal

## Structure and constitution of the Tribunal

19. The structure and constitution of the Tribunal are prescribed by Division 2 of Part VI of the Act. Pursuant to s.138, the Tribunal consists of a President and such number of Deputy Presidents and other members as are appointed. Section 140 of the Act prescribes the qualifications required in order to be appointed as a member of the Tribunal. The President of the Tribunal must be a judge of the Federal Court of Australia, and the Deputy Presidents must be or have been a judge of a federal or Supreme Court. While the prescribed qualifications of members are broad insofar as they need not come from a judicial or legal background, members of the Tribunal have thus far been almost exclusively lawyers. A question arises whether the Tribunal might benefit from the engagement of members from non-legal backgrounds, such as accountants, economists and other professional persons having relevant experience.

20. When hearing an application, the Tribunal is usually constituted by a single member, but may be constituted by up to two additional members upon application by a party. An issue arises whether the single member Tribunal need be constituted by a presidential member. If the hearing of matters by a single non-presidential member were permitted, a related question is whether that single member should have a legal background.

**21. The Committee invites comments on these and any other issues related to the Tribunal's structure and constitution.**

## Procedure and practices of the Tribunal

22. The procedure of the Tribunal is regulated by Division 4 of Part VI of the Act and by the *Copyright Tribunal (Procedure) Regulations*. Generally stated, the procedure of the Tribunal is within the Tribunal's discretion. The Tribunal is not bound by the rules of evidence, and proceedings are to be conducted with as little formality as the Act and proper consideration of the issues permit. The Tribunal may, if it thinks fit, take evidence by the tendering of a written statement. Parties may be represented by a barrister or solicitor. Proceedings of the Tribunal are public except where the Tribunal is satisfied that confidentiality or some other reason warrants a private hearing or restrictions on the publication of evidence.

23. It has been noted that the Tribunal currently operates much like a court, raising the question whether a more informal approach can be developed. In this regard it is to be noted that the Act currently provides that the procedure of the Tribunal is at the discretion of the Tribunal, and further that proceedings are to be conducted with as little formality as the circumstances of the case permit.

24. Questions have been raised in relation to the range of persons who may apply to the Tribunal. Mr Simpson suggests that the current provisions in the Act with respect to standing are overly limiting and complicated and suggests that interested parties

with a grievance and responsible representative bodies should have a right of access to the Tribunal. It has been suggested that a broadening of the current provisions regarding standing to be a party to Tribunal proceedings would be of benefit to businesses facing difficulties in negotiations with both owners and collecting societies by allowing a greater proportion of businesses to apply to the Tribunal. Mr Simpson also recommends 'that the procedures of the Tribunal be examined to see how matters might be dealt with faster and more cheaply'.

**25. Comments are sought on how the Tribunal's procedures might be structured so as to provide a less intimidating environment to potential users and whether the Tribunal's role should be expanded to increase the range of persons who would have standing to apply to the Tribunal.**

## **Alternative Dispute Resolution Mechanisms**

26. Many commentators have raised the issue as to whether an alternative form of dispute resolution may be appropriate in the field of copyright. While some collecting societies provide in their licensing agreements for arbitration in the event of a dispute, the creation of a specialised part-time Ombudsman of Collecting Societies to deal with concerns in relation to the operation of collecting societies has been suggested. Proponents of an Ombudsman suggest that the office would provide a facility for independent investigation, and could provide alternative dispute resolution facilities.

27. In his report, Mr Simpson recommends 'that there be established the position of Ombudsman of Copyright Collecting Societies' and suggests that it be a precondition of access to the Tribunal that grievances first be subjected to alternative dispute resolution procedures. He suggested that such a requirement may help to minimise the increase in costs associated with any expansion of the Tribunal's jurisdiction by effectively creating an earlier tier of review at which disputes may be resolved. Mr Simpson further recommends 'that the Tribunal have the right to review determinations of the Ombudsman'. Mr Simpson's recommendation gives rise to the associated issue of the cost involved in implementing and reviewing an alternative dispute resolution mechanism, and who should bear that cost.

28. Some commentators have advocated the introduction of mediation to the Tribunal. It has been suggested that such a service could be provided as an integral part of the Tribunal's structure. The House of Representatives Standing Committee on Legal and Constitutional Affairs recommended in its May 1998 report that mediation be available through the Tribunal in respect of disputes over licensing schemes. The Government has not yet responded to these recommendations.

29. It is notable that a number of other countries provide for the resolution of disputes with respect to copyright via mediation and other forms of alternative dispute resolution. In particular, Japanese copyright law expressly provides for the possibility of referring any dispute in respect of copyright to mediation.

**30. Comments are invited on the need for and suitability of alternative dispute resolution in relation to copyright disputes in Australia. In particular, the Committee seeks views on:**

- **the desirability of an alternative dispute resolution mechanism;**
- **the preferable model for any such mechanism ;**
- **whether an alternative procedure, should it be adopted, should be compulsory for all applicants;**
- **how an alternative dispute resolution mechanism might function in practice; and**
- **if the implementation of an alternative dispute resolution mechanism is proposed, who should bear the associated costs.**

## **Accessibility and Promotion of the Tribunal to Potential Users**

31. It has been suggested that the Tribunal is not readily accessible to persons who might wish to apply to it. It is further suggested that increased accessibility would make owners and administrators of rights subject to greater scrutiny, and give licensing schemes a greater level of acceptance within the community. The Committee invites comments on the accessibility of the Tribunal. Some suggestions that have been made for improving the accessibility and promotion of the Tribunal have been:

- the development of public education and awareness programs, for example advertising in relevant trade journals and the provision of information sheets to those who make inquiries of the Tribunal;
- the creation of printed forms to facilitate the giving of evidence to the Tribunal by affidavit and to demonstrate the representative character of bodies seeking to be involved in an application;
- the giving of detailed information with respect to the procedures that the Tribunal will follow at the first directions hearing on a matter; and
- the adoption of a Service Charter including a commitment to identified standards of service to Tribunal applicants.

**32. The Committee seeks comment on these and any other matters relating to access to and promotion of the Tribunal.**

## **International Models**

33. The Committee has prepared a Background paper examining selected international models for the resolution of copyright disputes, which is available on the Committee's website. The Committee's examination has revealed a variety of alternative practices. The Committee invites comments on the suitability or desirability of adopting aspects of any of the approaches embodied in foreign legislation as a model for Australia. Without wishing to limit the scope for comments, the Committee would be particularly interested in information about how those approaches work in practice and the extent to which they give rise to, or have

successfully resolved, concerns about timeliness and cost. The Committee also invites submitters to draw to its attention any overseas models that they consider may provide useful guidance for the Committee.



## Appendix A - Terms of Reference

1. The Copyright Law Review Committee (the Committee) is to inquire into and report on the need for changes to the jurisdiction and procedures of the Copyright Tribunal under Part VI of the *Copyright Act 1968*. The Committee should assess the need to increase the Tribunal's capacity to address matters arising under the Copyright Act, and related legislation, having regard to new uses of copyright materials made possible by ongoing technological developments. The Committee should also examine ways to facilitate access by parties to the Tribunal.

In so doing, the Committee should consider:

- (a) the Tribunal's structure, constitution, rules and practices;
- (b) the existing jurisdiction of the Tribunal under Part VI of the Copyright Act and the scope for any expansion in the Tribunal's role to cover new uses of copyright materials, including electronic uses, and any regulatory mechanisms that may be used to effect that cover;
- (c) the consequences of any expansion in the Tribunal's role on its administration;
- (d) the need and desirability for an independent alternative dispute resolution mechanism to complement the Tribunal's jurisdiction and procedure;
- (e) the costs and benefits on business, consumers and the community as a whole of any expansion in the Tribunal's role to cover new uses of copyright materials, including electronic uses, and of any independent alternative dispute resolution mechanisms;
- (f) how Part VI of the Copyright Act could be simplified to incorporate any proposed recommendations;
- (g) whether there is a need to actively promote the Tribunal to persons who may wish to use the Tribunal;
- (h) incidental matters arising from the examination of points (a) to (g), which are able to be addressed by the Committee within the time frame for the reference; and
- (i) a strategy to implement and review any recommendations made by the Committee.

2. In undertaking the inquiry the Committee will have regard to:

- (a) the recommendations and findings made in relevant Government reviews or inquiries, (including the review of the Copyright Act in 1999-2000 under the Commonwealth's Legislation Review Program) and any reports by relevant

expert or advisory bodies including the views of relevant expert or advisory bodies and other interests;

- (b) any relevant amendments to the Copyright Act or associated regulations that are introduced into Parliament, or which the Government announces are proposed to be introduced or are being considered;
- (c) any relevant international copyright obligations including those in treaties to which Australia is considering becoming a party;
- (d) the principle that legislation which restricts competition should be retained *or new legislation made* only if the benefits to the community as a whole outweigh the costs; and if the objectives of the legislation can be achieved only by restricting competition;
- (e) domestic and international tribunal models;
- (f) the possible effect on the operation and complexity of any future copyright legislation as a result of the need to introduce new transitional provisions relating to Part VI of the Copyright Act; and
- (g) the Government's policy that the compliance costs and paper work burden on small business should be reduced where feasible.

3. In undertaking the review, the Committee is to advertise widely and consult with key interest groups and affected parties.

4. In undertaking the review and preparing its report and associated recommendations, the Committee is to report to the Attorney-General by 30 April 2000.

## **Appendix B - Jurisdiction and Procedures of the Copyright Tribunal**

### **Applications for determination of equitable remuneration**

1. Applications may be made to the Tribunal for an order determining the amount of equitable remuneration payable in respect of selected statutory licences. The licences in respect of which such an application may be made are outlined below.

### **Reproduction of a literary, dramatic, musical or artistic work or adaptation for the purpose of broadcasting - s.149**

2. Sections 47(1) and 70(1) of the Act provide that where it would not be an infringement in the copyright of a literary, dramatic, musical or artistic work or adaptation to broadcast the work, it is not an infringement to make an ephemeral recording or film of the work or adaptation for the purposes of broadcasting the work. Where the broadcast is made by a person other than the maker of the reproduction, ss.47(3) and 70(3) provide that the maker must pay the copyright owner equitable remuneration for the making of the recording or film.

3. A licence of this type might be exercised by, for example, a television network seeking to broadcast a recording made by another broadcaster. In this situation, the maker of the recording or film will be required to pay the copyright holder equitable remuneration for the making of the reproduction. In the absence of agreement between the copyright owner and the maker of the recording or film, an application may be made to the Tribunal pursuant to ss.47(3) or 70(3) for the determination of the remuneration to be paid. Section 149 provides that where such an application has been made, the Tribunal shall make an order determining the amount of equitable remuneration to be paid.

4. It is to be noted that the exposure draft of the *Copyright Amendment (Digital Agenda) Bill 1999* (the draft Digital Agenda Bill) provides for the extension of the current definition of 'broadcast'. The broadened definition will be based on the definition of 'broadcasting service' in s.6(1) of the *Broadcasting Services Act 1992*. Unlike the existing definition of broadcast in the Act, which is limited to transmissions by wireless telegraphy, the definition of 'broadcasting service' covers cable transmissions. The wider definition of broadcast will have the effect of expanding the scope of statutory licences with respect to broadcasts, and, consequently, expanding the jurisdiction of the Copyright Tribunal in respect of the new wider class of licences that will be available. The draft Bill would appear to exclude the concept of datacasting from the new definition of 'broadcast'. However, the transmission of copyright material in a datacasting service would fall within the proposed new right of 'communication to the public' provided in the draft Bill.

## **Broadcast of a work or of an adaptation of a work by the holder of a print disability radio licence - s.149A**

5. The holder of a print disability radio licence may, without infringing copyright, broadcast a literary or dramatic work or adaptation thereof. In these circumstances, s.47A(8) provides that the licence holder is required to pay the copyright owner equitable remuneration for the making of the sound broadcast where the copyright owner has requested such payment. The section further provides that in the absence of agreement on the amount to be paid, an application may be made to the Tribunal for a determination of the amount payable. Under s.149A, the Tribunal shall then make an order determining the amount payable by way of equitable remuneration to the owner of the copyright in respect of the broadcast.

6. In its September 1998 report *Simplification of the Copyright Act 1968 Part 1 - Exceptions to the Exclusive Rights of Copyright Owners*, the CLRC recommended that the statutory licence granted by s.47A be framed so as to apply in respect of sound broadcasts and other sound transmissions and the making available to the public of programs and materials only if the purpose of the service or program is to communicate with people who, by reason of old age, disability or literacy problems are unable to handle books or newspapers or to read or comprehend written material. The recommendation is intended to address the removal of the distinction between print-handicapped radio licensees and other broadcasters effected by the *Broadcasting Act 1992*. The recommendation, if implemented, will not however impact on the jurisdiction conferred on the Tribunal by s.149A insofar as the provision refers back to s.47 itself, rather than referring to the particular terms. Moreover, the matters dealt with by the Tribunal under s.149A will not change because the licence remains available in respect of the same class of persons and on the same terms.

## **Reproduction of a sound recording for the purpose of broadcasting - s.150**

7. Section 107(1) of the Act provides that where it would not be an infringement in the copyright of a sound recording to broadcast the work, it is not an infringement to make a copy of the sound recording for the purposes of broadcasting the recording. Where the broadcast is made by a person other than the maker of the copy, s.107(3) provides that the maker of the copy must pay the owner of copyright in the sound recording equitable remuneration for the making of the copy. In the absence of agreement between the copyright owner and the maker of the copy, an application may be made to the Tribunal pursuant to ss.107(3) for the determination of the remuneration to be paid. Section 150 provides that where such an application has been made, the Tribunal shall make an order determining the amount of equitable remuneration to be paid.

## **Causing a published sound recording to be heard in public - s.151**

8. Section 108(1) of the Act provides that the copyright in a published sound recording is not infringed by causing the recording to be heard in public provided equitable remuneration is paid to the copyright owner. In Australia, the relevant collecting society is the Phonographic Performance Company of Australia Ltd (PPCA) which controls public performance and broadcast rights in sound recordings.

PPCA collects and distributes remuneration in respect of the public performance and broadcasting of sound recordings on behalf of the owners of those rights who have conferred licensing authority on the PPCA.

9. A common example of the exercise of this statutory licence might be the playing of a sound recording of chart music at a nightclub or the like. In this situation, the playing of the music will not constitute an infringement of the copyright in the sound recording if equitable remuneration is paid to the copyright owner. In most cases the PPCA will collect and distribute such remuneration to copyright owners on whose behalf they act. Should the PPCA and the person causing the music to be heard in public be unable to reach agreement, either party may apply to the Tribunal under s.151 for a determination of the amount payable for causing the record to be heard in public.

### **Broadcasting of published sound recordings - s.152**

10. Section 109 provides that it is not an infringement of the copyright in a published sound recording to broadcast it by free-to-air broadcast provided the maker of the broadcast gives a written undertaking to the copyright owner to pay the amount determined by the Tribunal, or, where there is an order of the Tribunal in force, the maker of the broadcast complies with that order. Under s.152, an application may be made to the Tribunal for an order determining, or making provision for determining, the amount payable by a broadcaster to the owners of the copyright in the published sound recordings during a specified period. Again, the PPCA is the relevant collecting society to which licensing authority with respect to a broadcasting right may be conferred by the copyright owner.

### **Retransmission of broadcasts**

11. The draft Digital Agenda Bill provides for a statutory licence for pay TV operators to retransmit broadcasts subject to the payment of equitable remuneration by the operator to the underlying rights holders. The licence is intended to redress the situation whereby pay TV operators are currently able to retransmit broadcasts without the permission of the owner of the copyright in the broadcast or the owners of the copyright in the underlying works. In default of agreement between the pay TV operator and the approved collecting society, the Tribunal will have jurisdiction to determine the amount payable via an extension to its jurisdiction. The jurisdiction proposed in the draft Bill is similar to that conferred in respect of royalties for the broadcast of published sound recordings. However, this provision in the draft Bill is currently under review.

### **Manufacture of a record of a musical work or of an adaptation of a musical work - ss.152A and 152B**

12. Section 55 of the Act provides that the copyright in a musical work is not infringed by the making of a record of the work in certain circumstances. Sections 152A and 152B of the Act give the Tribunal jurisdiction upon application to determine the amount of royalty payable for the recording of the musical works and the manner of

paying the royalty in the absence of agreement between the manufacturer and the owner of the copyright in the musical work.

13. In Australia, the Australasian Mechanical Copyright Owners Society (AMCOS) operates as a licensing office for rights to reproduce musical works in various forms. By agreement, AMCOS acts on behalf of music copyright owners in some circumstances, and is thereby able to collect remuneration payable under the statutory licence.

### **Copying by educational or other institutions of broadcast transmissions - s.153A**

14. Part VA of the Act establishes a statutory licence for the copying of transmissions (being sound broadcasts or television broadcasts, including those transmitted for a fee, and television transmissions to subscribers to a diffusion service) by educational and other institutions. Section 135E provides that the copyright in a transmission is not infringed by the making of a copy of the transmission by the administering body of an educational or other listed institution in certain circumstances, including the giving of an undertaking to pay equitable remuneration to the relevant collecting society.

15. Under s135G(2), that undertaking must specify whether remuneration is to be assessed on the basis of a records system or a sampling system. Where a records notice or sampling notice has been given and is in force, the equitable remuneration payable to the collecting society is determined by agreement between the administering body and the collecting society. In the absence of agreement, an application may be made to the Tribunal under s.153A for the determination of the amount of equitable remuneration payable to the collecting society by the administering body for the making of a copy of a broadcast.

16. The Audio-Visual Copyright Society Limited (AVCS, trading as Screenrights) collects royalties on behalf of copyright owners in respect of the copying by educational institutions of radio and television broadcasts for teaching purposes. The society enters into agreements with educational institutions for the rate of payment to be made. The AVCS was declared by the Attorney-General to be the body responsible for the administration of copyright owners' rights under the educational copying scheme, and accordingly all claims for off air educational copying are to be made through the AVCS.

### **Copying of works by educational or other institutions - s.153C**

17. Divisions 2, 3 and 4 of Part VB of the Act variously provide that the copyright in a literary, dramatic or musical work is not infringed by the making of a copy of the work by an educational institution, institution assisting a person with a print disability, or institution assisting persons with an intellectual disability in specified circumstances. In some instances, the licence to copy is dependent upon the giving of a remuneration notice by which the administering body of the institution undertakes to pay equitable remuneration to the relevant collecting society. Under s135ZU(2), that undertaking must specify whether remuneration is to be assessed on the basis of a records system or a sampling system. Where a records notice or sampling notice

has been given and is in force, the equitable remuneration payable to the collecting society is determined by agreement between the administering body and the collecting society. In the absence of agreement, an application may be made to the Tribunal under s153C for the determination of the amount of equitable remuneration payable to the collecting society by the administering body for the making of copies under the statutory licence.

18. The draft Digital Agenda Bill contains provisions to further extend the statutory licence available to educational institutions for the copying of works. Under a new Division 2A of Part VB, the statutory licence will be extended to allow the communication of works for educational purposes. The Bill defines communication in a manner such as to comprise electronic transmission and making available online. The effect of the new division therefore is to permit the electronic communication of material by an educational institution in prescribed circumstances.

### **Applications for other orders**

19. Applications may also be made to the Tribunal for the following matters:

#### **Apportionment of royalty in respect of a record - s.153**

20. Section 59(3)(b) provides that where a record is made of a song and the copyright in the musical work and the copyright in the lyrics are owned by different persons, the royalty that would have been payable in respect of the musical work is to be apportioned between the copyright owners. The relevant collecting society for the reproduction right in the musical work is AMCOS where it has been given authority by the copyright owners. In the absence of agreement, an application may be made under s.153 for an order apportioning the amount between the parties in an equitable manner.

#### **Determination of a sampling system for copies of transmissions by educational and other institutions - s.153B**

21. Where a sampling notice referred to in paragraph 15 is given, s.135J(3) provides that the extent of copying of transmissions shall be assessed by use of a sampling system determined by agreement between the administering body and the collecting society. In the absence of agreement, an application may be made to the Tribunal for the determination of the system to be used. The Tribunal may then, under s153B, make an order determining the sampling system.

#### **Determination of a sampling system for copies of works by educational and other institutions - s.153D**

22. Where a sampling notice referred to in paragraph 17 has been given, s.135ZW(3) provides that the number of licensed copies made shall be assessed by use of a sampling system determined by agreement between the administering body and the collecting society. In the absence of agreement, an application may be made to the Tribunal for the determination of the system to be used. The Tribunal may then, under s.153D, make an order determining the sampling system to be used.

### **Fixing of terms for the doing of acts comprised in copyright for the services of the Crown - s.153E**

23. Section 183(1) provides that the copyright in a literary, dramatic, musical or artistic work or a published edition of such a work, or in a sound recording, cinematograph film, television broadcast or sound broadcast is not infringed by the doing of acts comprised in the copyright where the acts are done for the services of the Commonwealth or a State or Territory. Pursuant to s.183(5), such acts are done on such terms as agreed between the Commonwealth or State or Territory and the owner of the copyright. In the absence of agreement, the terms for the doing of the acts is to be fixed by the Tribunal, which shall, under s.153E(2), make an order fixing the terms for the doing of the act.

### **Declaration that a company is a collecting society - s.153F**

24. Section 153F(1) provides that a company limited by guarantee may apply to the Tribunal for a declaration that it be a collecting society for the purposes of Division 2 of Part VII - Use of copyright material for the Crown. Upon the making of an application, the Tribunal has jurisdiction under s.153F(4) either to declare the applicant to be a collecting society, or to reject the application. Copyright Agency Limited (CAL) is the copyright collecting society declared by the Copyright Tribunal to administer the statutory licence for the copying of works and published editions of works by Commonwealth, State and Territory government departments and agencies. Remuneration payable in respect of such copying by the Crown is therefore payable to CAL.

### **Revocation of a declaration that a company is a collecting society - s.153G**

25. Pursuant to s.153G, the collecting society, member of the collecting society or a government may apply to the Tribunal for the revocation of a declaration that a company is a collecting society. The Tribunal must then, under s.153G(4), revoke the declaration or dismiss the application.

### **Determination of method for working out payment for government copies - s.153K**

26. Section 183A has the effect of providing that, where a company is the relevant collecting society in relation to copies of subject matter made for the Crown pursuant to the statutory licence conferred by s.183(1), the government must pay the relevant collecting society equitable remuneration using a method arrived at by agreement or determined by the Tribunal under s.153K. In practice, this means that CAL, having been declared as the collecting society for government copying of works and published editions of works, is to be paid for the doing of acts comprised in those copyrights by a government department or agency.

## **Review of declaration made by administering body stating function of educational institution - s.153L**

27. Section 10(1) of the Act provides for the definition of 'educational institution' for the purposes of the Act. Sub-paragraphs (g), (h) and (i) provide that institutions in respect of which a notice containing specified declarations with respect to the functions of that institution has been published fall within the definition of 'educational institution'. The body administering the institution may cause such notice to be published in the Gazette under s.10A(4).

28. Under s.153L, an application may be made to the Tribunal for review of a declaration included in a notice published under s.10A(4) where the notice was published for the purposes of paragraph (g), (h) or (i) of the definition of 'educational institution'.

29. In Part 1 of its report on the Simplification of the Copyright Act, the CLRC recommended the removal of the definition of 'educational institution', thereby transferring the onus of establishing credentials onto those institutions seeking to use the applicable exceptions and remove the complexity of the existing definitions. Should this recommendation be adopted by the Government, it will no longer be necessary for the Tribunal to review such declarations, and a copyright owner would be able to challenge in the courts the actions of a body claiming the right to the benefit of the educational copying provisions.

## **Referral of licence schemes to the Tribunal and refusal to grant a licence or unreasonable terms - ss.154, 155 and 157**

30. Under s.154 a licensor of a proposed licence scheme may refer it to the Tribunal. Under s.155 either the licensor of an operative scheme or a person requiring a class licence (or an organisation representing such persons) may refer a dispute over the scheme to the Tribunal. Section 157 of the Act provides the Tribunal with jurisdiction in respect of a refusal to grant a licence or a challenge to the conditions of a licence.

31. The licences and licence schemes to which Part VI, and hence ss.154, 155 and 157, applies are defined in s.136. Broadly speaking, the sections apply in relation to licences and licence schemes providing for the performance or broadcast of literary, dramatic and musical works or adaptations thereof, and sound recordings thereof. The effect of these sections is to extend the jurisdiction of the Tribunal beyond the realm of statutory licences, giving it jurisdiction to confirm or vary such schemes as are referred to it. An application may be made to the Tribunal under s.157 in the following circumstances:

- Where a licence scheme applies, an application may be made to the Tribunal under s.157(1) where the licensor operating a licensing scheme has refused or failed to grant or procure a grant of a licence to an applicant.
- An application may also be made to the Tribunal where a licence scheme applies but the grant of the licence in accordance with the scheme is claimed to be unreasonable in the circumstances of the case under s.157(2).

- Where a person or organisation requires a licence in a case to which a licence scheme does not apply and the licensor has refused or failed to grant a licence, or the licensor proposes the grant of a licence subject to unreasonable charges or conditions, an application may be made to the Tribunal under s.157(3) or (4).

32. Where an application is made under ss.154 or 155, the Tribunal shall make an order either confirming or varying the scheme referred. Upon the making of an application under s.157, the Tribunal shall make an order specifying the charges and conditions that are applicable or reasonable in the circumstances of the particular case.