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Response to CLRC Draft Report Jurisdiction and Procedures of the Copyright Tribunal

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Introduction

We have previously made a submission, dated 23 August 1999, to the Committee in response to its Issues Paper about the Copyright Tribunal.

A number of organisations affiliated with the Copyright Council have made separate submissions to the Committee.

Chapter 11: Output arrangements

[Paragraph 11.12] The Committee recommends that the Act be amended so that the jurisdiction of the Tribunal applies to all collectively administered licence schemes (whether administered under a voluntary or a statutory licence) concerning all types of copyright material and copyright uses.

We do not oppose the extension of the Tribunal's jurisdiction to cover all licence schemes administered by collecting societies. In addition, we do not oppose the extension of the Tribunal's jurisdiction to cover all licences administered by a collecting society which relate to all works in the society's repertoire, or to all works in a class of works which forms part of the society's repertoire.

On the other hand, we do not support an extension of the Tribunal's jurisdiction to cover licences administered by a collecting society which relate to a particular work or works. We agree with the views of the dissenting member at para 11.96 that such licences are unlikely to be anti-competitive and that giving the Tribunal jurisdiction in relation to them may not be consistent with the Berne Convention.

For example, we think the Tribunal should have jurisdiction in relation to production music licences administered by AMCOS (which allow a film maker to use any of the production music controlled by AMCOS), but should not have jurisdiction in relation to a licence granted by CAL to a book publisher to reproduce a cartoon from page 2 of the Sydney Morning Herald on 1 November 1999.

[Paragraph 11.22] The Committee recommends that ss. 55(1)(d)(ii)(B) and 59(5) (and the regulations made under those provisions) be repealed and the Tribunal's jurisdiction to determine the manner in which the royalty is payable in the absence of agreement between the parties be the basis for determining a dispute between the parties.

We do not oppose this recommendation.

[Paragraph 11.28] The Committee recommends that the current detailed requirements for record keeping under Parts VA and VB, and s. 47A be repealed, in favour of a provision that those details should be left to the agreement of the parties or, failing agreement, determination by the Copyright Tribunal.

We oppose this recommendation, and support the views of Screenrights and CAL on this issue.

[Paragraph 11.38] The Committee recommends that ss. 135G, 135H, 135J, 135ZU, 135ZV, 135ZW (and the related provisions for record keeping under

Parts VA and VB) be repealed and substituted with a single provision, replicated in Part VA and VB.

We do not oppose this recommendation.

[Paragraph 11.39] The Committee recommends that the substituted provision provide that the amount of equitable remuneration, and the method for determining it, is as agreed between the collecting society and the administering body or, failing such agreement, by the Copyright Tribunal on application by either of those parties.

We support this recommendation.

[Paragraph 11.68] The Committee recommends that the jurisdiction of the Tribunal should be confined exclusively to the review of licences and licence schemes administered by a collecting society.

We support this recommendation, subject to our view on licences relating to a specified work or specified works.

[Paragraph 11.69] The Committee recommends that the Copyright Act be amended so that the existing jurisdiction of the Tribunal not apply to transactional licences other than those offered by collecting societies.

As stated above, we do not think that the Tribunal should have jurisdiction in relation to licences for a particular work or particular works (as opposed to licences which allow the use of all works in the society's repertoire or all works in a class of works which forms part of the society's repertoire).

[Paragraph 11.96] The dissenting member recommends that the Act be amended to extend the jurisdiction of the Copyright Tribunal to licence schemes, but not transactional licences, administered by a collecting society.

We agree with the dissenting member that compulsory jurisdiction in relation to transactional licences may not be consistent with international obligations, where the term "transactional licence" refers to a licence relating to a specified work or specified works.

[Paragraph 11.102] The majority of the Committee recommends that the Act be amended to extend the jurisdiction of the Copyright Tribunal to all licences and licensing schemes administered by a collecting society, including transactional licences (as defined by the Committee at paragraph 11.52).

See response to para 11.12 above.

[Paragraph 11.108] The Committee recommends that no amendment be made to the Act to establish a register of collecting societies for the purpose of determining the jurisdiction of the Tribunal under the Act.

We support this recommendation.

[Paragraph 11.121] The Committee recommends that the definition of 'licensor' in s. 136 of the Act be amended so that it applies to any body, if the Tribunal is satisfied that the body administers rights in respect of a substantial number of works or subject matter of a particular class.

We do not think the proposed definition will achieve the Committee's recommendation in para 11.68 that the Tribunal's jurisdiction be limited to licences and licence schemes administered by collecting societies, as large publishers and producers would appear to be covered by the proposed definition.

[Paragraph 11.127] The Committee recommends that the Tribunal have jurisdiction to substitute a licence scheme under ss. 154, 155, 156, and to substitute a licence under s. 157 if such a scheme is put forward by a party, in addition to its existing jurisdiction to vary or confirm a scheme or specify charges and conditions under those provisions.

We do not oppose the continued operation of s157(3), provided it is confined to licences administered by collecting societies which relate to all works in the society's repertoire, or all works in a class of works in the society's repertoire. Currently, s157(3) may also give the Tribunal jurisdiction in relation to licences which are not administered by collecting societies, and licences which relate to a specified work or works.

Otherwise, we do not support the recommendation.

Chapter 12: Input arrangements

[Paragraph 12.14] The Committee recommends that the jurisdiction of the Tribunal not be amended to include a power to review input arrangements generally.

We support this recommendation

Chapter 13: Declaration of collecting societies

[Paragraph 13.13] The Committee recommends that the Attorney-General retain the power to declare a collecting society for the purposes of Parts VA and VB (and under the proposed statutory licence for retransmission of free-to-air broadcasts set out in the Digital Agenda Bill), in the first instance.

We support this recommendation.

[Paragraph 13.14] The Committee further recommends that the Act be amended so that (with the exception of the declaration of a collecting society for government copying under s. 153F) the Attorney-General may exercise a discretion to refer the matter to the Tribunal if s/he considers it appropriate in the circumstances.

We agree with CAL that if the Attorney-General is to have such power, it should only be exercisable in special circumstances which are listed in the Act.

Chapter 14: Compulsory referral of licence schemes

[Paragraph 14.15] The Committee recommends that there be no change to the Tribunal's jurisdiction to include a mechanism for compulsory referral of licence disputes.

We support this recommendation.

Chapter 15: The determination of equitable remuneration

[Paragraph 15.12] The Committee recommends the Act not prescribe factors to which the Tribunal may have regard in determining equitable remuneration under the various statutory licences.

We oppose this recommendation, and support the views of CAL on this issue.

[Paragraph 15.13] The Committee recommends that ss. 153A(3)(b) and 153C(3) of the Act, and the regulations made under those provisions, be repealed.

We oppose this recommendation, and support the views of CAL on this issue.

[Paragraph 15.17] In relation to the proposed Digital Agenda Bill, the Committee recommends that:

- *no factors be prescribed for the Tribunal to have regard to for the determination of the equitable remuneration payable by retransmitters to underlying copyright holders for the retransmission of free-to-air broadcasts; and*
- *no factors be prescribed for the Tribunal to have regard to in relation to the determination of equitable remuneration for copying and transmitting material in electronic form.*

We oppose this recommendation, and support the views of CAL on this issue.

Chapter 16: Guidelines regarding what is 'reasonable in the circumstances'

[Paragraph 16.14] The Committee recommends that no change be made to the Act to codify factors for the Tribunal to take into account when determining what is 'reasonable in the circumstances' in relation to licences and license schemes.

We do not oppose this recommendation.

Chapter 17: Anomalies in licensing schemes

[Paragraph 17.08] The Committee recommends that, if the record-keeping requirements under Parts VA and VB are retained, ss. 135H and 135ZV of the Act should be amended to extend the Copyright Tribunal's jurisdiction to include the power to determine 'any matters that are necessary or convenient to be assessed by use of a record-keeping system'.

We support this recommendation, subject to CAL's suggested amendment at para 14.3 of its submission.

[Paragraph 17.15] The Committee recommends that ss. 135H(2) and 135ZV(2) be omitted from the Act.

We support this recommendation.

[Paragraph 17.17] The Committee recommends that ss. 135J(4) and 135ZW(4) be omitted from the Act.

We support this recommendation.

Chapter 18: Untraceable copyright owners

[Paragraph 18.16] The Committee recommends that the Government consider the adoption of a mechanism for the granting of licences by the Copyright Tribunal for the use of copyright material where the copyright owner is unknown or untraceable, based on the mechanism used in Canada, but subject to the following:

- *Applications may be made for any type of copyright use and in respect of any type of copyright material, provided that the work or subject matter has been published, or otherwise publicly disseminated.*
- *Such a scheme could be administered by the Copyright Tribunal or the Registrar.*
- *Applications could be made 'on the papers'.*
- *Applications should be subject to a cost-recovery fee for the administration of the service (including the cost of the hire of extra staff, and associated costs, if the additional demand on the Tribunal's resources required it).*
- *To simplify determinations of the Tribunal or Registrar and to give guidance to applicants, guidelines should be developed setting out matters to be taken in to account by the Tribunal or Registrar:*
 - (i) in determining whether an applicant has undertaken an adequate search for a copyright owner;*
 - (ii) for the payment and retention of royalties;*
 - (iii) in determining terms and conditions of a licence.*

We originally proposed that such a mechanism be considered because we receive many enquiries, as part of our legal advice service, from people who genuinely want to obtain a clearance to use copyright material, but it is extremely unlikely that the copyright owner can be identified and located. An example might be an anonymous

work published in a magazine whose proprietor went out of business 20 years ago, or a postcard published 30 years ago where the artist or photographer is unattributed.

Our concern is that these enquirers start by wanting to comply with copyright law, but finish with some disillusionment about its application in their situation. What happens in practice is that people make a commercial decision about whether or not they are likely to be sued for using the work without a clearance, and whether the costs to them of being sued would be too high (as would usually be the case in the film industry). Where people proceed to use a work without a clearance, they sometimes publish a “good faith notice” with the work, in which they state that they tried to find the copyright owner, and that they invite the copyright owner to contact them to make arrangements for the use of the work.

We would only support such a scheme if there were a rigorous requirement for the applicant to pursue all avenues for identifying and locating the copyright owner, and a requirement for the applicant to pay a licence fee. We envisage that the mechanism would not be used by a person who could use alternative material for which a licence could be easily obtained— for example from a photo library or a licensor of stock film footage.

Chapter 19: Membership of the Copyright Tribunal

[Paragraph 19.09] The Committee recommends that more presidential and non-presidential members be appointed to the Tribunal. The non-presidential members should be people with relevant industry experience and care should be taken to ensure that there is an even representation of people from both copyright owner and user backgrounds among appointees.

We support this recommendation.

Chapter 20: Practice and Procedure

[Paragraph 20.26] The Committee recommends that where appropriate, the Tribunal should employ the case management mechanisms of the Federal Court. It should also use other strategies, such as deciding matters on the papers, if appropriate.

We support this recommendation.

[Paragraph 20.27] The Committee does not recommend that the Tribunal be required to hand down preliminary determinations.

We support this recommendation.

[Paragraph 20.28] The Committee recommends that the Tribunal be given the same express power to control the use of expert evidence as the Federal Court, including power to appoint experts to assist it in dealing with technical evidence and to receive expert evidence by using the panel approach.

We support this recommendation.

[Paragraph 20.29] The Committee recommends that in order to ensure flexibility, the Tribunal retain a wide discretion as to its procedures.

We support this recommendation.

Chapter 21: Alternative dispute resolution

[Paragraph 21.22] The Committee recommends that collecting societies adopt ADR for the resolution of their disputes with copyright users and potential users, as well as their disputes with members.

We support this recommendation.

[Paragraph 21.23] The Committee recommends that the Copyright Tribunal should encourage parties to explore ADR and should have the power to compel them to do so where the Tribunal thinks it is appropriate.

We oppose the recommendation that the Tribunal have the power to compel ADR, and agree with the views of CAL on this issue.

[Paragraph 21.24] The Committee recommends that the Copyright Tribunal should utilise the Federal Court mediation service as an effective form of ADR. It should also be able to refer matters for private mediation.

We support this recommendation, provided the referral is not compulsory.

Chapter 23: Ombudsman

[Paragraph 23.05] The Committee does not recommend the establishment of an ombudsman of collecting societies by the Government. The Committee notes that this recommendation is no barrier to collecting societies establishing their own industry ombudsman.

We support this recommendation.

Chapter 24: Accessibility and promotion of the Copyright Tribunal

[Paragraph 24.04] The Committee recommends that collecting societies notify parties that they may take a dispute up with the Copyright Tribunal (including an outline of its procedures and functions) at the time of sending out notifications of decisions regarding licence applications. The Committee acknowledges that this may not always be necessary, depending on the constituency of the particular collecting society.

We note the concerns of CAL and APRA in relation to this recommendation.

Libby Baulch
Executive Officer
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