

**AUSTRALIAN COPYRIGHT COUNCIL'S SUBMISSION IN RESPONSE TO THE
ACCC'S DRAFT COPYRIGHT GUIDELINES TO ASSIST THE COPYRIGHT TRIBUNAL IN THE
DETERMINATION OF COPYRIGHT REMUNERATION ("DRAFT GUIDELINES")**

NOVEMBER 2018

A. VIEW OF THE AUSTRALIAN COPYRIGHT COUNCIL

1. The Australian Copyright Council (**ACC**) recognises that the operation of certain collecting societies creates, in theory, a potential for abuse of at least quasi-monopoly power. Accordingly, the licensing activities of collecting societies in most territories in which they operate is subject to supervision by the Copyright Tribunal of Australia, which was established for this purpose under the *Copyright Act 1968*.
2. The ACC believes that the Copyright Tribunal effectively operates to constrain any market power held by collecting societies in Australia.
3. In 1959 the Copyright Law Review Committee¹ recommended the establishment of a tribunal to deal with disputes between bodies authorised to grant licences for the public performance of works and persons desiring licences (Recommendation 36).
4. The Copyright Tribunal was established under Section 138 in Part VI of the Copyright Act in response to the "perceived need to control the exercise by collecting societies or other 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."² It has the power to determine disputes over voluntary licences administered by collecting societies as well as various matters in respect of the statutory licences under the Copyright Act, including whether the payable

¹ Copyright Law Review Committee, *Report to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth* ("the Spicer Report"), December 1959 (<https://static-copyright-com-au.s3.amazonaws.com/uploads/2015/05/R00079-theSpicerReport.pdf>)

² Copyright Law Review Committee, *Jurisdiction and Procedures of the Copyright Tribunal*, December 2000 (<http://www.austlii.edu.au/au/other/clrc/3/1.html>)

remuneration is reasonable (for voluntary licences) or equitable (for statutory licences).

5. The ACC respectfully notes the calibre of the membership of the Copyright Tribunal, currently being the Honourable Justice Greenwood of the Federal Court of Australia (President), the Honourable Justices Jagot and Perram (Deputy Presidents), as well as lay members Dr Rhonda Smith, Professor John McMillan AO, Mr Charles Alexander, and Ms Sarah Leslie. The ACC submits that such depth of expertise gives the Copyright Tribunal considerable resources to assess the matters that come before it.
 6. The ACC believes that the existence of an expert body that has the power to determine licence terms acts as a moderator of collecting society conduct, even without its jurisdiction being enlivened.
 7. The ACCC Draft Guidelines have clearly been prepared following a thorough consideration of most, if not all, Copyright Tribunal determinations. It is apparent that the Copyright Tribunal is a body that must, and does, regularly consider economic arguments and evidence in making its determinations, particularly on questions of remuneration.
 8. The ACC expects that the kinds of matters set out in the Draft Guidelines are precisely the kinds of matters that are the subject of expert and lay evidence when sophisticated parties are before the Copyright Tribunal.
 9. Accordingly, the ACC believes that the Draft Guidelines will be particularly helpful as a reference in disputes, especially for less sophisticated parties who will be able to request that the Copyright Tribunal has regard to them perhaps in lieu of prohibitively expensive economic evidence.
 10. To the extent that the Draft Guidelines seek to clarify issues and considerations in relation to survey design and data, the ACC understands that survey evidence of the kind contemplated by the Draft Guidelines is expensive, and that its acceptance by the Copyright Tribunal is notoriously difficult to predict. The ACC would be concerned if the effect of the Draft Guidelines was to effectively require the use of survey evidence, which may be a barrier to the use of the Copyright Tribunal by smaller parties.
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11. The ACC respectfully cautions against any suggestion that the Copyright Tribunal should apply the methodologies favoured by the ACCC (eg, benchmarking and construction) to the exclusion of the other methodologies currently applied by the Copyright Tribunal in the exercise of its jurisdiction, such as judicial estimation. The Copyright Tribunal's jurisdiction and discretion is broad, and the Draft Guidelines should not be able to be misinterpreted as seeking to compromise that breadth.

B. ABOUT THE AUSTRALIAN COPYRIGHT COUNCIL

1. The ACC is an independent, non-profit organisation that represents the peak bodies for professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies. We are advocates for the contribution of creators to Australia's culture and economy. A full list of our affiliates is available on our website, copyright.org.au.
2. The ACC is grateful to the ACCC for considering the terms of this submission. Should there be any further queries or information required, please let us know.

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