

COPYRIGHT TRIBUNAL OF AUSTRALIA

**Phonographic Performance Company of Australia Limited (ACN 000 680 704)
under section 154(1) of the *Copyright Act 1968* (Cth) [2007] ACopyT 1**

COPYRIGHT – proposed licensing scheme – reference of scheme to Tribunal for approval under s 154(4) of the *Copyright Act 1968* (Cth) – licences for use of sound recordings in nightclubs and at dance parties – calculation of licence fee – where rate increase required – whether calculated by attendance or capacity – choice modelling survey – measurement of value of sound recordings in nightclubs and at dance parties – measurement of willingness to pay for recorded music – whether not for profit organisations should be treated differently.

Copyright Act 1968 (Cth), ss 22, 85(1)(b), 89, 154, 157
Copyright (International Protection) Regulations 1969 (Cth), r 6(2)

Reference by APRA: Re Australian Broadcasting Corporation (1985) 5 IPR 449 cited
In Re Hoskins 102 F.3d 311 (7th Cir.1996) cited
Copyright Agency Limited v Department of Education (1985) 4 IPR 5 at 33 cited
Audio Visual Copyright Society Ltd v Foxtel Management Pty Ltd (No. 4) (2006) 68 IPR 367 cited
APRA v AFRB (1999) 46 IPR 20 cited

REFERENCE BY: PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA LIMITED (ACN 000 680 704) UNDER SECTION 154(1) OF THE COPYRIGHT ACT 1968 (CTH)

CT2 OF 2004

THE TRIBUNAL: EMMETT J (DEPUTY PRESIDENT), PROFESSOR DENNIS PEARCE (MEMBER), DR RHONDA SMITH (MEMBER)

**10 JULY 2007
SYDNEY**

GENERAL DISTRIBUTION

COMMONWEALTH OF AUSTRALIA

Copyright Act 1968

IN THE COPYRIGHT TRIBUNAL

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UNDER SECTION 154(1) OF THE COPYRIGHT ACT 1968**

**THE TRIBUNAL: EMMETT J (DEPUTY PRESIDENT)
PROFESSOR DENNIS PEARCE (MEMBER)
DR RHONDA SMITH (MEMBER)**

DATE OF ORDER: 10 JULY 2007

WHERE MADE: SYDNEY

THE TRIBUNAL DIRECTS THAT:

1. The Applicant bring in short minutes to give effect to the Tribunal's conclusions.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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REASONS FOR DETERMINATION

PRELIMINARY

1 The applicant, Phonographic Performance Company of Australia Limited (the Society), is a copyright collecting society under the *Copyright Act 1968* (Cth) (the Copyright Act). The Society represents the interests of record companies and recording artists in relation to the broadcast, communication or public playing of recorded music and music videos. The Society proposes to bring into operation a licence scheme for the grant of licences for the use of **sound recordings** in connection with dancing in nightclubs and at dance parties. The Society has applied to the Tribunal for an order under s 154(4) of the Copyright Act that the proposed scheme be confirmed or be varied as the Tribunal considers reasonable in the circumstances.

2 Several entities have been joined as parties to the Reference. The first, second, third, fourth, fifth and seventh respondents, Australian Hotels Association, Clubs Australia, Clubs NSW, Explorer Cruise Lines Pty Ltd, CHB Charters Pty Ltd and Cabaret Owners Association of Western Australia Limited (together the Nightclub Respondents), object to certain aspects of the proposed scheme, particularly the royalty that would be payable under the proposed scheme. The sixth respondent, New Mardi Gras Limited (Mardi Gras), has applied under s 157(2) of the Copyright Act for orders that a distinction be made in the proposed scheme between commercial entities such as the Nightclub Respondents, on the one hand, and not for profit community associations, such as Mardi Gras, on the other hand.

COPYRIGHT IN SOUND RECORDINGS

3 Section 89(1) of the Copyright Act relevantly provides that copyright subsists in a sound recording of which the maker was a qualified person at the time when the recording was made. A qualified person is, relevantly, a body corporate incorporated in Australia. In addition, under s 89(2), copyright subsists in a sound recording if the recording was made in Australia. Finally, under s 89(3) copyright subsists in a published sound recording if the first publication of the recording took place in Australia.

4 Under s 85(1)(b) of the Copyright Act, copyright in relation to a sound recording includes the exclusive right to cause the recording to be heard in public. It is the right to cause sound recordings to be heard in public that the society would licence under the proposed scheme.

5 Under s 97(2) of the Copyright Act, the maker of a sound recording is, *prima facie*, the owner of any copyright subsisting in the recording. If there is more than one owner, they hold the copyright as tenants in common in equal shares. Under s 22(3A), the makers of a sound recording of a live performance are:

- (a) the person or persons who, at the time of the recording, own the record on which the recording is made; and
- (b) the performer or performers who performed in the performance, other than a performer who is already covered by (a).

Under s 22(7), a performance of a musical work is taken to be a live performance, whether it is in the presence of an audience or otherwise and performer includes each person who contributed to the sounds of the performance. Under s 22(3), the maker of a sound recording, other than a sound recording of a live performance, is the person who owned the record at that time. Under s 22(3)(a) such a sound recording is to be taken to have been made at the time when the first record embodying the recording was produced.

6 Thus, the protection of the Copyright Act applies to sound recordings having a relevant connection with Australia. However, the operation of the Copyright Act in the international context is extended by the provisions of the *Copyright (International Protection) Regulations 1969* (Cth) (the International Regulations). Regulation 4 of the International Regulations extends copyright protection generally to subject matter connected with other countries so that that subject matter is protected under the Copyright Act in the same way as subject matter connected with Australia is protected.

7 However, not all recordings are protected under the Copyright Act for the purpose of public performance. Thus, r 6(2) of the International Regulations provides that copyright that subsists in a recording includes the exclusive right to cause the recording to be heard in public **only if** the maker of the recording was, at the time when the recording was made:

- a citizen or national of a country that is specified in Schedule 3 to the International Regulations; or
- a person resident in, or a body corporate incorporated under the law of, such a country, or if the recording was made in such a country.

The United Kingdom, Ireland, Canada, Germany, Italy and many other European and Asian countries are specified in Schedule 3. An important omission from Schedule 3 is the United States of America. That is not as significant as it may first appear, as the recording of many US works attracts Australian protection because either the maker of the recording is Australian or the making of the recording is covered by the International Regulations.

8 Between 70 and 80% of the popular sound recordings played at nightclubs and dance parties are protected under the Copyright Act. The consequence is that between 20 and 30%

of the sound recordings can be played in public without infringement of copyright under the Copyright Act.

STATUTORY FRAMEWORK FOR THIS REFERENCE

9 Section 154(1) of the Copyright Act provides that, where a licensor proposes to bring a licence scheme into operation, the licensor may refer the scheme to the Tribunal. Under s 154(4), the Tribunal must consider such a scheme and must make such order, either confirming or varying the scheme, as the Tribunal considers reasonable in the circumstances. Under s 136, a licence scheme is a scheme setting out both:

- the classes of cases in which the licensor is willing, or the persons on whose behalf the licensor acts are willing, to grant licences; and
- the charges, if any, subject to payment of which, and the conditions subject to which, licences would be granted in those classes of cases.

The term **licence** is defined in s 136 to include a licence to cause a sound recording to be heard in public. Section 154(4) permits the making of variations, in the sense of amendments and alterations to a proposed scheme, but does not empower the Tribunal to substitute a scheme of an entirely different kind (*Reference by APRA: Re Australian Broadcasting Corporation* 5 IPR 449 at 458-459).

10 In each reference under s 154, the Tribunal must make a value judgment as to what it considers reasonable in the circumstances. It is not usually possible to calculate mathematically the correct licence fee in any particular case (*APRA v AFRB* 46 IPR 20 at [19] and [11]). Where approval of a scheme would lead to a substantial increase in fees, the increases can be phased in over a period of years rather than being introduced immediately. In the present case, the Society proposes that there be a phasing in of the increase claimed by it.

11 In determining whether a proposed scheme, and the licence fee payable under it, are reasonable, a number of approaches might be adopted. The approaches include the following, which may overlap to a certain extent:

- Market rate: the rate actually being charged for the same licence in the same market in similar circumstances.
- Notional bargain rate: the rate on which the Tribunal considers the parties would agree in a hypothetical negotiation, between a willing but not anxious licensor and a willing but not anxious licensee.
- Comparable bargains: bargains not in the same market but sufficiently similar to such a notional bargain as to provide guidance to the Tribunal.
- Judicial estimation: the rate determined by the Tribunal after taking into account a range of matters such as:
 - previous agreements or negotiations between the parties;
 - comparison with other jurisdictions;
 - comparison with rates set by other licensors, capacity to pay, value of the copyright material, the general public interest and the interests of consumers; and
 - administrative costs of a licensing body (see *Audio Visual Copyright Society Ltd v Foxtel Management Pty Ltd (No. 4)* 68 IPR 367 at [131] and [142]).

12 The Society contends, in essence, that there is no market rate or comparable bargain available in the present case. The Tribunal's approach, therefore, must be a combination of notional bargain rate and judicial estimation. It may be that the latter includes the former.

13 Section 157(2) of the Copyright Act allows a person to apply to the Tribunal if that person claims that the grant of a licence would be subject to charges or conditions that are not reasonable in the circumstances of the particular case. If the Tribunal is satisfied that such a claim is well founded, the Tribunal may make an order specifying the charges and conditions that it considers reasonable in the particular circumstances. Thus, the Tribunal is empowered to address the unreasonable application of a scheme in a particular case.

NIGHTCLUBS

14 There is little reported data in relation to the nightclub industry in statistical or economic sources generally available. Accordingly, the Society commissioned a study by

Quantum Research, a well respected market research company. Mr Adrian Goldsmith, a market researcher, gave evidence regarding the conduct and results of the Quantum Research survey. The study involved visits by field workers to 100 nightclubs around Australia. Quantum Research compiled a sample list of 100 venues of the total 528 venues in respect of which nightclub licences have been granted by the Society. The sample was intended to be structured so as to be broadly representative across different geographic areas in Australia and to reflect the different types and sizes of nightclubs.

15 The overwhelming majority of the 528 nightclub venues licensed by the Society are based in cities or larger regional centres. Quantum Research field workers visited:

- Almost 20% of the nightclub venues licensed by the Society.
- Nightclubs operating within hotels and within clubs.
- Nightclubs in Sydney, Canberra, Melbourne, Brisbane, Adelaide and Perth, together with nightclubs in Wollongong, Gosford, Ballarat, Geelong and the Gold Coast.

Thus, field workers visited nightclubs in every State and Territory other than Tasmania and the Northern Territory.

16 None of the Nightclub Respondents sought to adduce evidence of any industry wide study or any researched account or representative picture of the industry in which they operate. Although certain of the Nightclub Respondents have hundreds of members who operate nightclubs, there was no evidence adduced on behalf of the Nightclub Respondents based on any compilation or collection of information about the position of, or experiences of, members who operate nightclubs. Specific evidence was given on behalf of the Nightclub Respondents by several operators but the only comprehensive evidence concerning the nightclub industry overall came from the Quantum Research study.

17 The Quantum Research study suggests that there is a great diversity of nightclub venues, which differ greatly in size, in the amenities they offer, in their use of disc jockeys (DJs), in the genres of music they play, in the nights they are open, in the hours for which they remain open and as to whether they charge an entry fee. One common factor across all of the nightclubs surveyed was the use of recorded music, in at least one room, as

entertainment for patrons. Over 25% of the venues visited had dance floors in more than one room or area. Together, the 100 venues visited have 232 separate rooms playing sound recordings. The genres of music being played were diverse. A number of the genres were described as follows:

- R & B;
- Top 40;
- Techno;
- Hip Hop/Rap;
- Retro;
- House Music.

18 Around 46% of the venues visited had a DJ playing. An additional 24% of the venues had sound recordings playing with no apparent DJ. In about 30% of the venues visited, more than one DJ was scheduled to play in the night. Around 88% of the venues in question advertised or held special events or theme nights, such as having guest DJ's, themed music or special drink prices.

19 A cover charge, as it is usually called in the industry, was imposed at 53% of the venues visited. Cover charges were imposed at 81% of stand alone nightclubs, 50% of hotel nightclubs and 21% of nightclubs in registered clubs. The median cover charge across all venues that applied a charge was \$10.66. Approximately 40% of venues charged less than \$10 and 9% of venues charged over \$20. An ordinary DJ (one who is not nationally or internationally known) was present in 31% of venues with no cover charge and a featured DJ (one who is nationally or internationally known) was present in 3% of venues with no cover charge. There was an ordinary DJ present in 45% of venues with a cover charge and a featured DJ in 14% of venues with a cover charge. The mean cover charge at venues where a featured DJ was scheduled to play was \$12.08 and where an ordinary DJ was scheduled to play the mean cover charge was \$9.75. If only one DJ was to play, the mean cover charge was \$9.28, increasing to \$10.90 where more than one DJ was to play. In 25% of the venues with a cover charge, the charge changed in the course of the evening, with the pattern of changes varying widely. It was more common for a cover charge to be imposed at venues in regional areas than in the metropolitan areas. In relation to the 100 venues visited, where

cover charges were imposed, they were enforced at the door and over 80% of patrons paid the charge for entering the venue.

20 Dr Shane Homan, a researcher with experience in the area of the cultural and regulatory history of popular music in Australia, also gave evidence on behalf of the Society concerning various aspects of the nightclub industry, including the range and characteristics of nightclub venues and patrons, attendance charges and branding of nightclubs. Dr Homan's view was that the starting price for a cover charge for a Friday or Saturday night was \$5 but that a higher fee would be charged if there were an interstate or overseas DJ.

21 One-third of the venues visited provided a cloak room for patrons. Approximately 64 % of them charged between \$1 and \$5 per item for use of the cloak room.

22 In the course of the Quantum Research study, a comparison was made between drink prices in nightclubs and "*front bar*" prices at bars and clubs in the five capital cities. The comparison showed that nightclub prices were considerably higher as follows:

- 17% higher for local beer;
- 35% higher for imported beer;
- 46% higher for wine;
- 27% higher for spirits.

23 Dr Homan provided an overview of the nightclub industry. Evidence was also given by Mr Tim Ritchie, a former DJ, with extensive experience as a radio announcer, including 14 years as a high profile radio DJ on radio station 2 Triple J.

24 Dr Homan and Mr Ritchie described the phenomenon of nightclubs increasing in number and catering to multiple differentiated genres and sub-genres, which have particular appeal to different patrons. The music played in nightclubs in the early 1980s has developed into over a 100 different genres, such as Techno, Trance, Breakbeat, Drum and Base and Hip Hop. There are sub-genres such as Deep House, Hard House and Acid House.

25 Nightclubs promote and advertise their music to reach a youth audience; they advertise on the internet and in street press. Nightclub operators target sub-markets of

patrons interested in particular types of music and events. One way in which nightclub operators cater for patrons seeking particular genres of music is by engaging DJs who are known to play that particular genre of music. Some venues specialise in playing particular genres.

26 A good DJ works through the music in an endeavour to keep the crowd involved and will read the crowd to keep people enthusiastic and dancing and work with sound recordings by beat mixing or beat matching, to manipulate the music from different recordings and transition through a series of recordings. The result of those techniques, and the universal experience in nightclubs, is that the music is continuous and unbroken.

27 Both Dr Homan and Mr Ritchie stressed the significance of music in defining the experience offered to patrons who attend modern nightclubs. Both said that a venue without music could not operate as a nightclub and that music is the critical factor in setting the tone or ambience of a particular venue, by determining the type of people who are likely to attend the venue.

28 Leading DJs earn substantial sums for their services. The remuneration varies considerably according to the reputation of the DJ, but some very well known DJs could command amounts of \$50,000 to \$100,000 for a two hour set. Thus, there is an undoubted appeal by top name DJs and a good DJ will be of considerable value at any dance venue. Good DJs work with sound recordings with great creativity to entertain the crowd and produce the experience at the nightclub. However, no one would pay anything to see a DJ without the sound recordings.

29 It is common ground that people attend nightclubs to drink, to socialise, to meet new people and to engage in social intercourse. Loud music is an essential element and is the primary feature that creates the atmosphere, context and cultural environment within which the drinking and socialising occurs. Loud music is what differentiates nightclubs from other venues where socialising might occur.

30 It is equally common ground that live music is increasingly a feature of the late night entertainment industry in which nightclubs have always operated. There are live music options available in the late night entertainment market in competition with nightclubs.

Nightclubs also compete with hotels, clubs, casinos and a host of other late night social venues at which socialising might take place.

31 The Quantum Research study suggests that common features and elements of nightclub venues include:

- the presence of a dance floor;
- trading late into the night, although some also operate during the day;
- premium pricing for alcoholic drinks and bottled water;
- promotion of a particular style, atmosphere or brand;
- special events or theme nights, such as promoting a particular type of music;
- presence of a wide range of other amenities, such as pool tables, tv/video screens;
- membership packages providing benefits to members.

32 Nightclub operators incur multiple expenses in running their businesses. All of those expenses, other than licence fees for music, are paid in accordance with ordinary commercial rates, set by market forces. Such expenses include:

- lighting and audio facilities, including sophisticated sound systems;
- security;
- staff;
- rent or ownership expenses;
- DJs.

33 The Nightclub Respondents adduced evidence in relation to nightclubs conducted at only 8 venues. The venues were:

- Home Night Club, in Central Sydney;
- Three nightclubs operated by companies associated with Mr Graham Hardie, in or near Perth;
- Two nightclubs operated by companies associated with Mr Tom McGuire located, in the outskirts of Brisbane;
- Revesby Workers Club, in Western Sydney;

- Scone Golf Club, situated in country New South Wales.

34 Home is a multi level venue at Cockle Bay in central Sydney, which was built in 1998. The nightclub is one of two distinct business units conducted at that venue. The nightclub has a capacity of 1,800 and can accommodate about 820 patrons on the various dance floors. The majority of patrons spend their time talking, socialising, drinking and walking from room to room. Nightclub patrons are attracted to a variety of attributes of the nightclub, including the ambience and the social interaction that they can expect.

35 Since early 2001 there has been a decline in the number of paying patrons attending the Home nightclub. In early 2001, it attracted approximately 2,700 paying patrons on Friday nights with a cover charge of \$20, with about 200 non-paying guests. It now averages about 800 paying patrons and about 600 guests who attend on the basis of free passes. Discounts are given on the cover charge, some patrons having a discount of \$10. Overall financial performance has declined.

36 Since about 2000, Saturday night has not been as successful as Friday night at Home. In 2000, Home attracted approximately 1600 paying patrons and approximately 200 guests on a Saturday night. Since 2000, Saturday night has operated as a dance club in much the same way as Friday night, but with less variety in the selection of music. For Saturday nights in the year prior to July 2005, the Club was split into two, with a club on the roof top, providing music of black origin, and a standard house music night on the main floor and mezzanine. The main floor club struggled to achieve more than 700 paying patrons and about 700 guests. The performance of the roof top club was erratic, with numbers fluctuating between 26 and 332 paying patrons and between 67 and 504 guests. From July 2005, the Home venue was let to outside promoters for coordination of Saturday night functions. The outside promoter paid a fee of \$3 plus GST for each paying customer as a hiring fee and \$2 plus GST for each paying customer as a fee for the use of the sound and lighting equipment, subject to the payment of the minimum fee calculated on the basis of 1800 paying customers. Since August 2005, outside promoters have achieved 1800 paying customers on only four occasions. Some outside promoters have achieved as few as 537 paying customers. The owner of Home has promoted Saturday night function himself, when unable to attract an outside promoter. On four nights in the second half of 2005, when the owner promoted Saturday night, the club averaged approximately 1021 paying customers, with an average of

approximately 590 guests. However, generally speaking, the number of paying customers on Saturday nights is over 25% less than the number who came in 2000 and 2001.

37 For about 90% of the time, Home is about 50% below capacity. A similar venue, called Tank, which competes with Home, and which has a capacity of 800 to 900, is presently attracting 150 to 200 people per night.

38 Companies associated with Mr Graham Hardie have owned and operated nightclubs, hotels and taverns in Perth and Fremantle since 1979. Mr Hardie gave evidence concerning his experience in relation to three nightclubs known as Justice, the Church and Paramount.

39 Justice is a stand alone facility in the northern satellite town of Joondalup, approximately 30 km from Perth. It has suffered from nearby competition and has failed under various operators, notwithstanding that no cover charge is levied on patrons. Justice was custom built in 1998. It was originally successful but subsequently suffered from competition after the opening of a new cabaret and a new late night tavern in the immediate vicinity.

40 The Church is in Northbridge, in Central Perth and has been operating since 1983. While it was successful in the early 1980s, it has suffered from the effects of competition. The dance floor presently occupies 7.6% of the total area of the venue and the vast majority of patrons do not dance. Because of the competitive market, the prices of drinks are comparable with competing licensed premises in the area, including hotels, taverns and other nightclubs.

41 The other Perth nightclub operated by Mr Hardie is Paramount, a multi-function facility built in 1998, in Northbridge, Perth. Paramount has a live music room, a discothèque, bars, balconies and a courtyard. It can accommodate 953 patrons. It only operates on Friday and Saturday nights. The dance floor occupies about 7% of the total licensed public areas. Most patrons listen to live music in the venue's live music room or socialise in other areas of the venue. Paramount is poorly attended on Friday nights, peaking at about 30% of its capacity at around 2.30 am. Saturday night is more successful when Paramount tends to reach its licensed capacity at around midnight. There was no evidence as to the total number

of patrons who attend during a night. There is no cover charge at Paramount and drink prices are comparable with competing hotels, taverns and nightclubs in the vicinity.

42 Mr Tom McGuire and companies associated with him operate two nightclub facilities, one at the Calamvale Hotel about 20 km outside Brisbane and the other at the Alexandra Hills Hotel, about 25 km east of Brisbane.

43 The Calamvale Hotel includes a nightclub with a capacity of around 1,000. Attendance on Saturday night is about 14% of capacity. The majority of patrons socialise without dancing. The dance floor in the nightclub can accommodate about 100 patrons. Drink prices in the nightclub are the same as the prices charged in other bars that operate in the venue. Whilst recent renovations, including renovations to the sound and lighting system, have lifted the performance of the nightclub on Friday night, Saturday night remains at 14% of capacity. It is unclear whether that figure represents the total attendance at any given time or the total attendance during the night.

44 The Alexandra Hills Hotel is a multi function venue which includes a nightclub. The dance floor in the nightclub can accommodate about 150 people whereas the nightclub is licensed to admit 1,500. The majority of patrons socialise rather than dance. Drink prices at the nightclub are the same as the prices charged in other bars which operate in the venue. There was no evidence as to how the prices compare with other competing establishments.

45 The Revesby Workers' Club is a large club in suburban Western Sydney, approximately 24 km from the Sydney Central Business District. The Club is a not for profit organisation and provides a range of facilities and services to its members, including a live theatre, restaurants, bars, gaming facilities, a fitness centre, retail shops and a range of services. Revesby Workers' Club's expertise and fame is in staging live acts.

46 Revesby Workers' Club competes for patrons on Friday and Saturday nights with 20 comparable clubs within a radius of 5 km. It is not clear whether such comparable clubs also provide nightclub facilities. The nightclub at Revesby Workers' Club is provided as a service to members of the Club and is described as a '*loss leader*'. At best, the overall financial benefit of running a nightclub on Friday and Saturday nights is marginal. There is no cover charge on either night and the venue almost invariably reaches its capacity of 300 on a Friday

night. On a Saturday night the average attendance is between 250 and 300. It is unclear whether that figure represents the total attendance at any given time or the total attendance during the night. When a cover charge of \$5 was imposed in 2004 and 2005 for Friday nights, there was a decline of about 50% in attendance. There are very few people on the dance floor before midnight and the majority of people talk and drink throughout the night. There is a premium charged on drinks on Friday and Saturday nights of 20%.

47 Scone is a rural town in the Upper Hunter region of New South Wales, with a population of about 5,500. Scone Golf Club provides a range of facilities, including the golf course, a restaurant, TAB and gaming facilities, bingo, darts, raffles and a dance night. The Club has a licensed capacity of 300 and a floor size of approximately 1,010 sq m.

48 Scone Golf Club conducts a dance night on Friday nights. The auditorium where dancing occurs has a floor size of approximately 350 sq m. Entry to the dance night is only possible by way of the main entrance to the Club. Patrons then move freely through the entire Club. The Club is open on Friday nights until 1.30 am and competes with the Belmore Hotel and the Royal Hotel in Scone, each of which has a dance floor and a DJ on Friday nights until midnight. There is no cover charge for any person who enters the Club before 9 pm and the drink prices are not increased on Friday nights beyond the prices ordinarily charged in the Club.

49 Young people go to the Club to meet on Friday nights. Only about one in six patrons actually dances. The remainder stand around in the auditorium or lounge bar area drinking and talking. The Club relies upon the contribution of revenue from bar sales and poker machine revenue to maintain the golf course. The additional revenue received on Friday night is offset by the additional costs of Friday night, including the provision of a DJ, security, additional staff, a courtesy bus and driver and additional cleaning and promotional costs.

DANCE PARTIES

50 Dance parties are held in a range of indoor and outdoor venues, often in a field, or park or on a beach. Dance parties do not generally take place in purpose built venues but in any large indoor or outdoor space that lends itself to dancing. Venues for dance parties in

Sydney include the Bondi Pavilion, the Hordern Pavilion, Lunar Park, the Super Dome, Centennial Parklands and Randwick Racecourse. They cover a variety of musical genres played in different areas or on different stages at the event. Dance parties usually involve multiple DJs and a mix of live music and sound recordings. For every dance party, music is the essential component. Even those featuring live music often use extensive sound recordings as part of the entertainment. Advertising and promotional material for dance parties promote music, either by naming the genre or listing DJs who are known to play a particular genre of music.

51 Dance parties in Australia are generally organised by promoters who are responsible for the key aspects of organising the events, such as hiring the venue, booking DJs and promoting, marketing and ticketing the event. There are several major dance party promoters in Australia including Fuzzy, Future Entertainment, Powerhouse Productions, Transmission, Hardware Corporation, Beat Division, Agent Mad, Jam Music, Sounds Group, Sweet Chilli and Earth Core. Individual promoters host more than one event during the year and in different places.

52 Dance parties are typically long running events, going either for an entire day or throughout the night to daylight of the next day, sometimes followed by separate after party events. Some dance parties span a number of days.

53 The numbers of people attending dance parties vary. Numbers of people can be in excess of 20,000, although there are also instances of much smaller dance parties.

54 The cost of tickets to dance parties varies with the size of the event, the popularity, the style of music, the number of DJs playing and the reputation of the promoters. Tickets to popular dance parties can be from \$60 to \$100 per person and even as high as \$150. On the other hand, there are instances of dance parties the entry to which is as low as \$3.

55 Dance parties are promoted widely through advertisements in street music publications, on dance music web sites, on promoter and venue web sites, in entertainment guides appearing in the daily press and on radio, bill posters and the like. Major brands and products have been promoted to the youth market in past years by means of sponsorship of dance parties. Thus, for example, Smirnoff, Heineken, Red Bull, Vodafone, Pump, Bacardi,

Motorola and Crazy John have engaged in marketing activities connected with dance music. Vodafone sponsors dance parties, as does Smirnoff. Sponsors of dance party events are often given exclusive right to sell their product at the event and their logos appear on the ticketing and advertising and stalls and tents at the event. Larger, more established, dance parties attract multiple corporate sponsors, with an average of about three to four sponsors involved with a particular event. The generally applicable sponsorship fee is approximately \$1 per person attending an event. The dance parties organised by Mardi Gras are prominently affiliated with corporate sponsors including Coca Cola and Lavazza.

56 The level, costs and extent of major corporate and commercial sponsorship of dance parties is a significant feature of such events. Sponsorship directly affects the revenues and demonstrates the scale of commercial enterprise inherent in the dance party industry. The running of a dance party is a significant commercial venture, involving substantial costs, which generates significant revenue. Sponsorship is also an issue for smaller dance parties at popular and high profile venues.

57 Dance promoters face multiple expenses in running their businesses, all of which are paid in accordance with ordinary commercial rates, set by the market. Those costs and expenses include:

- DJs;
- lighting and audio;
- security;
- staff;
- fitting out venues.

58 There is a very considerable variety in the nature and size of dance parties such that it might be difficult to identify a “*typical*” dance party. There are typical large events and typical small events. Smaller dance parties, as a general rule, charge less for entry than big parties. While there are events that are successful, there are also events that either break even or even lose money. Smaller venues may not be able to capture significant sponsorship revenue.

59 Fuzzy is considered to be the most successful dance music promotion company in Sydney and has been responsible for many of Sydney's largest and highest profile dance music events. Those events are held once a year and provide a mixture of live and DJ music, food, bars, fair ground attractions and rides, games, market stalls and other activities. Patrons spend time sitting on the grass using all of the facilities, watching, listening and dancing to the performers.

60 Several dance party promoters have failed to survive in the industry for long and Fuzzy's success is generally regarded within the industry as exceptional. The cost of staging events has increased in that Fuzzy has had to spend more on acts, visual extras and decorations to maintain the same level of excitement, ticket sales and customer satisfaction. An event will not succeed unless it has the highest quality facilities, including lighting, sound and video systems and other infrastructure.

61 The dance party market has shrunk somewhat from its peak in the late 1980s and early 1990s, when there was a dance party almost every weekend with more than 1,000 patrons each. Many dance parties are promoted as one-off events at nightclubs. The success or failure of a dance party event depends upon the venue, the identity of the DJs and other performers, the quality of the facilities and staff. In advertising materials, the focus is on the acts playing at the dance party. Customers are willing to pay more to see a well known DJ, even though that DJ may play the same music as a cheaper, less well known DJ.

THE SOCIETY AND ITS CURRENT TARIFFS

62 The Society was established by the major record companies and is licensed, by input arrangements, to grant licences, through its schemes, in respect of the repertoire of major record companies as well as other members of the Society. The result is that virtually all recordings commercially released in Australia are covered by the Society's licences.

63 The Society operates on a system of licences based on record label information provided by its members. Members of the Society release their sound recordings on labels, such as Sony, Epic, BMG, RCA, Angel Records, At Large Recordings, Blue Note, Chrysalis, DFA Records, Harvest Records, RAK Records, Real World, Positiva and Virgin Records. The labels constitute a useful means whereby a licensee can check whether a recording is

embraced by a licence. At present, the Society's repertoire extends to recordings released under more than 5,000 different labels.

64 As at 13 February 2006, the Society had 553 members, covering a vast recorded repertoire, including all of the major record company interests such as Sony BMG, EMI, Universal and Warner. Those four record companies collectively control from 80% to 90% of the sound recordings commercially released in Australia. The repertoire that the Society is authorised by its members to license to third parties for use in nightclubs or at dance parties currently includes virtually all commercially released sound recordings. However, some of those recordings are not protected by the Copyright Act.

65 Each member of the Society is the owner or exclusive licensee of the copyright in protected sound recordings within the meaning of ss 89 and 90 of the Copyright Act. Each member of the Society has granted to the Society a non-exclusive licence of the right to broadcast, communicate and play in public sound recordings, and has authorised the Society to grant a licence of those rights to others, including the operators of nightclubs and dance parties.

66 The Society offers standard form licences to a wide range of different businesses and organisations. Such licences are organised under a system of tariffs applicable to different commercial uses of sound recordings and music videos. Each tariff has a specific fee or range of fees applicable to the circumstances of the use of the recordings covered by that tariff.

67 At present, operators of nightclubs and of dance parties are licensed to play sound recordings under the Society's Standard Terms and Conditions for Licence for Public Use of Protected Sound Recordings (the Standard Terms and Conditions). The licence fee for nightclubs is as set out in Tariff E. The licence fee for dance parties is as set out in Tariff B. The provisions of the Standard Terms and Conditions are as set out in Schedule 1 to these reasons. Tariff E is set out in Schedule 2 to these reasons and Tariff B is set out in Schedule 3 to these reasons.

68 The current licence fee for nightclubs is 7.48 cents per person per night of operation, based on the licensed capacity of the venue where the sound recordings are used, with a

minimum annual fee of \$128.59. The licensed capacity of a venue is the number of patrons licensed by relevant State authorities as applicable to the venue or, if there is no such State authority licence, as agreed between the Society and the operator of the venue. The annual fee payable by a nightclub operator for a particular venue is determined by multiplying 7.48 cents by the total number of people the venue is licensed to hold and then multiplied by the number of days in the year that the venue is operated as a nightclub.

69 The fee payable under Tariff E is payable for each area where sound recordings are played. Thus, if a particular venue has more than one room, level or area where sound recordings are played, each room, level or area requires a separate licence. The licence fee does not depend in any way upon the number of people who attend a venue on any specific day. Nor does the fee depend in any way upon whether or not a cover charge is made by the operator of the venue and does not vary with the opening hours of the venue.

70 There has been a published Tariff E in effect since 1 June 1987 at the latest. At that time, the licence fee was equivalent to 0.9 cents per person per night based on venue capacity. From 1987 until December 1995, changes were made to the licence fee in accordance with increases in the Consumer Price Index.

71 In December 1995, the Society increased the licence fee under Tariff E from 1.33 cents per person per night to 5 cents per person per night. The minimum annual fee was also increased from \$46.73 to \$93.46. Following the increase, several licensees challenged the increase pursuant to the Society's standard terms and conditions. Clause 4.1 of the standard terms and conditions provides that, if a licensee considers that any terms or conditions of the licence are unreasonable, the licensee may refer those terms or conditions to a board of review for review. Such a board of review is constituted by three members consisting of a chair appointed by the Australian Institute of Arbitrators, a member appointed by the Society and a member appointed by the Trade Association most closely associated with the business or industry of the licensee. If the board of review is satisfied that any of the terms or conditions of a licence referred to it for review are unreasonable, it may amend those terms or conditions in such manner as it thinks fit.

72 The board of review established following the reference by the licensees after the 1995 increase held that the Society's new rate was not reasonable in the circumstances and

determined that the rate applicable to the nightclubs that had initiated the review should be reduced to the equivalent of 4.25 cents per person per night from December 1998. This reduced fee was applied only to the parties to the reference to the board of review. The 5 cents per person fee was applied to all other nightclubs. There are now no exceptions to the standard fee prescribed in Tariff E.

73 The fee in Tariff E has been increased since December 1995 in accordance with increases in the Consumer Price Index and following the introduction of the Goods and Services Tax. The licence fees payable under Tariff E since 1 December 1994 are set out in Schedule 4 to these Reasons.

74 As at 14 February 2006, licences pursuant to Tariff E had been granted to 534 operators. The numbers of operators who held licences in accordance with Tariff E for the past 6 years were as follows:

Year	Total Operators
2000	541
2001	508
2002	570
2003	552
2004	583
2005	603

75 The total licence fees charged by the Society to nightclub operators for the last five years are as follows:

2001	\$935,651
2002	\$1,039,875
2003	\$977,824
2004	\$993,607
2005	\$1,057,194

76 The licence fee payable under Tariff B by the operators of dance parties is 19.8 cents per person per event. For the purpose of calculating the fee, the number of persons per event

is based on estimated attendance at the dance party, either by considering past attendance or the capacity of the venue. A minimum fee of \$46.86 per event is payable.

77 The licence fee under Tariff B, when introduced on 1 April 1998, was 15 cents per person per event, with a minimum fee of \$36.77 per event. The fee has been increased to take into account the introduction of the Goods and Services Tax on 1 July 2000. The licence fee was also increased with effect from 1 July 2005 to take account of increases in the Consumer Price Index for the previous five years. The licence fee payable under Tariff B since 1 April 1998 is as set out in Schedule 5 to these Reasons. As at 29 January 2006, there were 66 licensees holding dance party licences in accordance with Tariff B.

78 In July 2003, a decision was made on behalf of the Society to undertake a comprehensive ongoing review of the Society's tariffs, reviewing their scope and application as well as the amounts of the respective licence fees. In commencing the review, it was necessary to decide which tariff to review first. The tariffs for both nightclub licences and dance party licences were chosen as the starting point. Between July 2003 and May 2004, the Society undertook a number of preliminary steps in the review including:

- Reviewing the current tariff structures and rates charged by other copyright collecting societies around the world for the right to play recorded music at nightclubs and dance parties.
- Looking at aspects of the liquor licensing regimes applicable to nightclubs in various States and Territories.
- Considering the operational aspects of the nightclub industry, including nightclub and hotel finances, operations and charges.
- Obtaining preliminary accounting advice with respect to the financial operations of the operators of nightclubs.

Following analysis of the information gathered pursuant to those preliminary steps, the Society commenced formal consultation with nightclub licensees and dance party licensees, in addition to consultation with associations and representative organisations for such licensees.

79 As part of the consultation process, the Society sent letters to more than 800 organisations and licensees but received only 36 written responses. While there was a general rejection of the Society's proposal that there should be a significant increase in the rates payable by licensees for the public performance of sound recordings, no financial data or economic analysis was provided by licensees. No consistent approach was presented as to what would constitute a fair and reasonable rate for the right to use licensed sound recordings in nightclubs and dance parties. During the consultation process, the Society met with representatives of a number of the Nightclub Respondents.

80 As a result of the review and consultations, the Society proposed new rates for the use of sound recordings in nightclubs and at dance parties. The rates were developed following the detailed economic analysis undertaken by the Allen Consulting Group, to which reference is made below. The purpose of that economic analysis was to determine the value derived from the use of recorded music by nightclub and dance party operators. The Society concluded from the economic analysis that the economic value of the right to play recorded music in a nightclub venue was \$6.97 per person per night of operation, based on the licensed capacity of the venue. The Society concluded that, on the basis of a three way division of that amount, among musical works rights owners, sound recordings rights owners and nightclub owners, the sum of \$2.32 should be attributed to the owners of the rights in sound recordings.

81 In its correspondence to nightclub licensees in May 2004, the Society argued that a significant rate increase was required and said that the fee should be at least \$1 per person per night of operation, based on licensed capacity. The amount presently claimed is of course greatly in excess of that figure. The correspondence also expressed the Society's view that issues such as the hours during which a venue was open and whether there was a cover charge should be factored into the rate. The Society's position was summarised as follows:

'...[the Society] seeks to apply a more equitable rate, such that venues charging entry fees would be required to pay a higher licence fee, but venues closing early would have a reduced licence in recognition of the more limited number and turn over of people in those venues on any one day.'

Again, it is clear that the position now contended for by the Society departs from the position so stated in its correspondence with licensees in May 2004.

THE RESPONDENTS

82 Australian Hotels Association represents over 8,500 pub style hotels and three, four and five star accommodation hotels throughout Australia. Its members are the hotel associations in each State and Territory. The members of the State and Territory associations are the owners of such hotels in those jurisdictions. A significant number of members operate nightclubs or otherwise provide music for dancing. A number also conduct dance parties.

83 Clubs Australia represents over 4,000 registered and licensed clubs in Australia and New Zealand. Its members are club industry associations for each State and Territory. The members of the State and Territory associations are registered and licensed clubs in those jurisdictions. A significant number of registered and licensed clubs operate nightclubs or otherwise provide music for dancing.

84 90% of the approximately 1,400 registered clubs in New South Wales are members of Clubs NSW. In addition, Clubs NSW has five affiliated associations as members, being:

- Royal New South Wales Bowling Association;
- New South Wales Golf Association;
- New South Wales RSL Clubs Association;
- The Leagues Club Association of NSW; and
- Federation of Community Sporting Workers' Clubs.

Suppliers and consultants to the registered clubs industry are also associate members of Clubs NSW. A significant number of its members operate nightclubs or otherwise provide music for dancing.

85 Explorer Cruise Lines Pty Ltd is the owner of a nightclub in Western Australia operating under the name "Paramount". CHP Charters Pty Ltd is the owner of a nightclub in Western Australia operating under the name "The Church Night Club". Cabaret Owners Association of Western Australia Ltd is a not for profit association that represents the interests of approximately 44 cabaret operators in Western Australia who operate nightclubs or otherwise provide music for dancing.

86 Under its constitution, Mardi Gras is obliged to apply its assets and income solely in the furtherance of specific objectives including the following:

- to organise and co-ordinate events of celebration, commemoration and protest and engage in such activities as part of the gay, lesbian, trans gender, bisexual and queer community;
- to sustain the strength of the gay, lesbian, transgender, bisexual and queer community;
- to acknowledge the diversity of the gay, lesbian, transgender, bisexual and queer community;
- to advance the goals of the gay, lesbian, transgender, bisexual and queer community;
- to advance the interests and general well being of gay, lesbian, transgender, bisexual and queer people; and
- to build strong, positive and beneficial relationships between the gay, lesbian, transgender, bisexual and queer community and the wider community.

In the promotion of those objectives, Mardi Gras has, since its creation on 9 October 2002, conducted events, including dances and dance parties, in which sound recordings are performed in public. The events include the following in 2003, 2004 and 2005:

- Sleaze;
- Party;
- Launch;
- Fair Day; and
- Parade

An entry fee was charged for the first two but at the last three, no tickets were sold and no money was demanded for entry.

87 Money raised by Mardi Gras from dances and dance parties is applied solely in furtherance of the objectives of Mardi Gras described above by funding events and education and social awareness programs and campaigns advancing the goals and interests of the gay,

lesbian, transgender, bisexual and queer community within the wider Australian and international community. At the events described above, Mardi Gras provides a forum for various community based organisations to convey messages to those who attend the events. Such organisations are not limited to those providing for the gay, lesbian, transgender, bisexual and queer community.

THE ISSUES

88 In general, the terms of the licence proposed under the Society's proposed scheme are unexceptionable and no exception is taken by any of the respondents. However, there are significant issues concerning the manner in which the licence fee payable is to be calculated. Those issues can generally be summarised under the following heads:

- definition of "*nightclub*";
- whether the licence fee should be calculated by reference to actual attendance rather than capacity;
- the significance of non protected music;
- the extent to which the willingness of patrons to pay for recorded music can be ascertained;
- the manner of calculating the fee for dance parties.

89 In addition, there is the issue concerning Mardi Gras and whether it, and bodies of a similar nature, should be treated differently from other organisations.

90 A significant part of the hearing was taken up with evidence of a survey conducted at the behest of the Society, which was designed to assess the amount that patrons would be prepared to pay in order to have the benefit of recorded music at nightclubs and dance parties. For reasons advanced in detail on behalf of the Society, including the survey evidence, the Society contended that the rate for nightclubs should be \$2.32 per person per night, based on venue capacity and that the rate for dance parties should be \$5.10 per person, based on ticket sales. Those licence fees represent a very significant increase over the licence fees payable under current Tariff E and Tariff B. The respondents point particularly to the history of the licence fees under those Tariffs as a basis for resisting such a substantial increase.

91 The Nightclub Respondents suggest that there are three possibilities open to the Tribunal. The first is to refuse to confirm the scheme on the basis that it is unreasonable in the circumstances. The second alternative is for the Tribunal to confirm the scheme subject to variations in the proposed rate that would satisfy the Tribunal that the scheme would be reasonable in the circumstances. The third possibility is for the Tribunal to make other changes to the proposed scheme with a view to making it reasonable in the circumstances. That alternative may be more problematic if the variations concerned resulted in an entirely different scheme.

92 The Tribunal's power to vary is limited to making variations in the sense of amendments or alterations but not so to change it as to substitute an entirely different scheme for the one proposed. Thus, a change in the basis of the calculation of the licence fee may involve substituting an entirely different scheme. The Nightclub Respondents contend that the Tribunal has power to vary the proposed scheme for the purpose of calculating rates by reference to actual attendance as opposed to licensed capacity or to enable rates to be calculated by reference to cover charge levied. The Tribunal expresses no view at this stage as to whether such a change would involve a different scheme from that proposed.

DEFINITIONS OF NIGHTCLUB AND DANCE PARTY

93 The scheme currently proposed by the Society is set out in Schedule 6 to these Reasons. One of the changes from the existing regime is the inclusion of new definitions of **Nightclub** and **Dance or Dance Party**. The proposed definitions were modified during the course of the hearing.

94 After the completion of the hearing, the Tribunal wrote to the Society's solicitors and to the other parties pointing out that the definition of "*dance party*" proposed had not received the attention that had been given to the definition of "*nightclub*". The Tribunal suggested that, on the wording of the definition of dance party, the term might include events conducted by churches or schools, where an entry fee is charged. The Tribunal requested clarification as to whether such events were intended by the Society to be covered by the definition. The Tribunal indicated that, if they were, the Tribunal may require further submissions concerning the appropriateness of a single licence fee to include such events.

95 The Society indicated that it did not intend that such events be covered by the Scheme and suggested that such events would fall within the definition of “*private functions*”. However, in order to avoid doubt, the Society indicated its willingness to add a further exclusion in respect of events organised by a church or school or other like body. The Society also indicated that it was intended, in modifying the definition, to exclude small events that are private or private in character as is normally the case with a school or church event, so that the Tribunal could focus, in its consideration of the Scheme under s 154, and Mardi Gras’ application under s 157, on the evidence concerning large scale commercial events, including Mardi Gras’ two parties, Mardi Gras Party and Sleaze Ball.

96 Neither the Nightclub Respondents nor Mardi Gras opposed the amendments or objected to the question of the definition being raised by the Tribunal. However, Mardi Gras sought to make further submissions on the basis that the proposed amendments to the definition of “*dance party*” involved a change of position by the Society from that put in its submissions to the Tribunal. Those submissions are dealt with below in considering the application by Mardi Gras under s 157 of the Copyright Act.

97 In the Society’s Third Further Amended Reference, the relevant definitions are as follows:

“Dance or Dance party means any one off or occasional event charging an entry fee and playing Sound Recordings for dancing as the primary form of entertainment at the event, and which:

- (a) is not an event regularly held at Nightclub premises;
- (b) is not a private function, or an event which features ballroom or similar traditional dancing;
- (c) is not an event for underage persons (such as a ‘blue light’ disco); and
- (d) is not an event organised by a church or school or other like body.

Nightclub means a licensed venue, carrying on or promoting itself as carrying on a business providing music for dancing, which:

- (a) uses Sound Recordings as the primary form of music based entertainment; and
- (b) has a dance floor/area or charges an entry fee (even if the fee is not charged to all patrons); and
- (c) is not a private function, a Dance or Dance Party, or an event which features ballroom or similar traditional dancing; and
- (d) is not an event for underage persons (such as a ‘blue light’ disco).

The above definition includes a nightclub operating within a multi purpose venue in a physically separate area of that venue, where that separate area satisfies the above criteria.”

98 Under the proposed scheme, a licence would be issued to the operator of a nightclub or a dance or dance party on the Standard Terms and Conditions. The licence would authorise “*dance use*”. Dance use is defined in the proposed scheme as the use of sound recordings for the purpose of dancing:

- (a) in nightclubs, or
- (b) at dances or dance parties.

99 The operative provision of the Standard Terms and Conditions is as follows:

“Grant of Licence

2.1 Subject to the terms and conditions of this agreement, [the Society] grants you on and from the Commencement Date a non-exclusive licence of the Licensed Rights in the Territory for an initial period of 12 months...

2.2 For the purposes of clause 2.1... the Licence is, unless we inform you to the contrary, limited to those uses, premises, events, times, numbers of users, facilities, vehicles, venues and/or equipment described in the Licence Details...

Licence Fee

2.5 In consideration of the grant of the Licence for the Initial Period, you must pay [the Society] on or before the Commencement Date the Licence Fee for the initial period, as specified in the Licence Details...”

100 Under clause 1.1 of the Standard Terms and Conditions, **Licence Details** means the form completed by the licensee and provided to the Society at the time at which the licensee applied for the grant of a licence.

101 The Nightclub Respondents propose an amended definition of **nightclub** as follows:

That part of a licensed venue which provides music for dancing, which:

- *uses sound recordings as the primary form of music for dancing;*
- *has a dance floor/area;*
- *is not a private function, a dance party, or an event which features ballroom or similar traditional dancing; and*
- *is not an event for underage persons (such as a “blue light” disco).*

102 The Nightclub Respondents say that their definition differs from that proposed by the Society by confining the area covered to that part of a licensed venue that has a dance floor and by deleting any reference to the charging of an entrance fee. Their purpose in confining the definition to the area where dancing occurs is to prevent multi purpose venues being charged in relation to those parts of a venue not providing music for dancing. The deletion of the reference to entry fee is made because, they say, the question whether venues charge any entry fee is irrelevant: the only question is whether a venue plays recorded music for dancing.

103 It is by no means clear what the effect of the amendments proposed by the Nightclub Respondents would be. A difficulty with both definitions is that they are dependent upon the term “*licensed venue*”. The parties have proceeded on the basis that there would be no difficulty in identifying a “*licensed venue*” as a venue in respect of which liquor licensing regimes apply. The rate of the fee proposed by the Society is determined by reference to venue capacity. That term is defined in the proposed scheme as the number of patrons licensed by a relevant State body as applicable to the venue.

104 The Nightclub Respondents proposed the deletion of the last sentence of the definition proposed by the Society and the insertion of “*that part of*” at the beginning of the definition. It is not clear what was intended by that change. If anything, it was apparently designed to add clarity. It does not do so and tends to give rise to confusion.

105 The deletion of the reference to charging an entry fee is not justified. The basic requirement of the definition is that the venue is used for carrying on the business of providing music for dancing. Even if there is no dance floor or separate area for dancing, the licence fee should be attracted if the operator makes a charge for entry to premises that are used for carrying on a business of providing music for dancing.

106 The Tribunal considers that an appropriate definition of nightclub would be as follows:

A licensed venue that:

- *is used for providing music for dancing; and*
- *uses sound recordings as the primary form of music for dancing; and*
- *has a dance floor or other area for dancing or charges an entry fee (even if the fee is not charged to all patrons); and*
- *is not being used for:*
 - *a private function;*
 - *a dance party;*
 - *an event that features ballroom or similar traditional dancing; or*
 - *an event for underage persons (such as a “blue light” disco).*

The definition includes a nightclub operating within a multi purpose venue in a physically separate area of that venue, where that separate area satisfies the above criteria.

BASIS OF CALCULATION

107 The proposed scheme entails a calculation of a licence fee on a basis that might fairly be characterised as artificial and arbitrary. It may be that there are many bases upon which a fee could be calculated that would be perceived as fair and reasonable. A fee based on the number of people who actually attend on a particular day would normally be regarded as a fair and reasonable method for assessing an appropriate fee. However, that might depend upon the time for which each individual remained at the venue. The charge for entry, if any, made by the operator of the venue might be a relevant factor and it would be possible, at least in theory, to vary the fee according to the quantum of any charge made by the operator. Such regimes would require very detailed recording and reporting provisions. There was no evidence adduced to indicate what difference the calculation of the licence fee on any of those bases would make. For quite a considerable number of years the calculation of a fee on the basis of the capacity of a venue has apparently proved acceptable. Again, no evidence was adduced to indicate that an increase in the quantum of the fee based on capacity was of itself unreasonable.

108 While there is a degree of arbitrariness in the calculation of a fee on the basis of capacity, such a regime can operate favourably to both sides. Thus, the evidence indicated that, on any given day, patrons would not necessarily attend a venue for the whole of the opening time. Indeed, on any given day, the number of patrons who enjoyed the venue could be far in excess of its capacity, by reason of the continued throughput of patrons. On the

other hand, of course, there could be circumstances where even the total number of patrons on a given day would not exceed capacity. However, there was no definitive evidence, one way or the other, to indicate that the calculation of a fee on the basis of capacity was of itself unreasonable. There is no reason to depart from that aspect of the scheme proposed by the Society.

NON PROTECTED MUSIC

109 It is clear enough that non protected music is played at nightclubs and at dance parties. The full extent is not entirely clear, although the Society accepts that, to the extent that there is material available to it, it could be in excess of 20%. While there was such quantitative evidence, there was no qualitative evidence to indicate whether non protected music, such as that originating in the United States of America, had any greater significance or importance to patrons than protected recorded music. In all of the circumstances, it would be appropriate to discount, by 20%, the fee that would otherwise be appropriate for the playing of records, in order to take account of the fact that approximately 20% of the recorded music that would be played at dance parties and nightclubs would not require the grant of a licence by the Society.

WILLINGNESS TO PAY: THE CHOICE MODELLING SURVEY

110 The Society engaged Allen Consulting Group (Allen Consulting) to carry out a project designed to estimate the value of sound recordings in the context of nightclubs and dance parties. Allen Consulting provides expert advice to business and government on economic issues. Mr Jeremy Thorpe, a director of Allen Consulting, was responsible for the project. Mr Thorpe has particular expertise and experience in the economic analysis of copyright protection and the application of economic principles to intellectual property issues. Mr Thorpe was responsible for determining the appropriate economic approach and methodology to be used in the project. He considered a number of potential evaluation methods that are commonly used by economists in valuing goods or services. Mr Thorpe concluded that the most appropriate methodology was a **choice modelling survey** to determine the willingness of patrons to pay for music in nightclubs and at dance parties. He considered that that would provide a measure of the value of recorded music in the context of a nightclub and a dance party.

111 Mr Thorpe developed and designed a choice modelling survey that he considered was appropriate. In the survey, respondents were presented with a series of choices as to venues that they wished to attend. Thus, they were asked to choose one of three possibilities, being two different late night venues or neither of the venues. In each choice set, or set of alternatives associated with specific late night venues that respondents were to choose from, the two venues differed in their attributes, including price of entry. By varying the attributes and the price over a number of questions, the survey was designed to enable the isolation of the monetary value that respondents placed on recorded music. Mr Thorpe concluded that the survey provided an estimate of patrons' willingness to pay to visit a nightclub playing music, with or without a DJ, over another form of late night venue with no music but with all other attributes and variables held constant.

112 The survey produced a result that valued the patrons' willingness to pay to visit a nightclub playing recorded music at \$6.97. Mr Thorpe assumed a three way division of that total among the nightclub operator, the owners of rights in the musical works and the owners of the rights in the sound recordings. That sum was divided among those three interests, resulting in the sum of \$2.32 being attributed to the owners of rights in the sound recordings being played at nightclubs.

113 Mr Thorpe considered that the calculation of the value of sound recordings in the context of a dance party was more directly related to the price paid as an actual entry fee to the dance party, since entry to dance parties is almost always based on a fixed price ticket, unlike nightclubs. The survey asked respondents to assign values to the various attributes of dance parties, including music, in order to obtain a measure of the significance of each attribute. Excluding the attribute of cover charge, respondents assigned 39.4% of the value associated with dance parties to music. The survey showed that the average dance party entry charge was \$39. Applying 39.4% to that average suggested that the value that could be ascribed to music in the dance party context was \$15.37.

114 Mr Thorpe assumed a three way division of that total among the dance party promoter, the owners of rights in the musical works and the owners of the rights in the sound recordings. That resulted in a value of the rights in performance of sound recordings for dance parties of \$5.10.

115 The Nightclub Respondents and Mardi Gras did not dispute the appropriateness of a choice modelling survey as an appropriate means of estimating the value of recorded music to patrons. However, the Nightclub Respondents challenged a number of aspects of the precise application of the methodology and survey questions adopted by Allen Consulting in conducting the survey.

Designing and Developing the Survey

116 The first critical aspect in developing a choice modelling survey is the identification and selection of the attributes to be included in the description of the products or services being compared and then the setting of levels or options for each of the attributes. In order to determine the appropriate attributes, Allen Consulting arranged a series of seven focus groups attended by people aged between 18 and 35 who had attended a nightclub or a dance party in the previous year.

117 Three initial focus groups were held in the Sydney CBD, at Harris Park, a Western Suburb of Sydney, and in Bathurst, a New South Wales regional city. Following the initial three focus groups, a draft survey questionnaire was developed, which was based on the attributes that had been identified in the focus group discussions. That survey questionnaire was tested in two subsequent focus groups in Sydney and Harris Park. Members of those groups participated in an initial session where they identified the attributes that were significant to them in deciding a venue to attend. They were then asked to complete and give feedback on the draft survey questionnaire.

118 In the draft survey questionnaire, a choice was invited between two different venues with varying attributes as follows:

- type of venue – stand alone nightclub, part of a hotel or part of a licensed club or casino;
- type of music – soft background music, general dance music or the participant's favourite dance music;
- DJ – no DJ, ordinary DJ or featured DJ;
- décor – trendy or plain;

- closing time – 12 am, 4 am or after 4 am;
- location – very convenient, somewhat convenient or inconvenient, to get to;
- cover charge – ranging from \$5 to \$40.

119 After the focus group testing of the draft survey questionnaire, Mr Thorpe concluded that the choice of attributes described above did not allow a clear identification of the value associated with music itself. An alternative choice was therefore also presented to the focus groups. Members of the groups were given a series of choices between three venues, with the different options set out for each of the attributes described above. They were asked to choose whether they would go to any of the three venues or none of them. In the alternative choice set, a nightclub with no music was included as one of the options for the attribute of type of music.

120 However, the testing of the alternative choice sets suggested that proposing an option described as a nightclub without music was not seen as realistic or credible, because music was perceived as being so integral to the operation of a nightclub that members of focus groups could not conceive of a nightclub without music. Mr Thorpe, therefore, concluded that the alternative of a nightclub with no music in the choice sets would not yield valid results. On the other hand, the alternative of a nightclub playing recorded music with no DJ was seen as credible, notwithstanding that most nightclubs have a DJ present, selecting and playing the music.

121 A further version of the questionnaire was then constructed and presented to a focus group in Harris Park. Two major changes to the survey questionnaire were made as follows:

- Several attributes were combined to create a single attribute with a number of features, such as a nightclub with a dance floor, but no DJ. That was done in order to reduce the number of separate attributes that respondents to the survey would need to consider.
- The nature of the venues that were included in the choice sets was broadened, to encompass a venue that did not feature music. Respondents were asked to choose which late night venue they would attend. The alternatives included nightclubs, which were always described as having a dance floor and

providing music, sometimes with a DJ and sometimes with no DJ. The options also included a bar with no dance floor and where no music was played and which always had a zero entry charge. That was intended to provide a base position of a venue without music, from which the incremental willingness to pay for music could be calculated.

122 On the basis of feedback from the focus group in Harris Park, the second draft of the proposed survey questionnaire was varied and a third draft of the proposed survey questionnaire was produced. That third draft was tested at a focus group in Bathurst. The third draft included an attribute that had not been included in the earlier draft questionnaires, namely, drink prices. Further focus group testing on the issue of drink prices, however, demonstrated that people did have a consistent understanding of what they understood by the use of options of cheap drink prices, average drink prices and expensive drink prices.

123 In addition to selecting the attributes and levels to be included in the proposed survey questionnaire, it was also necessary to construct an experimental design that would determine the way in which the levels or options would be combined or varied in the questionnaire. One of the issues was whether respondents should be asked to choose between two alternative venues or three alternative venues. A second issue was the pattern in which the various choice sets should be combined or paired and presented as alternatives. As the levels of the attributes are varied, many different alternatives can be produced. It is necessary to determine a particular statistical approach for the order in which the choice sets are put together and the respondents are asked to choose between them.

124 A third issue concerned how many of the attributes should be tied in a choice set. That is to say, it was necessary to decide how many of the attributes would be the same in any choice set as opposed to the number that would differ. Having more attributes tied makes it easier for the respondent to choose between two options, since there are fewer differences to be taken into consideration.

125 Following some editorial amendment to the third draft of the proposed survey questionnaire, a fourth version was tested in the pilot survey. The pilot survey indicated the implicit price for music varied, depending upon the form of the model used, from \$7.67 to \$8.18. The pilot survey also suggested that, for a bar with all of the worst features, the

willingness to pay was about \$0 and for a nightclub with the best possible features, namely cheap drinks, very convenient location, expensive décor, closing at 5 am, featured DJ, the willingness to pay ranged from about \$35 to \$39.

126 The pilot survey also suggested that respondents were tiring of the survey, since the level of “*no choice*” responses increased significantly as the choices went on. Further modifications were therefore made to the proposed survey instrument and it was decided that the choice sets in the final survey instrument should only offer respondents a choice of two alternatives.

127 The proposed survey instrument was provided to the Nightclub Respondents together with a copy of the experimental design intended to be used for the survey. Comments were received from the Nightclub Respondents, most which were rejected by Mr Thorpe. However, some comments were taken into account and some changes were made as a consequence of the comments. For example, some preliminary questions that had been included in the draft survey questionnaire were deleted in order to make the survey shorter and less complex. Two preliminary test questions were added in order to check that respondents had understood the explanations and use of the terms *nightclub* and *bar or other late night venue*. Finally, the responses in a number of the preliminary questions were reordered so that they ran from the lowest value to the highest.

Nightclub Survey

128 The survey instrument consisted of 36 questions. The first 19 questions were concerned with the respondents’ experience of nightclubs, bars and other late night venues. Those questions were followed by a section headed “*Choosing Between Late Night Venues*”. That section consisted of eight questions. The last nine questions were concerned with the respondents’ previous experience of dance parties.

129 The critical part of the survey instrument, from the point of view of the choice modelling survey, was the section headed “*Choosing Between Late Night Venues*”. That section commenced with a preliminary instruction to respondents to indicate the way in which the next eight questions were to be answered. The preliminary section was as follows:

In this part of the survey we'd like to describe to you some late night venues, and for you to tell us which of these you would realistically go to.

When answering these questions, put yourself in the following scenario:

- *you are visiting a late night venue on an average **Friday or Saturday night***
- *the people who go to these venues are a **similar age and type to yourself***
- *you're happy with the level of security*
- *in the **nightclub venues**, there is recorded music being played (e.g. CDs, vinyl)*
- *in the **bars and late night venues that are not nightclubs**, no music is being played*
- *the **nightclub** is playing a type of music that you like listening to*
- ***you are picking the venue**, even if you normally visit late night venues as part of a group of friends*

*The following questions **may look similar**, but in each of the questions **the cover charge and features of the late night venues are different**.*

When answering these questions, please keep in mind the amount that you are usually prepared to spend when attending a late night venue and the features that are important to you."

Each of the succeeding eight questions commenced with the following preamble:

*Suppose the following two late night venues were the **ONLY** ones available for you to go to. Realistically, which late night venue would you choose to go to?*

130 The two venues specified in each question consisted of two of the following three venue types:

- Nightclub with dance floor with DJ;
- Bar with no dance floor and no music played;
- Nightclub with dance floor and no DJ.

131 In the final survey instrument, six attributes in relation to nightclubs were listed as follows:

- venue type;
- drink prices;
- décor (i.e. design and furnishings);

- closing time;
- location; and
- cover charge.

For the first five attributes, there were three possibilities. For the final attribute of cover charge, there were six possibilities.

132 Respondents were asked to make eight choices. Each choice described two venues on the assumption that they were the only ones available to go to. Respondents were asked to indicate whether they would choose to go to venue 1 or to venue 2 or to go to neither of those venues. The six attributes varied for each of the two venues in each choice.

133 The survey was administered by means of the internet. The respondents were people aged 18 to 35 who had been to a nightclub or dance party in the past 12 months. 12,526 invitations to participate in the survey were sent. 813 surveys were completed. A further 184 incomplete responses were received. Of the 813 respondents, only six had been to a dance party but not to a nightclub or other late night venue in the previous 12 months. Those six individuals answered only the dance party questions.

134 Mr Thorpe considered that the survey, as administered, accurately reached the target population. Based on the response level of 813 surveys, the survey provided an error level of 2.9% with 90% confidence, 3.4% with a 95% confidence and 4.5% with a 99% confidence. That is to say, for example, for any particular response, one can be 95% confident that the true average percentage of the population is 3.4% more or less than the result obtained from the sample. That is considered by Mr Thorpe to be a reliable error margin.

135 Based on the relationships believed to exist between different variables obtained from such surveys, statistical programs are used to estimate a number of different choice models. Differently specified choice models were estimated to provide the most satisfactory explanation of the outcomes in the data, using established tests to see how well the models fitted the survey data. When analysed, using the choice modelling framework identified as the most appropriate, the survey allowed for the identification of two specific measures of value as follows:

- implicit prices for each of the attributes;
- values for willingness to pay for specific bundles of attributes.

136 Implicit prices indicate the amount of money respondents are willing to pay to secure an increase in one or more of the attributes, other than the attribute of price. A comparison of the implicit prices of attributes affords some understanding of the relevant importance that respondents hold for those attributes.

137 The results of the survey showed that respondents are willing to pay \$6.97 to visit a nightclub without a DJ, rather than go to a bar, all other things being equal. That is to say, \$6.97 represents the marginal value attached to the provision of music for the purpose of dancing. Respondents are prepared to pay \$6.97 more to visit a nightclub without a DJ than to visit a bar where no music is played for the purpose of dancing.

Dance Party Survey

138 It was initially intended to undertake a choice assessment of dance parties on a basis comparable to that adopted for nightclubs. Thus, in the first focus groups there was a comparable process whereby attributes were identified and values identified for each of the attributes. However, it became clear that a survey that included choice modelling for both nightclubs and dance parties was undesirable, since it would be too long and complex to elicit reliable answers. The possibility of a separate survey was rejected because the smaller number of people who had attended a dance party required a separate dance party survey. The sample would have had to have been significantly larger than the nightclub survey in order to be statistically robust.

139 Accordingly, Allen Consulting decided that the use of the identified attributes in a non-choice modelling form would allow respondents to indicate their relative support for those attributes. That could then be used to correlate the dance party responses with the value identified for nightclubs. That is to say, the willingness to pay for music at a dance party would be determined by reference to the willingness to pay for music at nightclubs.

140 The survey revealed that the average dance party cover charge is \$39. On average, the most that respondents were willing to pay to attend a dance party was about \$58. In the

survey, respondents were asked to assign values to various attributes of dance parties. Music made up 39.4% of the value of the attributes, other than the attribute of price. The average dance party cover charge of \$39 was taken to be the minimum value that respondents were willing to pay to enter dance party events. On that basis, the value that can be attributed to music was taken to be 39.4% of \$39, namely, \$15.37. As the value of music at a dance party is 2.2 times the value of music at a nightclub, namely \$15.37 as against \$6.97, the value of a licence from the Society should be 2.2 times the licence fee for a nightclub.

Structure of Tariffs

141 Thus, Allen Consulting concluded that the survey revealed that respondents are willing to pay about an extra \$6.97 to visit a nightclub without a DJ, rather than another form of late night venue, such as a bar, all other things being equal. That is to say, \$6.97 represents, through the proxy of nightclub patrons, the most that a nightclub operator would be willing to pay for the right to play recorded music.

142 The sum of \$6.97 represents the maximum willingness of nightclub patrons on average, to pay for recorded music at nightclubs. That sum must be distributed between the parties who would be involved in a notional negotiation necessary to derive that receipt. Allen Consulting identified three parties to such a bargain:

- nightclub operators;
- the Society, as representatives of owners of the sound recordings; and
- Australian Performing Rights Association (APRA), as the representative of the owners of the underlying copyright works.

Both the Society and APRA are necessarily involved because the rights of both are required for the playing of protected recorded music in nightclubs. None of the three parties can derive the \$6.97 without the participation of the other two. Because of that interdependence, there is an incentive for each party to participate in negotiations, since, without participation, nobody will receive the \$6.97. Allen Consulting suggest that experimental economics reveals that in such symmetric situations the parties would agree to divide returns equally. Allen Consulting concluded, therefore, that it is reasonable to assume that a likely bargaining outcome is one in which the Society, APRA and the nightclub operator choose to divide the sum of \$6.97 into three equal shares.

143 There is no way to predict where in the bargaining range a bargain might be struck. However, people who find themselves in a bilateral monopoly situation may simply agree to split the difference in order to economise on bargaining costs (*In Re Hoskins* 102 F.3d 311 at 316). On the assumption that each of the three parties, nightclub operators, APRA and the Society has equal bargaining power, the \$6.97 would be shared equally between them, giving \$2.32 to each party. That results in a licence fee for the playing of sound recordings of \$2.32 for each person attending a nightclub on any given day.

144 As the value of music at a dance party is 2.2 times the value of music at a nightclub, the value of a licence to play recorded music at a dance party should be 2.2 times the licence fee for a nightclub of \$2.32, namely, \$5.10.

CRITICISM OF THE SURVEY

145 The Nightclub Respondents did not complain about the validity of choice modelling survey as a general principle. Rather, their complaint concerned the manner in which the particular survey was conducted by Allen Consulting. Thus, the validity of a choice modelling survey, in the context of a comparison between similar products or services with different attributes, where the same basic commodity was involved, was accepted by the Nightclub Respondents. They say, however, that the survey conducted by Allen Consulting did not adopt that approach.

146 The Nightclub Respondents assert that there was a fundamental flaw in the survey, in that it sought to ascertain an amount representing “*average willingness to pay*” for recorded music played in nightclubs in a manner that did not take into account the effects of competition. Rather than comparing nightclubs with music with nightclubs without music, the design sought to compare nightclubs with music with bars without music. The survey involved the comparison of various nightclubs, all of which played recorded music, and various bars, at which no music was played. Thus, the Nightclub Respondents say, the survey excluded from the assessment of willingness to pay for recorded music, the effect of any competition from nightclubs, bars and other late night venues at which live music is the primary form of entertainment or where recorded music is only played in the background or during breaks in live performances.

147 The fundamental criticism by the Nightclub Respondents is that the survey was fundamentally flawed in so far as it sought to ascertain the average willingness of patrons to pay in circumstances that were divorced from economic and competitive reality. They say that nightclubs compete with many other types of venue, apart from bars with no music. For example, nightclubs that play recorded music for dancing compete with venues that play live music and venues that play sound recordings between sets of live music or as background.

148 Clearly enough, in a competitive market, prices set by individual nightclubs would be restrained by those of their competitors, being other late night venues that do not play recorded music. They contended, therefore, that no individual nightclub would be able to mark up its price, whether they be in the form of drinks or a cover charge, in order to capture unrealised willingness to pay for recorded music. A nightclub operator who operated such a strategy would face a loss of business to competitors. In so far as the survey failed to make allowance for the effect of competition, if any, in calculating willingness to pay, the economic analysis relied upon by the Society is flawed.

149 However, the criticism fails to take account of the object of the survey, which was to determine how much more a patron would be prepared to pay to attend a nightclub playing recorded music rather than attend a bar with no music. It is not to the point that a respondent might prefer to go to some other late night venue, such as a nightclub that plays live music or a bar that plays recorded music but provides no facilities for dancing. However, that proposition raises the second criticism directed by the Nightclub Respondents at the survey. They say that a fundamental assumption underlying the study is highly doubtful.

150 The Nightclub Respondents draw particular attention to the form of the final survey instrument. They assert that what was postulated were unrealistic choice sets, in which there were only two types of venues to attend, being a nightclub playing recorded music that the respondent likes listening or dancing to, with or without a DJ, and a bar at which no music is being played. The survey essentially involved a comparison between nightclubs with a dance floor playing recorded music and bars where no music is played. The assumption is that, with the exception of the recorded music, those venues share the same attributes.

151 Thus, the Nightclub Respondents say, because of differences between bars and nightclubs, when comparing a bar with no music and a nightclub with a dance floor and

recorded music, more than one attribute has changed. Even assuming that all other aspects of the survey methodology and the analysis of its results are robust, the estimate derived cannot be said to value the music alone. Rather, so the Nightclub Respondents say, the derived estimate measures the difference in the willingness to pay as between two different types of venue, one being a venue that plays music for the purpose of dancing and does not serve food and the other being a venue that does not play music for the purpose of dancing and may serve food.

152 The criticism was developed into an assertion that the notion of a bar without music would tend to suggest a public bar where patrons stand or sit to drink and look to pool tables, poker machines, betting facilities and televised sport for entertainment. They say that, in fact, upmarket bars are more likely to feature live or recorded music such that the notion of a bar without music would be perceived as having more in common with the public bar of a suburban hotel than a lounge bar in an upmarket city hotel. Accordingly, they say, a bar without music is not a real proxy for a nightclub without music.

153 The Nightclub Respondents directed three further criticisms at the manner of conducting the survey:

- The method by which the sample was selected;
- The effective size of the sample and the consequent potential for sampling error;
- Possible inaccuracy in the responses by reason of the time required to complete the survey instrument, having regard to its complexity.

154 The survey respondents were selected by use of a pre-existing register of people who are prepared to respond to various surveys. The survey was then conducted on-line, by means of the internet. It was suggested that that method would exclude a particular group of the population of those who might attend nightclubs or dance parties, being those without access to the internet.

155 However, the evidence indicates that the internet is increasingly being used for surveys. Further, widespread internet use amongst the target population, of those aged from 18 to 35 years, indicates that there is unlikely to have been any significant bias in the results by reason of the sample selection.

156 For a sample from a population of given variability, the larger the sample, the lower the sampling error is likely to be. The impact of sampling error can be reduced by structuring the sample to ensure appropriate representation of known population characteristics relevant to the survey. That involves imposing quota controls requiring specific numbers of respondents with specified characteristics. However, the sample in the survey was constrained to include equal male and female respondents and to be representative in terms of geographic spread, although some lack of prior information about the group that was the target of the survey limited the use of quota control. The criticism is not justified.

157 The survey instrument was also criticised as being long and complex, giving rise to concern that respondents may have had difficulty in giving thoughtful answers, having regard to the hypothetical and contrived scenarios presented in the survey instrument. However, assuming that a respondent who responded to the survey did so in good faith, there is no reason, on the face of the survey instrument, to conclude that ordinary and reasonable people would have any difficulty in following the instrument. Wherever defined terms were used in the critical eight questions concerning the choice sets, a pop up was available to enable the respondent to remind himself or herself of the defined terms. While the survey instrument is not entirely straightforward, there is no basis for concluding that accurate responses were not given by reason of its complexity or lack of intelligibility.

COMPETITION ISSUES IN RELATION TO THE VALIDITY OF THE SURVEY

158 The Society's approach is that the value of the recorded music to the operator of a nightclub or dance party is the basis upon which the licence fee should be determined. However, such operators have a disincentive to reveal such information, given that it will likely mean an increase in the fee payable. In order to ascertain such information, or at least arrive at an estimate of it, the Allen Consulting survey was directed to establish the willingness to pay of patrons at such venues, on the assumption that the value placed by patrons on the recorded music played at the venues is a good proxy for the value that the operators place on it, because the willingness to pay of patrons is a primary determinant of the revenue that the operators can expect to derive.

159 The willingness to pay of patrons indicates the maximum that they would pay, rather than forego the experience of attendance at nightclubs or dance parties. The willingness to

pay will vary between individuals for a variety of reasons, including tastes or preferences. The Society accepts that the estimated willingness to pay may not be completely accurate and that some discounting would be appropriate.

160 The Nightclub Respondents accept that the willingness to pay of patrons is a proxy for the willingness to pay of operators. However, they say that that is the average maximum willingness to pay and that the valuation of some patrons would be higher or lower. Nevertheless, if the survey is reasonably representative and accurate, the willingness to pay can be taken to be representative of demand conditions.

161 In the long run, in a competitive market, the price will approximate the cost of supply, including a reasonable return on the capital employed. That leaves a surplus of the estimated willingness to pay over the price for some consumers, referred to as "*the consumer surplus*".

162 Assuming no change in the underlying demand conditions, an increase in the licence fee will result in a higher price being paid by consumers who acquire those services, namely, the patrons of nightclubs and dance parties. This may result in a smaller quantity of nightclub and dance party services being acquired. Consequently, whether, and to what extent, attendance prices increase will depend upon the price elasticity of demand for the services.

163 Within the nightclub industry, one nightclub may be a close substitute for another. If so, the demand for attendance of one particular nightclub would be likely to be relatively highly price elastic. The same can be said for dance parties. Nevertheless, the Nightclub Respondents draw attention to the availability and closeness of substitutes for nightclub services, both functionally and economically. That is to say, they say that other forms of late night entertainment are close substitutes for nightclubs. However, there was no specific evidence directed to the question of elasticity, except in terms of competition between such venues.

164 If demand for nightclub and dance party venues is relatively inelastic, then most of the additional cost resulting from a licence fee increase would be passed on to patrons. On the other hand, if demand is relatively elastic, part of the additional licence fee would need to be absorbed by the operators. That may have the consequence that some operators will cease

operating, which is part of the normal adjustment that occurs in competitive markets. In negotiating a licence fee, the Society may trade off the loss of revenue that they will receive to the extent that higher licence fees mean lower attendance against the increase in revenue from the increase in the licence fee. The Society, therefore, could find it worth while to impose a smaller increase in licence fees.

165 If the demand for attendance at nightclubs is relatively inelastic, the entire amount of estimate of willingness to pay of patrons may be extracted and then divided between the relevant parties. If the only cost for a nightclub operator in supplying recorded music is the licence fee, then the willingness to pay may be equally divided between relevant parties. However, if that is not the case, other costs of the operator should be taken into account in determining the division.

166 In the absence of specific evidence directed to the question of the substitutability of other late night entertainment facilities for nightclubs, the Tribunal must make a judgment on that question. As a matter of commonsense, there must be a degree of elasticity in the sense that numbers of patrons of nightclubs would choose to go to other entertainment if there was a significant increase in the entry charge for nightclubs. On the other hand, to the extent that patrons seek a facility for dancing to music, there will be a higher degree of elasticity between nightclubs providing dancing facilities with recorded music and nightclubs providing dancing facilities with live music.

167 Thus, nightclubs providing dancing to live music will be readily substitutable for nightclubs providing dancing to recorded music. However, there was simply no quantitative evidence concerning the extent of such substitutability. While much was said about the competitiveness of live music venues, and there was evidence as to the number of venues that have been granted nightclub licences by the Society, there was no evidence concerning the numbers of nightclubs providing live music or the extent to which it was featured during the evening. Assuming that a valid figure for patrons' willingness to pay for recorded music can be deduced from the survey evidence, it should be discounted for, amongst other things, the possible effect of competition from nightclubs providing live music. The extent of the discount must be a matter of somewhat ill-informed judgment on the part of the Tribunal.

THE ALTERNATIVE ASSESSMENT OF WILLINGNESS TO PAY

168 The Society also relied on an independent review of the Allen Consulting survey. That review was carried out by Professor David Hensher, who is a world renowned expert in choice modelling with extensive publications in the area. He is the co-author of the leading current text in the area and has been working in the field of choice modelling since the 1970s. He has had direct experience and involvement in over 100 choice modelling studies carried out in Australia, New Zealand, the United States, the United Kingdom, Sweden and the Netherlands.

169 Professor Hensher was asked to give particular attention to the criticism as to the way in which the Allen Consulting survey measured music as an attribute of nightclubs. Professor Hensher accepted that the criticism involved a reasonable point. He addressed the criticism by conducting a further analysis in order to derive a sum for the willingness to pay for music in nightclubs without using any of the data from the choice sets of the survey relating to bars. His intention was to eliminate any confounding effects resulting from the comparison of nightclubs with bars, namely, factors that might relate to features of nightclubs other than the recorded music.

170 Professor Hensher identified what he described as “*a greater amount of rich information*” relating solely to nightclubs, without the bar comparator, than was analysed by Allen Consulting. That information enabled Professor Hensher to revisit the model outputs and to derive an alternative measure of willingness to pay for recorded music. The alternative measure of the value of recorded music related specifically to the recognised practice of trading off the attributes that define the nightclub alternatives. Such attributes are either observed or unobserved. Observed attributes, being drink prices, décor and the other attributes identified in the survey, are specifically dealt with. Unobserved attributes are not specifically or individually identified from the model, but are present in the distribution of unobserved effects, as captured, on average, through what Professor Hensher described as a **nightclub specific constant**.

171 In order to infer a willingness to pay for music using the nightclub component of the model alone, without the bar component, Professor Hensher made two assumptions as follows:

- (a) the duration of time that a nightclub is open is a significant proxy for duration of music; he considered that assumption to be reasonable if the music is played for virtually all the time that the nightclub is open; and
- (b) music is the major attribute not already accounted for that varies systematically with duration, namely, closing times; he considered that assumption to be appropriate because, while the other unobserved attributes of a nightclub may vary in terms of marginal utility by hours opened, they are likely to be less relevant than music in terms of unobserved effects, because they are intermittently, rather than perpetually, occurring.

172 Having used the data to derive the “*nightclub specific constant*”, as described above, the choice model of the survey enabled Professor Hensher to identify the value of the entire unobserved set of attributes through that nightclub specific constant. After accounting for all of the specific observed attributes, all of the other influences that affect willingness to pay are represented by the nightclub specific constant.

173 After excluding data relating to bars, the average willingness to pay for all of the unobserved attributes for attending a nightclub was calculated at \$11.82, which Professor Hensher says was the nightclub specific constant. That sum represented the amount that nightclub patrons are willing to pay for all of the other attributes of the nightclub that are not already accounted for in the observed attributes. Thus, attributes such as drink prices, décor and the others identified in the survey were excluded.

174 In order to identify the likely contribution of music to the value of \$11.82, it is necessary to find a way to separate the value of the recorded music from the other unobserved attributes. This is due to the fact that the value of recorded music is not an individually measured attribute in the survey, rather, that value is an element of the nightclub specific constant of \$11.82.

175 On the basis of the first assumption made by Professor Hensher, music is present throughout the entire period that the nightclub is open. Whether or not a patron is dancing or just listening or even not listening, there is a passive and active role of music at all times

while the nightclub is open. Professor Hensher considered that music would be the predominant unobserved attribute that is continuously present in that sense.

176 Accordingly, the duration for which the nightclub is open is a suitable proxy for the exposure to music. That is to say, systematic variations in the hours of opening are likely to be highly correlated with systematic variations in the exposure to music. Other unobserved attributes, such as meeting with new people or talking with friends, are not continuously present throughout the period in the way that music is. Such other unobserved attributes are likely to be much less correlated with duration than the music. Therefore, in Professor Hensher's view, it is appropriate to derive a value for recorded music by using the duration attributes of a nightclub as proxies for the duration of music.

177 By use of a re-estimated model, of which there was no criticism by the Nightclub Respondents, Professor Hensher established the extent to which the marginal utility of closing hours differed between nightclubs and bars. Professor Hensher had confidence in the existing parameter estimates from 3 am and 5 am closing times. He then calculated an estimate of willingness to pay from the ratio of the marginal utility of closing time to the marginal utility of the cover charge. That produced a willingness to pay for music of \$5.16 for a four hour period from 1 am to 5 am and an amount of \$4.20 for a two hour period from 1 am to 3 am.

178 Professor Hensher then considered the values derived from that analysis in the context of the nightclub constant of \$11.82. Thus, if a nightclub is open for 4 hours, from 1 am to 5 am, then the value of that music to its customers is \$5.16. \$5.16 is a substantial component of \$11.82. If a nightclub is open for a longer period of six hours, say from 11 pm to 5 am, Professor Hensher estimated that the \$5.16 amount would increase to at least \$5.50. As the duration for which a nightclub was open increased beyond six hours, so too would that value increase, but at a diminishing amount for each additional hour of duration.

179 Professor Hensher considered that that approach resulted in the derivation of a value for recorded music in nightclubs and eliminated any possible confoundment between the sources of utility attributed to bars and those attributed to nightclubs, whether observed or unobserved. Accordingly, Professor Hensher concluded that the figure of \$6.97 estimated by Allen Consulting is not unacceptably out of line or too high, although it is on the higher side.

He considered that the sum of \$6.97 was not inconsistent with the value of music that he derived using the alternative approach, which eliminated any possible confounding factors associated with the bar comparator.

180 However, Professor Hensher expressed the reservation that none of the figures should be treated as fixed or absolute figures. They are all derived estimates and it is not possible to provide a single figure that represents an exact value for recorded music in a nightclub. Nevertheless, Professor Hensher was confident, from the survey and the data that he reviewed, that the real value lies in the region of those sums.

181 The Nightclub Respondents' response to Professor Hensher was to reject, as not being reasonable, his assumption that music is the major attribute not already accounted for that varies systematically with duration. They assert that there are other important attributes of a nightclub experience that are perpetually occurring, apart from the music, such as the availability of alcohol and the company of friends, both of which are major attributes of the nightclub experience.

182 Professor Hensher accepted in cross-examination that a nightclub provides an opportunity for socialisation with friends over a drink. He accepted that it may well be that there is a proxy for drinks as well as for music, although he did not focus on that. However, he reiterated that a nightclub is open for a range of reasons, of which music is a very important one. He considered that it was a reasonable assumption that people go to nightclubs to enjoy the music, although he also accepted that people also go to nightclubs for the purpose of enjoying a drink and enjoying the companionship of their friends.

183 However, Professor Hensher did not ignore the availability of alcohol and the opportunity to meet and socialise with friends, because they are attributes that are implicit in his overall calculation of the residual valuation of \$11.82. In any event, Professor Hensher expressed the view that people would not be buying and drinking alcohol throughout the entire night but that they would in fact be accessing or exposed to music all the time.

184 Professor Hensher did not assume that music was the only attribute not already accounted for, but that it was the **major** attribute. The evidence indicated that the decibel level of music in nightclubs is significantly high. It is such as not to be conducive to ordinary

conversation and socialising. People seeking the opportunity to socialise with friends and to consume alcohol, and nothing more, would be unlikely to choose a nightclub to do so. Professor Hensher's assumption, that the music is a major attribute of a nightclub, is eminently reasonable. His conclusions, therefore, give some support to the results of the Allen Consulting survey, in so far as that survey is criticised for the adoption of a bar without music as a comparator with nightclubs with dance floor and recorded music. However, for the reasons indicated below, there must be some discounting of the results of the survey.

POSSIBLE COMPARABLE RATES

185 The Nightclub Respondents draw attention to the fact that the Society has not brought forward any evidence concerning possible comparable rates in other countries, such as the United Kingdom. They say that, when seeking to justify increases in 1995, the Society relied upon various comparisons of rates, including in particular, the rate charged in the United Kingdom. There is nothing, they say, to suggest that the existing rate charged by the Society is significantly out of step with overseas rates, including those charged in the United Kingdom. Nor, however, is there any evidence to show that rates charged in the United Kingdom or anywhere else in the world are comparable. Neither party has sought to adduce evidence as to those matters.

186 On 10 December 1992, the Tribunal confirmed a scheme propounded by APRA, another collecting society under the Copyright Act. APRA is in a similar position to the Society, except that it represents composers and performers of recorded music, rather than makers of the recordings. Since 1992, the royalty under the APRA Scheme has been the subject of annual increases in accordance with the Consumer Price Index.

187 The Society responds that there is no justification for making an assumption that the licence fee payable under the APRA Scheme is a market rate. There is nothing to suggest that APRA ever conducted any economic based assessment in the way that the Society has attempted to do with the Allen Consulting survey.

188 Finally, the Nightclub Respondents rely upon the past history of the licence fees payable to the Society. They say that those rates must be taken to indicate the result of market forces. The Society responds, once again, by pointing out that at no time has there

been detailed economic and other evidence available to the Society such as is now advanced before the Tribunal. The Society accepts that the 1995 increase was based on the rate then being charged by APRA and a consideration of the corresponding rate in the United Kingdom. However, in the absence of evidence to demonstrate that either of those rates is based on materials such as is now available to the Tribunal, they should be given little, if any, weight.

189 In short, the Society invites the Tribunal to consider the question of the appropriate licence fee completely afresh. The Tribunal is invited to assess the reasonableness of the proposed licence fee on the basis of the economic and industry evidence advanced on behalf of the Society and unconstrained by historical rates that have no regard to such matters. As will be apparent, the Tribunal has approached its task along those lines.

QUANTUM OF THE INCREASE

190 The Nightclub Respondents draw particular attention to the quantum of the increase in licence fee for nightclub operators if the Society's proposed scheme were approved. The Society's proposed licence fee of \$2.32 per person per event for nightclubs represents an increase of some 30 times the present licence fee of 7.48 cents per person per event.

191 There is some limited evidence of some of the financial consequences of the introduction of the proposed increase, so far as the six Nightclub Respondents are concerned. Thus, the fee payable in respect of Home nightclub would be in excess of \$480,000 per annum. That sum would exceed the net profit derived by Home for the financial year ended 30 June 2005. The proprietor of Home asserts that it would have no option but to transform the present venue into a big hotel with background music.

192 The proposed fee that would be payable in respect of Church nightclub in Perth, would exceed the current total gross revenue of that venue on a Friday night, of between \$300 and \$400. The Church has operated at a loss on Friday nights for the past year because of the present current running costs. The proprietor asserts that, if the proposed new licence fee were introduced, the Church would immediately close on Fridays.

193 Nothing was said by the Nightclub Respondents concerning the specific effect of the proposed increase in relation to the operation of the Justice and Paramount nightclubs, the other two Western Australian nightclubs operated by entities associated with Mr Graham Hardie. No evidence was led by the Nightclub Respondents in relation to the specific effect of the proposed increase on the financial operation of the nightclubs operated by the entities associated with Mr Tom McGuire in Queensland.

194 Further, no evidence was led concerning the financial effect of the proposed licence fee on Revesby Workers' Club. However, the assertion was made that, if the proposed scheme were implemented, the manager would advocate for the adoption of an atmospheric lounge or a low key acoustic live act rather than the nightclub operation. Even now, the operator of the nightclub at Revesby Workers' Club is contemplating turning the nightclub into an atmospheric lounge with background music, so as to avoid the anti-social element that comes with running a nightclub.

195 The adoption of the proposed scheme would increase the costs incurred by Scone Golf Club in running its nightclub by about \$37,000 per annum. It is asserted that it would not be able to increase golf membership fees in order to meet that additional cost nor to increase social membership fees. As a last option, it would be necessary to increase the cover charge from \$7 to \$14. It is asserted that the majority of patrons would either avoid the fee by coming early or would not come at all. The operator asserts that if the proposed scheme were adopted, the Scone Golf Club would most likely cease conducting dance nights on Friday nights and focus on increasing revenue from poker machines. Similarly, the proprietor of the Royal Hotel, a competitor of Scone Golf Club in relation to its nightclub operation, would cease to conduct dance nights on Friday nights if the scheme were adopted.

196 The Nightclub Respondents, except for Explorer Cruise Lines Pty Ltd and CHP Charters Pty Ltd, are representative organisations. Their members would include most, if not all of the licensees who presently have nightclub licenses from the Society. Nevertheless, as indicated above, no attempt was made by the Nightclub Respondents to adduce industry evidence concerning any nightclub operators, other than the eight nightclubs referred to above. While assertions were made in submissions on behalf of the Nightclub Respondents that the nightclubs, about which evidence was given, should be taken to be typical, no

evidence was adduced to support those assertions. In circumstances where it had been open to the Nightclub Respondents, who are representative organisations, to adduce evidence as to the financial operations of nightclubs of varying sorts throughout Australia, no inference should be drawn in their favour from the very sparse and limited material that is before the Tribunal.

197 The Nightclub Respondents criticised the industry evidence adduced by the Society. Thus, for example, the Nightclub Respondents observed that many regional areas did not feature in the sample of venues surveyed by the Quantum Research survey: there is no representative of a small country town hotel, Gosford being the smallest of the locations sampled. The Nightclub Respondents say that the Quantum Research suggestion that venue proprietors are typically taking an entry fee of about \$20 is not founded in fact.

198 Further, the Nightclub Respondents criticised the Quantum Research Survey as providing no insight into the ability of venues to achieve capacity attendance. However, the Society's evidence, in the form of the Quantum Research survey, is the only material before the Tribunal. It is a matter of pure speculation as to the extent to which nightclubs of various sizes, genres and at various locations throughout Australia achieve their capacity at any time, either at a given point of time or over the period when the nightclub is open.

199 It is true that the proposed licence fee is very substantially higher than that presently charged by the Society. However, in the absence of assistance from the Nightclub Respondents, the economic and financial consequences of the increase for nightclubs as a whole throughout Australia are a matter of pure speculation. If any inference is to be drawn from the state of the evidence, it is that evidence from the industry as a whole would not have supported the assertions by the Nightclub Respondents that the proposed licence fee would force large numbers of nightclubs to close.

200 The assertion, of course, is not to the point. If it be the fact that the right to play recorded music has the value claimed by the Society, the fact that many nightclubs presently operating cannot afford to pay for that privilege is not a reason for them to be subsidised by those whom the Society represents. Ultimately, market forces will operate. That is to say, one of the consequences of the introduction of the proposed licence fee may be to reduce significantly the number of nightclub operators who are prepared to pay the fee for the

privilege of playing recorded music at their venues. Inefficient operators who are required to pay a market price for all of the services they require in order to conduct their businesses may be forced out of business. That is the nature of a competitive market.

201 Ultimately, of course, the object of the Tribunal in approving the proposed scheme is to fix upon a licence fee that can be regarded, as nearly as it is possible to estimate, on the basis of the evidence before the Tribunal, as the fair market price for the privilege of playing the recorded music in respect of which the Society is able to grant a licence. If it be the fact that the market rate is 30 times the rate that has hitherto been charged by the Society, that is no reason why it should not now charge that rate. Having regard to the significance of the increase, the Society, as indicated above, is prepared to phase in the increase over a period of five years. All in all, the evidence before the Tribunal does not enable the Tribunal to base its decision to any significant extent on the fact that the proposed licence fee might be very much greater than the current licence fee.

RELEVANCE OF OTHER CHARGES

202 The Society relied on the findings of the Quantum Research survey concerning three sources of revenue for nightclub operators, being:

- entry charges or cover charges;
- cloakroom charges; and
- liquor prices.

203 Reference has already been made to the criticism by the Nightclub Respondents of the conclusion advanced from the Quantum Research survey. That survey, however, is the only evidence of the industry in general that is available to the Tribunal. The conclusion advanced is that cover charges are a significant source of revenue for nightclub operators. Over half the venues imposed cover charges, including 50% of the nightclubs in hotels and 21% of the nightclubs in registered clubs. The median cover charge was \$10.66 with 9% of venues charging over \$20 and 40% of venues charging less than \$10. The average cover charge increased to \$12.08 where a featured DJ was scheduled to play, or to \$10.90 for more than one DJ. Venues in regional areas were more likely to impose a cover charge than those in metropolitan areas.

204 While the Nightclub Respondents asserted that cover charges are often not enforced, the Quantum Research survey confirmed that, for the venues visited, where cover charges did apply, they were enforced at the door. At 89% of stand alone nightclubs, over 80% of patrons paid the cover charge to enter the venue.

205 A third of the venues had a cloakroom and 64% of them charged between \$1 and \$5 per item to use it. There was no evidence from the Nightclub Respondents, within whose knowledge the matter lay exclusively, as to the cost of providing cloakroom services; nor was there any evidence from the nightclub operators, within whose exclusive knowledge the information lay, as to the extent to which cloakroom services are utilised by patrons. The only evidence concerning profit from the provision of cloakroom services was that of Mr Hardie, who suggested that the provision of such services does not yield any profit. However, Mr Hardie's evidence cannot be taken as indicative of the nightclub industry as a whole.

206 In any event, the significance attached to cloakroom charges by the Society is not that it generates a profit but that it indicates that patrons are prepared to pay between \$1 and \$5 per item for cloakroom services. Patrons may, therefore, be prepared to pay, in order to enjoy the recorded music that is the subject of the Society's licence, a sum at least equal to the price they pay for the convenience of leaving items at the cloakroom. It is a useful comparator for what patrons of nightclubs might be prepared to pay for the nightclub experience, an experience that would not be available to them without the playing of recorded music pursuant to the Society's licence.

207 The Nightclub Respondents criticised the Quantum Research survey's conclusions concerning inflated drink prices. They say that the Society's evidence was gathered somewhat haphazardly from a handful of hotels and clubs in major capital cities and that there is no indication as to when it was gathered, what type of bars were visited, the location of those bars or the applicability of those bars to a proper comparative exercise. The Nightclub Respondents put forward their own evidence from eight nightclubs as providing a useful comparison of the prices which apply in multifunction venues.

208 Once again, however, the observation can be made that the evidence of the Nightclub Respondents concerning eight nightclubs cannot be accepted as typical of the industry

throughout Australia. The evidence of the Quantum Research survey gives rise to an inference that liquor prices are regularly inflated at nightclub venues by amounts equivalent to, or in excess of, the amount of the licence fee now propounded by the Society. That inference is not rebutted by any of the evidence adduced on behalf of the Nightclub Respondents. The fact that nightclub patrons are prepared to pay inflated prices for each drink consumed at a nightclub venue indicates a preparedness to pay a significant sum in order to enjoy recorded music as part of the nightclub experience.

209 The Quantum Research survey made no attempt to indicate any correlation between cover charges, cloakroom charges and liquor prices. There are various ways in which an operator could structure pricing. For example, it is possible that nightclubs that charge a significant cover charge may offer drinks at non inflated prices. Similarly, it may be that cloak room charges are not made by nightclubs that charge inflated prices for drinks or entry charges. In the circumstances, the Tribunal makes no assumptions as to any possible correlation.

210 Even if the whole of the licence fee propounded by the Society were to be charged, it would be something in the order of 20% of the median charge for entry, assuming that the median charge were paid by a number of patrons equal to the capacity of the venue. Of course, on a busy night, the total number of patrons who enter a venue over the period that it is open could be far in excess of the capacity. Using cloak room charges and liquor prices as comparators is subject to the same deficiency as using entry charges, in the sense that a comparison is valid only if it is assumed that the number of patrons who use the cloak room services and buy drinks on a particular day or night will be close to the capacity of the venue.

JUDICIAL ESTIMATE

211 The Society's case at its highest will result in a licence fee of \$2.32 per person, based on the capacity of the venue, per day or night of operation of the venue. However, that figure must be discounted by reason of the following factors that have been described above:

- non-protected recorded music;
- competition of other late night venues providing live or recorded music; and
- actual patronage on the day or night being below or above capacity.

In addition, the appropriateness of a three way division between nightclub operator, APRA and the Society requires consideration.

212 One begins with the estimated willingness to pay of patrons of \$6.97. That should be discounted to take account of non protected music. The evidence does not enable the Tribunal to form any firm views concerning the significance of non protected music. On the one hand, it is conceivable that, if non protected music were not played at nightclubs, there would be a significant drop in attendance: alternatively, it may make no difference. On the other hand, it is also conceivable that if only non protected music were played at nightclubs, there would be a significant drop in attendance: alternatively, there may be no difference. In the absence of any evidence as to those matters, the Tribunal considers that some discount is appropriate. Having regard to the evidence as to the proportion of non protected music that is played at nightclubs, as indicated above, an appropriate discount would be 20%.

213 The figure should be further discounted to take account of competition from other late night venues that might take patronage away from nightclubs in the event of an increase in, or imposition of, a cover charge or entry fee. Such a discount should also take into account difficulties of the choice modelling survey in endeavouring to estimate the willingness of patrons to pay for recorded music and in establishing an appropriate late night venue comparator. In all of the circumstances, the Tribunal considers that an appropriate discount to take account of those matters would be 20%.

214 The question of adjustment to take account of disparity between the capacity and attendance on any day or night has its own difficulty. The proposed scheme can operate to the detriment, or for the benefit, of the operator of a nightclub. Thus, on a particular day, the total number of patrons may well exceed the capacity because of the continual throughput of patrons. On other days, of course, the total number of patrons may not exceed the capacity. The Tribunal has no way of estimating which of those two possibilities is more likely. In all of the circumstances, the Tribunal considers that no adjustment is required.

215 Finally, the division of the estimate of willingness to pay should be adjusted to reflect the fact that the entrepreneurial risk in relation to the operation of a nightclub is undertaken by the operator and not by the Society or by APRA. There is no relevant marginal cost involved for either the Society or APRA in granting a licence for a nightclub operator to play

recorded music at a venue. On the other hand, the nightclub operator runs the risk of substantial losses having regard to the expenses that must be incurred in order to offer a nightclub experience, expenses that will be sunk, whether or not patrons attend and irrespective of how many patrons attend. A more appropriate division, therefore, would be 50% to the operator and 25% to each of APRA and the Society.

216 Thus, discounting \$6.97 by 40%, being \$2.78, gives a result of \$4.19; 25% of \$4.19 is \$1.05. Some comfort can be gained from the fact that the Society's original proposal of \$1 is very close to the result of \$1.05. The figure of \$1.05 is a reasonable remuneration to the members of the Society for the use of the protected recorded music at nightclubs.

217 The exercise that results in that figure is, of course, to a considerable extent, arbitrary and artificial. Nevertheless, it has a rational basis for arriving at what has been described as a judicial estimate of what a reasonable but not too anxious licensor would require to be paid and what a reasonable but not too anxious nightclub operator would be prepared to pay for the right to play recorded music at nightclub venues.

218 The value of music at a dance party was taken to be \$15.37. That figure must be reduced by two of the factors described above. Thus, it should be discounted by 20% to take account of non-protected music. That gives a figure of \$12.30. For reasons indicated above, the operator of the dance party, who assumes the entrepreneurial risk, should receive 50% of that figure and APRA and the Society should receive 25% each. That results in a licence fee for dance parties of \$3.07 per person per event.

APPLICATION BY MARDI GRAS

219 Section 157(2) of the Copyright Act relevantly provides that a person who claims, in a case to which a licence scheme applies, that he or she requires a licence but that the grant of a licence in accordance with the scheme would be subject to the payment of charges that are not reasonable in the circumstances of the case, may apply to the Tribunal. Under s 157(6), where such an application is made and the Tribunal is satisfied that the claim of the applicant is well founded, the Tribunal must make an order specifying the charges, if any, that the Tribunal considers reasonable in the circumstances in relation to that applicant.

220 Mardi Gras has applied under s 157(2) for a determination that the charges that might otherwise be payable by it under the licence scheme for which approval is sought by the Society are not reasonable. The application is in the nature of a protective claim against the possibility that the Tribunal will confirm the licence scheme proposed by the Society, or confirm it with variations that would still make it applicable to events conducted by Mardi Gras. If the Tribunal does not approve the scheme propounded by the Society, Mardi Gras' application would fall away. It did not dispute the proposition that it is obliged to obtain a licence for the use of sound recordings at the various events that it conducts. Mardi Gras has recognised that obligation in the past by making payments to the Society in accordance with the applicable tariff in force in the past.

221 Mardi Gras is a not for profit community association, which was incorporated in December 2002 following the collapse of Sydney Gay and Lesbian Mardi Gras Limited in August 2002. Mardi Gras oversees the delivery of a series of events in Sydney that include the Gay and Lesbian Mardi Gras Parade in February each year. Between 6,000 and 8,000 people participate in the Parade, which is viewed by approximately 300,000 spectators. The parade is followed immediately by the Mardi Gras Party (the Party), which attracts 15,000 to 17,000 people. Recorded music is played at the Party, largely by DJs, although there are also live performers. The Party is Mardi Gras' most significant fund raising activity and funds raised from it are used to fund all other events conducted by Mardi Gras, as well as meeting the day to day expenses of Mardi Gras. It is thus an opportunity to raise social awareness of issues pertaining to the gay, lesbian, transgender and bisexual community, as well as the wider community.

222 Mardi Gras also organises the Sleaze Ball, a dance party held in Sydney in the spring. It is attended by approximately 6,000 to 9,000 people and is also a fund raising event for Mardi Gras.

223 Mardi Gras charges an entry fee for attendance at both the Party and the Sleaze Ball. In 2005, the ticket prices for the Party were between \$99 and \$125. Approximately 15,500 tickets were sold. In 2006, the prices ranged from \$99 for first release tickets in December 2005 to \$170 for what were described as "*Platinum Tickets*". Overall, approximately 16,000 tickets were sold. Ticket prices were set at what was regarded as commercial rates. To that

end, the price of the Platinum Tickets was fixed with a view to subsidising the \$99 tickets, the price of which was below a figure that covered the cost of the event.

224 The price for the Sleaze Ball tickets in 2004 ranged from \$89 to \$124 and in 2005 from \$99 to \$135. Ticket sales in 2004 were approximately 9,500 and in 2005 6,500.

225 The revenue from ticket sales in the years ended 31 March 2005 and 31 March 2006 was respectively \$2,302,760 and \$2,154,043. That represented some 75% of Mardi Gras' income for those years.

226 The Parade is subsidised to the extent that some public services, such as police and ambulance attendance, are provided free as part of the Parade's State Government "*Hallmark Event*" status. Under sponsorship arrangements with the Sydney City Council, street cleaning costs were also waived. Some entertainers at Mardi Gras events are paid at full rates, while others provide their services free or at a discount. Mardi Gras paid market rents for the use of the premises in which the Party and the Sleaze Ball were held and for the cost of utilities such as power, telephone, etc that were required for the events.

227 Mardi Gras says that it would not be reasonable for it to pay the licence fee under the Society's proposed licence scheme because of its status as a not for profit community services organisation. Mardi Gras provides many benefits to the community, including community development, promotion of health and well being, education and dissemination of information relating to tolerance and support of fund raising for charitable and not for profit organisations. It claims that the nature of its activities distinguish it from other organisations that would be obliged to obtain a licence under the Society's proposed scheme, because such other organisations are all commercial enterprises. Mardi Gras pointed specifically to the fact that it does not receive any profit from the sale of liquor at its events, unlike commercial dance parties, where that is a major source of revenue.

228 Clearly enough, the Sleaze Ball and the Party are dance parties within the meaning of that term as defined in the Society's proposed scheme. Mardi Gras does not contend to the contrary and it has always obtained a licence from the Society for those functions in the past. Of course, if those events are not dance parties, they will not be covered by the proposed scheme.

229 There is no reason why Mardi Gras events should be viewed differently from commercially sponsored dance parties. The purpose of Mardi Gras is to make as much money from the Party and the Sleaze Ball as it can, having regard to the circumstances of the patrons who are likely to attend. That, of course, is the object of a commercial sponsor of a dance party. Ticket prices are fixed by reference to what the operator considers prospective patrons can and will pay. The fact that Mardi Gras engages in a cross subsidy between its more affluent and its less well off patrons does not mean that the price ultimately charged is not driven by an assessment of what the market will bear.

230 The arrangements that Mardi Gras has in place in relation to the sale of liquor do not affect that conclusion. There is no reason why a commercial sponsor of dance parties would not find it just as convenient to adopt similar arrangements. That is no reason to take such an operator outside the proposed scheme.

231 The Party and Sleaze Ball are significant revenue generating events for the purposes of Mardi Gras. They subsidise its other activities. To that extent, they function in the same way as a dance party staged by a commercial operator. The only difference is the use that is made of the revenue that is generated.

232 Clearly, much of Mardi Gras's activities are intended to serve a community purpose. However, that does not mean that the Society, and its members, must also be compelled to support those purposes. It is not for copyright owners, or any other private group in the community, to subsidise public instrumentalities or charities. Such instrumentalities and charities pay for other services and commodities used by them at commercial prices. They are not entitled to the benefit of a licence from the Society without paying a commercial price for the grant of it. It is not the role of copyright owners to subsidise the activities of copyright users, even though the use being made of the copyright works may be to serve a public or community purpose (see, for example, *Copyright Agency Limited v Department of Education* 4 IPR 5 at 33, *Reference by APRA Re ABC* 5 IPR 449 at 480). Whether the Society affords favourable treatment to an organisation such as Mardi Gras because of its community based objectives must be a matter entirely for the Society. It should not be compelled to provide favourable treatment. It would not be unreasonable for Mardi Gras to pay whatever is found to be the appropriate licence fee in respect of dance parties.

233 In its submissions made after the end of the hearing, Mardi Gras referred specifically to the Society's submission that both Mardi Gras' Party and Mardi Gras' Sleaze Ball are conducted on a commercial basis and with the objective of maximising return to Mardi Gras and that what Mardi Gras subsequently does with the funds that it raises from such activities is irrelevant to the exercise being undertaken by the Tribunal. Mardi Gras submitted that the Society's submission that motive was irrelevant to the function of the Tribunal was either wrong or must be treated as withdrawn as a consequence of the Society's change in the definition of "*dance or dance party*" referred to earlier.

234 Ultimately, Mardi Gras' submission appears to be that the change in definition supports Mardi Gras' application under s 157. Mardi Gras submitted that the change in definition indicated that the Society accepts that the use of music by certain bodies is different and that those bodies are entitled to or deserve an exemption from the full cost of the use of music. Mardi Gras says that that is a recognition that the cost of music under the proposed scheme:

...has been deliberately calculated by a public expectation associated with commercial operations.

Thus, Mardi Gras contends that the amendment involves a recognition of the relevance of motive of the operation of a function and that there should be an exemption for all not for profit community associations.

235 However, the functions conducted by Mardi Gras have nothing in common with events conducted by a church or school or other like body, other than music and dancing. Events conducted by a church, school or other like body are likely to be casual, ad hoc, small and local events, quite unlike the professionally organised commercial events conducted by Mardi Gras, which are extensively marketed and to which the general public is openly invited. The Tribunal does not consider that the change in definition has any bearing on Mardi Gras' application under s 157.

CONCLUSION

236 The proposed scheme should be confirmed, subject to the adjustment of the licence fee and amendment of definitions as indicated above. The application by Mardi Gras should be refused. The Society should bring in short minutes to give effect to these conclusions.

I certify that the preceding two hundred and thirty-six (236) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Tribunal.

Associate:

Dated: 10 July 2007

Counsel for the Applicant: R Cobden SC with C Dimitriadis and H Bevan

Solicitor for the Applicant: Gilbert + Tobin Lawyers

Counsel for the First, Second, Third, Fourth, Fifth & Seventh Respondents: J V Nicholas SC with D R Sibtain

Solicitor for the First, Second, Third, Fourth, Fifth and Seventh Respondents: Minter Ellison Lawyers

Counsel for the Sixth Respondent: M Seymour

Solicitor for the Sixth Respondent: Surry Partners Lawyers

Dates of Hearing: 13, 14, 15, 16, 19, 20, 21, 22 June and 23, 24 October 2006

Date of Judgment: 10 July 2007

SCHEDULE 1

PPCA STANDARD TERMS AND CONDITIONS FOR LICENCE FOR PUBLIC USE OF PROTECTED SOUND RECORDINGS

TERMS AND CONDITIONS – Licence for public use of protected sound recordings and/or music videos

1. DEFINITIONS

- In this Agreement:
 - **Agreement** means these Terms and Conditions, the Licence Details (including any Special Conditions noted thereon), Schedule 1 and Schedule 2, and any and all other schedules, attachments and/or annexures.
 - **Annual Renewal Date** means the anniversary of the Commencement Date.
 - **Commencement Date** means the date specified as such in the Licence Details.
 - **Copyright Act** means the *Copyright Act 1968* (Cth), as amended from time to time.
 - **Exhibit** means cause a Licensed Music Video, in so far as it consists of visual images, to be seen in public and, in so far as it consists of sounds, to be heard in public, and **Exhibition** has a corresponding meaning.
 - **Licence** means the licence granted to You under clause 2.1 of this Agreement.
 - **Licence Details** means:
 - the form that You completed and provided to PPCA at the time at which You applied for the grant of the Licence, in which You described Your uses of sound recordings and/or music videos, as amended by PPCA to include information relevant to the granting of this Licence in the section of the form marked "PPCA Use Only"; or
 - any similar form that You completed and provided to PPCA on or about an Annual Renewal Date, in which You provided updated details of Your uses of sound recordings and/or music videos; whichever is the most recent.
 - **Licensed Music Video** means a cinematograph film that embodies:
 - a sound recording; or
 - a sound-track that, if made separately from the cinematograph film, would be a sound recording;in which the copyright is owned or controlled by a Licensor listed in Schedule 1, in any form including digital or other electronic machine-readable form.
 - **Licensed Rights** means such of the following rights as are specified in the Licence Details as being granted to You in accordance with this Agreement (as further limited under clause 2.2).
 - the Public Performance Right in the Licensed Sound Recordings;
 - the Music on Hold Right in the Licensed Sound Recordings; and/or
 - the right to Exhibit the Licensed Music Videos.
- **Licensed Sound Recording** means a Protected Sound Recording in which the copyright is owned or controlled by a Licensor listed in Schedule 1, and which has been released on a label listed in Schedule 2, in any form including digital or other electronic machine-readable form.
- **Licensor** means a person who owns or controls the copyright in the Territory in a Protected Sound Recording and/or a Licensed Music Video, and who authorises PPCA to grant Licences in accordance with this Agreement.
- **Music on Hold Right** means the right to transmit Licensed Sound Recordings to callers on hold by means of an analogue or digital service or device (whether now in existence or developed in the future), including without limitation a radio, compact disc player, cassette player, computer hard drive or other audio device, used in connection with a telecommunications system.
- **Personal Information** means information or opinion about an individual from which the identity of the individual is apparent or can reasonably be ascertained.
- **PPCA** means Phonographic Performance Company of Australia Limited (ACN 000 680 704).
- **PPCA Tariff Schedule** means the published schedule of tariff classifications and fees (as amended from time to time) under which PPCA grants licences for the public use of Licensed Sound Recordings and Licensed Music Videos. The applicable version of the PPCA Tariff Schedule at any time can be accessed on the Website, or will be made available on request to PPCA.
- **Public Performance Right** means the right to cause Licensed Sound Recordings to be heard in public.
- **Protected Sound Recording** means a sound recording for which the Copyright Act grants a Public Performance Right and/or a Music on Hold Right.
- **Schedule 1** means the list of Licensors published on the Website, as amended from time to time in accordance with clause 2.10.
- **Schedule 2** means the list of labels owned or controlled by the Licensors listed in Schedule 1, as published on the Website, and as amended from time to time in accordance with clause 2.10.
- **Territory** means Australia.
- **Website** means the PPCA website currently located at www.pcca.com.au and any subsequent website which might replace it.
- **You** means the person or entity holding the Licence granted under this Agreement, as specified in the Licence Details, and Your has a corresponding meaning.

- A word or expression which is not defined in this Agreement, but which is defined in the Copyright Act, has the meaning given to it by that Act.

2. LICENCE

Grant of Licence

- Subject to the terms and conditions of this Agreement, PPCA grants You on and from the Commencement Date a non-exclusive licence of the Licensed Rights in the Territory for an initial period of 12 months (**Initial Period**).
- For the purposes of clause 2.1, and subject to clause 2.3, the Licence is, unless we inform You to the contrary, limited to those uses, premises, events, times, numbers of users, facilities, vehicles, venues and/or equipment described in the Licence Details (**Your Approved Uses**).

Variation of Licence

- If at any time Your use of Licensed Sound Recordings or **Licensed Music Videos** materially changes from Your Approved Uses, You must notify PPCA in writing within 28 days of that change. In addition to that obligation, You must also notify PPCA of any such changes from Your Approved Uses by completing the Licence Details sections of any re-assessment form sent to You by PPCA prior to an Annual Renewal Date. PPCA may by written notice to You increase the amount of Your licence fee, in accordance with the then applicable PPCA Tariff Schedule, to reflect any such changes in Your Approved Uses (**Revised Licence Fee**). The notification to You of the Revised Licence Fee will constitute a debt due and owing by You to PPCA.
- Once You have paid any such Revised Licence Fee, and unless PPCA notifies You to the contrary, the Licence will be **extended** to include any changes notified to PPCA under clause 2.3 on and from the date that You notified PPCA, and for the purposes of clauses 2.2 and 2.3, Your Approved Uses will be deemed on and from that date to include those changes.

Licence Fee

- In consideration of the grant of the Licence for the Initial Period, You must pay PPCA on or before the Commencement Date the licence fee for the Initial Period, as specified in the Licence Details. In consideration of the renewal of the Licence in any subsequent years, You must pay PPCA on or before the Annual Renewal Date the amount of the licence fee for that year, as notified to You by PPCA. PPCA may increase the licence fee payable for any subsequent years in accordance with the PPCA Tariff Schedule that applies on the Annual Renewal Date.
- The amount of any licence fee payable under this Agreement is inclusive of GST.

PPCA Warranty

- PPCA warrants that
 - it will procure that each of the Licensors, as applicable, will at all times keep You harmless and indemnified against all claims, demands, damages, costs, charges and expenses which may be made against You, or which You may suffer or incur at the suit of any third party arising out of any defect in the title of that Licensor in respect of the Licensed Rights, provided that:
 - such claim or demand did not arise out of the exercise of any Licensed Rights,

in respect of which, at the time or times of such exercise, the Licence had been withdrawn pursuant to clauses 2.10, 2.11 or terminated pursuant to clause 3;

- You notify PPCA within 7 days of becoming aware of any such claim or demand being made or threatened; and
- You make no admission of liability and take no action that might prejudice the position of PPCA, the Licensor which purports to either own or control the Licensed Rights (**the Relevant Licensor**) or of any persons owning or having any interest in the Sound Recording(s) concerned, without the prior written consent of PPCA or the Relevant Licensor;
- any one or both of PPCA or the Relevant Licensor will be entitled to conduct at their own cost and expense all negotiations in respect of any such claim or demand and any proceedings that may arise from it, and to contest, settle or otherwise deal with any such claim or demand or proceeding as PPCA or the Relevant Licensor may in its absolute discretion determine. You must, if and when so reasonably required by PPCA or the Relevant Licensor, provide PPCA or the Relevant Licensor, as applicable, with such evidence relating to any matter arising out of any such claim or demand or proceeding as You may have at your disposal and attend and give evidence at any court hearing or other inquiry, provided that PPCA or the Relevant Licensor, as applicable, compensates You for all reasonable costs, expenses and labour time incurred; and
- PPCA must, within fourteen (14) days after being notified by You of any claim or demand having been made or threatened as provided in paragraph (a) (ii), inform You in writing of the name and address of the Relevant Licensor. PPCA will in all cases liaise directly with the Relevant Licensor on any such claim or demand and their response.

Limitations on Licence

- This Licence does not authorise or permit You to:
 - use any Licensed Sound Recording or Licensed Music Video for the purpose of a broadcast on radio or television, or for any form of transmission or making available over the Internet, or in any circumstances other than Your Approved Uses;
 - duplicate, dub, transfer or otherwise copy or reproduce, by any means or in any medium (whether digital or analogue, and whether now in existence or developed in the future), the whole or any part of a Licensed Sound Recording or Licensed Music Video for any purpose whatsoever;
 - use any Licensed Sound Recording or Licensed Music Video prior to the date on which it is first published in Australia;
 - Exhibit any Licensed Music Video prior to the date on which the sound recording embodied in the Licensed Music Video is first published in Australia; or

- cause to be heard in public, or to be communicated to the public (including without limitation by any form of electronic transmission or making available over the Internet), independently of the Exhibition of a Licensed Music Video in accordance with this Agreement, any Protected Sound Recording embodied in a Licensed Music Video.
- Nothing in this Agreement grants You any rights in relation to any musical, literary or artistic works, or any other copyright-protected subject matter, embodied or reproduced in a Licensed Sound Recording or Licensed Music Video. You acknowledge that if You wish to exploit any such rights, it is Your responsibility to obtain a licence from the owner of copyright in the relevant works, or from an organisation authorised to grant such licences, such as the Australasian Performing Rights Association (**APRA**).
- PPCA may at any time amend Schedule 1 by deleting or adding the name of a Licensor or Schedule 2 by deleting or adding the name of a label, and any such amendment takes effect as and from the date on which the amendment is incorporated into Schedule 1 or Schedule 2 and posted on the Website. You acknowledge and agree that if the name of a Licensor is deleted from Schedule 1, or the name of a label is deleted from Schedule 2, then the Licence for Licensed Sound Recordings and/or Licensed Music Videos owned or controlled by that Licensor or released on that label (as the case may be) is withdrawn on and from the date of posting on the Website, and if the name of a Licensor is added to Schedule 1, or the name of a label is added to Schedule 2, then the Licence extends to Licensed Sound Recordings and/or Licensed Music Videos owned or controlled by that Licensor or released on that label (as the case may be) on and from the date of posting on the Website.
- PPCA may withdraw the Licence for particular Licensed Sound Recordings or Licensed Music Videos and notify You of such withdrawal. Any such withdrawal takes effect on and from the date on which You receive notification from PPCA of that withdrawal.
- If the Licence for a Licensed Sound Recording or Licensed Music Video is withdrawn for any reason, You are not authorised under this Agreement to exercise any rights in that Licensed Sound Recording or Licensed Music Video after the date of withdrawal of the Licence.
- This Licence is personal to You. It must not be assigned or sub-licensed except with the written consent of PPCA. For the purposes of this Agreement, an assignment will be deemed to have occurred where You, as a corporation, cease to be controlled (within the meaning of the *Corporations Act 2001* (Cth)) by the person or persons who controlled You on the Commencement Date.
- Nothing in this Agreement prevents You from seeking or obtaining a licence authorising You to exercise any rights in relation to sound recordings or music videos from any other party holding or retaining such rights (including the rights) and authorised to negotiate and grant such a licence, including the Licensors listed in Schedule 1.
- You acknowledge that, notwithstanding this Licence, any person can, subject to certain conditions, avail themselves of the statutory licence under section 108 of the Copyright Act to cause sound recordings to be heard in public if they have paid an agreed amount to the owner of copyright in the recording or have given an undertaking to the copyright owner to pay such amount as is determined by the Copyright

Tribunal under section 151 of the Copyright Act. The terms of these provisions of the Copyright Act are set out in full on the Website, or will be made available on request to PPCA.

3. TERM AND TERMINATION

- On each Annual Renewal Date, unless this Licence is terminated by PPCA or by You pursuant to clause 3.2, and provided You pay the amount of the licence fee notified to You by PPCA in accordance with clause 2.5, the Licence will be automatically renewed for a further period of 12 months (**Further Period**) on the same terms and conditions (subject to clause 6.5).
- Either You or PPCA may terminate this Agreement, at the end of the Initial Period or at the end of any Further Period, by written notice to the other party. A termination notice under this clause must be given to the other party at least two weeks before the relevant Annual Renewal Date and will take effect on and from the Annual Renewal Date.
- If You breach any term or condition of this Agreement (including without limitation by failing to pay any amount of money due to PPCA by the relevant due date), PPCA may terminate the Agreement by written notice to You. Any such termination takes effect immediately on notification to You. A termination under this clause does not affect PPCA's right to recover from You any monies due and payable by You under this Agreement, or the right of PPCA or any of the Licensors listed in Schedule 1 to recover any damages they have suffered as a result of the breach.
- Notwithstanding any other clause, this Agreement terminates automatically and without notice:
 - if You are not a natural person, immediately on the appointment to You of a liquidator or provisional liquidator, receiver or receiver and manager, administrator, or an agent of a mortgagee or immediately on the passing of a resolution or the making of an order for Your winding-up; or
 - if You are a natural person, immediately on You committing an act of bankruptcy or being declared bankrupt, or on You making a composition with creditors.A termination under this clause does not affect PPCA's right to recover from You any monies due and payable by You under this Agreement.
- You must pay to PPCA any expenses, costs, fees, disbursements or other charges reasonably incurred by PPCA in recovering any monies due and payable by You under this Agreement, whether during the term of the Agreement or following the termination of the Agreement, including without limitation any debt collection fees and legal expenses.
- If this Agreement is terminated for any reason, You will not be authorised under this Agreement to exercise any rights in any Licensed Sound Recordings or Licensed Music Videos after the date of termination of the Agreement.

4. ADDITIONAL RIGHTS

- Subject to clause 4.2, if You consider that any terms or conditions of this Agreement are unreasonable, You may refer those terms or conditions to the PPCA Board of Review for review. You must give PPCA one month's written notice of Your intention to seek a review, specifying the terms or conditions of the Agreement which You wish to have reviewed. However, You may seek a review from the Board of Review immediately on execution of this Agreement

- by giving PPCA written notice at that time of the terms or conditions which You wish to have reviewed.
- If:
 - at the time You are seeking a review under clause 4.1, there is in force an order of the Copyright Tribunal which has the effect of confirming the terms or conditions which You wish to have reviewed, including without limitation the licence fees (in this clause 4, the **Disputed Terms or Conditions**); or
 - at the time You are seeking a review under clause 4.1, the Copyright Tribunal has before it an application (whether made by You, PPCA or any other person) the determination of which will or may have the effect of confirming or varying the Disputed Terms or Conditions; PPCA may notify You in writing accordingly, and Your right to seek review of the Disputed Terms and Conditions under clause 4.1 will be terminated on and from the date of receipt of such notification.
 - Until the Board of Review has made its decision, this Agreement continues to govern the rights and obligations of PPCA and You. If You refer to the Board of Review under this clause 4 the amount of any licence fee payable under this Agreement, then You must still pay the licence fee to PPCA in accordance with the terms of this Agreement. In the event that the Board of Review determines that a lower fee is payable, PPCA will refund the balance to You within 14 days of such determination (subject to any right of either party to apply to the Copyright Tribunal or a court).
 - The Board of Review will be constituted by three members including a Chair appointed by the Australian Institute of Arbitrators, a member appointed by PPCA, and a member appointed by the trade association most closely associated with Your business or industry.
 - If the Board of Review is satisfied that any of the terms or conditions of this Agreement referred to it for review are unreasonable, it may amend those terms or conditions in such manner as it thinks fit. Those amended terms and conditions bind both You and PPCA.
 - Nothing in this Agreement is intended to limit or otherwise affect Your or PPCA's right to make an application to the Copyright Tribunal in accordance with the Copyright Act in relation to the exercise of any rights licensed to You under this Agreement. However, if at any time before the Board of Review has made a decision under this clause 4, an application is made to the Copyright Tribunal (whether by You, PPCA or any other person) the determination of which will or may have the effect of confirming or varying the Disputed Terms and Conditions, the Board of Review's consideration of the Disputed Terms and Conditions will be terminated on and from the date of such application.
 - For the purposes of the Board of Review's consideration of the terms or conditions of this Agreement referred to it for review, the following provisions will apply:
 - no legal representatives may appear;
 - any hearing will occur at a place that the Chair considers convenient for all parties;
 - the costs of the proceedings, including without limitation any professional costs incurred by the Chair and members, stenographer's fees and any fees for the hiring of a venue, will be shared equally between You and PPCA;
 - the Board of Review must not require a party to pay the costs of any other party;
 - the proceedings will be conducted in accordance with the procedures (if any) published by PPCA from time to time on the Website. If no such procedures have been published by PPCA, the proceedings will be conducted in accordance with procedures agreed between the parties or, if the parties cannot agree, in accordance with procedures decided by the Chair. At all times during the proceedings, the Chair retains the power to make decisions in relation to specific procedural matters not dealt with in any published, agreed or previously decided procedures, and such decisions are binding on both You and PPCA. In all cases, the proceedings must be conducted in an informal manner and the rules of evidence will not apply;
 - the parties must comply with any directions of the Chair about the conduct of the proceedings; and
 - subject to clause 4.6, the Board of Review must give the parties a written decision on the terms or conditions of this Agreement referred to it for review within three months of receiving final submissions. If the Board of Review has not made a decision within that time, PPCA may immediately terminate this Agreement. Any such termination does not affect PPCA's right to recover from You any monies due and payable by You under this Agreement up to and including the date of such termination.
- In reviewing the terms or conditions of this Agreement referred to it, the members of the Board of Review must act as experts and not as arbitrators. *The Commercial Arbitration Act 1984* (NSW), or any similar legislation of any State, Territory or the Commonwealth, has no application to the review or to the Board of Review's decision.
- ## 5. PERSONAL INFORMATION
- You acknowledge that PPCA needs to collect Personal Information about You for the purpose of PPCA performing its obligations and exercising its rights under this Agreement (**the Primary Purpose**) and for related purposes. You authorise PPCA to collect, use and disclose Personal Information about You for the Primary Purpose, including without limitation to supply that Personal Information to the Australian Record Industry Association Limited (**ARIA**) for the purpose of ARIA determining whether any person may require a licence for the reproduction of any sound recording or music video.
 - You acknowledge that this Agreement may require You to disclose to PPCA Personal Information about individuals from whom You obtain, or to whom You supply, goods or services (**Individual Customers**). It is Your responsibility to ensure that, before disclosing to PPCA any Personal Information about Individual Customers, each such Individual Customer is made aware that:
 - You may disclose to PPCA Personal Information about the Individual Customer, including without limitation their name and address, the details of the goods or services You supply to them or obtain from them, and the details of any agreements they have with You;
 - PPCA may collect, use and disclose such Personal Information about the Individual Customer for the Primary Purpose and for related purposes; and

- PPCA may disclose such Personal Information about the Individual Customer to ARIA for the purpose of ARIA determining whether any person (including the Individual Customer) may require a licence for the reproduction of any sound recording or music video.
 - You must at all times indemnify and hold PPCA harmless against all claims, demands, damages, costs, charges and expenses (including legal expenses) that may be made against or incurred by PPCA arising out of or in connection with a breach of this clause, including without limitation any amount incurred or paid by PPCA as compensation for loss or damage suffered by any individual as a result of an interference with the privacy of that individual (within the meaning of the *Privacy Act 1988* (Cth)).
- 6. MISCELLANEOUS**
- This Agreement takes effect when both PPCA and You have executed it.
 - This Agreement is subject to any Special Conditions that appear in the Agreement Details. In the event of any inconsistency between such Special Conditions and this Agreement, the Special Conditions will prevail, but only to the extent of the inconsistency.
 - Any notice or other communication to or by a party under this Agreement must be in writing addressed to the other party. Any such notice or communication is deemed to have been received by or served on the recipient:
 - if by email, on the day the email is sent (as long as the sender has not received a delivery failure message in relation to that email);
 - if by delivery in person, when delivered to the recipient;
 - if by post, five days from and including the date of postage; or
 - if by facsimile transmission, when despatched to the recipient; but if the delivery or receipt is after 4:00 pm (recipient's time), it is deemed to have been received or served on the following day.
 - All notices to PPCA must be sent to the address specified at the end of this Agreement. All notices to You will be sent to the address specified in the Agreement Details, or to such other address as You notify to PPCA in writing.
 - You acknowledge and agree that PPCA may amend any or all of the terms and conditions of this Agreement (with the exception of Schedule 1 and Schedule 2, which will only be amended in accordance with clause 2.10) at any time by giving notice to You in accordance with this clause 6 (**Amendment Notice**). If You do not agree with the amended terms and conditions, You may terminate this Agreement by giving notice in writing to PPCA before the date of effect specified in the Amendment Notice. If You continue to exercise any of the Licensed Rights after the date of effect of an Amendment Notice, You will be deemed to have agreed to the amended terms and conditions and You will continue to be bound by this Agreement, as amended.
 - No waiver by PPCA of a breach of a clause of this Agreement operates as a waiver of any other breach of the same clause or of a breach of any other clause. All rights not expressly granted to You under this Agreement are reserved to PPCA.
 - This Agreement is deemed to have been made in New South Wales and must be construed, and has effect, according to the laws of that State. Each party irrevocably submits to the non-exclusive jurisdiction of the courts of New South Wales.

SCHEDULE 2



Established to grant licences in Australia for the public performance rights in protected sound recordings and music videos

TARIFF "E"

TO COVER THE USE OF PROTECTED SOUND RECORDINGS BY

NIGHTCLUBS, FIXED DISCOTHEQUES AND DISCOTHEQUE PROMOTERS

WHERE PROTECTED SOUND RECORDINGS ARE USED AS MUSICAL FOREGROUND ENTERTAINMENT, WHICH INCLUDES BREAKS IN LIVE PERFORMANCES.

Calculated at \$0.0748 (ie 7.48 cents) per person per night of operation, for each person of the room's capacity.*

MINIMUM ANNUAL FEE - \$128.59

BARS - FOREGROUND MUSIC

WHERE PROTECTED SOUND RECORDINGS ARE USED AS A PREDOMINANT MEANS OF ENTERTAINING PATRONS.

Calculated at the rate of \$0.0385 (ie 3.85 cents) per person per night of operation, for each person of the room's capacity*, with a minimum annual fee of \$128.59.

**Capacity is the number of patrons licensed by Local Government, Liquor Licensing Body or Fire Department as applicable to the venue.*

NB A separate fee is payable in respect of each area where protected sound recordings are used. If more than one room, level or area - then each room, level or area would need to be licensed.

NB This tariff does not cover background music in bar areas (Tariff "M" is applicable), restaurants (Tariff "R" is applicable), or jukeboxes (Tariff "J" is applicable). Nor does this licence cover the public exhibition of music video clips, including DVD, or any other similar medium (Tariffs "W" and /or "W-E" are applicable).

FEES FOR ALL LICENCES ISSUED UNDER THIS TARIFF ARE PAYABLE IN FULL ANNUALLY IN ADVANCE. THESE RATES APPLY FROM 1 JULY 2005.

PPCA will have the right to increase tariffs annually on and from 1 July in each year in line with movement in the Consumer Price Index (CPI) since the last review/increase date. Any such increase will not be notified separately, but will apply to all invoices issued after 1 July in any year. Any proposed increases resulting from broad or structural reviews will only be implemented following a period of consultation with the relevant sector.

ACN 000 680 704 ABN 43 000 680 704
LEVEL 4, 19 HARRIS ST, PYRMONT NSW 2009
PO BOX Q20, QUEEN VICTORIA BUILDING NSW 1230
T. 02 8569 1111 F. 02 8569 1183
licensing.mail@ppca.com.au www.pcca.com.au

**PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA LTD
LINKING BUSINESSES TO MUSIC MAKERS**

PPCA PROVIDES LICENCES FOR THE PUBLIC USE OF SOUND RECORDINGS AND MUSIC VIDEOS PROTECTED BY COPYRIGHT. USERS MAY ALTERNATIVELY OBTAIN LICENCES DIRECTLY FROM ALL RELEVANT COPYRIGHT OWNERS.

SCHEDULE 3



Established to grant licences in Australia for the public performance rights in protected sound recordings and music videos

TARIFF "B"

EVENTS AND FESTIVALS

ARTS, DANCE, FRINGE, MUSIC, FOOD/WINE, SPORTING, FILM AND COMMUNITY FESTIVALS. DANCE PARTIES, EISTEDDFODS AND SIMILAR EVENTS INCLUDING PROMOTERS/ORGANISERS OF EXHIBITIONS, FASHION SHOWS AND EVENT CO-ORDINATORS/MANAGERS.

*** Where protected sound recordings are used as a means of entertainment of patrons (for specific festival events held in unlicensed premises).**

Up to 140 m ² (approx 1,500 ft ²)	\$60.39
141 m ² to 465 m ² (approx 1,501-5,000 ft ²)	\$81.29
466 m ² to 930 m ² (approx 5,001-10,000 ft ²)	\$110.55
Over 930 m ² (over 10,000 ft ²)	\$139.81

NB A separate fee is payable in respect of each area where protected sound recordings are used.

*** Where protected sound recordings are used in open areas such as parks, streets, town squares and other open places, (for open-air events, such as street fairs and similar occasions).**

Calculated at 13.2 cents per person per event (estimated attendance).

Minimum Fee: \$48.07

Eg: A street fair with a proposed attendance of (or attendance history of) 1, 500 persons attending for 2 days of the year will pay \$330.00 per annum (calculated as follows):

13.2c x 1,500 persons	=	\$198.00	per day
x 2 days	=	\$396.00	

*** Where protected sound recordings are used as featured musical entertainment and/or accompaniment to dance, (for opening/closing night parties, dances, dance parties, parades/carnivals, musters and similar occasions).**

Calculated at 19.8 cents per person per event (estimated attendance).

Minimum Fee: \$48.07.

Eg: A dance party with a proposed capacity of (or attendance history of) 500 persons operating 10 nights a year will pay \$990.00 per annum (calculated as follows):-

19.8c x 500 persons	=	\$99.00	per night
x 10 nights	=	\$990.00	

FEEES FOR ALL LICENCES ISSUED UNDER THIS TARIFF ARE PAYABLE IN FULL ANNUALLY IN ADVANCE. THESE RATES APPLY FROM 1 JULY 2005.

PPCA will have the right to increase tariffs annually on and from 1 July in each year in line with movement in the Consumer Price Index (CPI) since the last review/increase date. Any such increase will not be notified separately, but will apply to all invoices issued after 1 July in any year. Any proposed increases resulting from broad or structural reviews will only be implemented following a period of consultation with the relevant sector.

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PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA LTD
LINKING BUSINESSES TO MUSIC MAKERS

PPCA PROVIDES LICENCES FOR THE PUBLIC USE OF SOUND RECORDINGS AND MUSIC VIDEOS PROTECTED BY COPYRIGHT. USERS MAY ALTERNATIVELY OBTAIN LICENCES DIRECTLY FROM ALL RELEVANT COPYRIGHT OWNERS.

SCHEDULE 4

LICENCE FEES PAYABLE SINCE 1980s

DATE	LICENCE FEE	EQUIVALENT PER PERSON FEE	MINIMUM ANNUAL FEE
1 December 1994	\$1.33 per 100 persons	\$0.0133 per person	\$46.73
1 December 1995	\$5.00 per 100 persons	\$0.05 per person	\$93.46
1 December 1996	\$5.18 per 100 persons	\$0.0518 per person	\$96.92
1 December 1997	\$5.25 per 100 persons	\$0.0525 per person	\$98.18
1 December 1998	\$5.27 per 100 persons	\$0.0527 per person	\$98.58
1 December 1999	\$5.33 per 100 persons	\$0.0533 per person	\$99.64
GST introduced (GST inclusive fees)			
1 July 2000	\$5.863 per 100 persons	\$0.05863 per person	\$109.60
1 December 2000	\$6.05 per 100 persons	\$0.0605 per person	\$113.08
1 March 2002	\$0.0682 per person		\$117.59
1 June 2003	\$0.0704 per person		\$122.54
1 July 2004	\$0.0726 per person		\$125.40

SCHEDULE 5

AMOUNT OF LICENCE FEE PAYABLE UNDER TARIFF B

DATE	LICENCE FEE	MINIMUM ANNUAL FEE
1 April 1998	\$0.15 cents per person	\$36.77
1 December 1998	\$0.15 cents per person	\$36.92
1 December 1999	\$0.15 cents per person	\$37.32
GST introduced (GST inclusive fees)		
1 July 2000	\$0.165 cents per person	\$41.05
1 December 2000	\$0.165 cents per person	\$42.35
1 March 2002	\$0.165 cents per person	\$44.00
1 June 2003	\$0.165 cents per person	\$45.87
1 July 2004	\$0.165 cents per person	\$46.86

SCHEDULE 6

DANCE USE LICENCE SCHEME

TARIFF CATEGORY	DANCE USE	RATE				
		Year 1	Year 2	Year 3	Year 4	Year 5
E 1	Nightclubs	\$1.12	\$1.42	\$1.72	\$2.02	\$2.32
		The Proposed Rates are per person per night of operation, calculated on the basis of the Venue Capacity. The Proposed Rates would also increase annually by CPI.				
E 2	Dances and Dance Parties	\$5.10				
		The Proposed Rate is per person per event based on number of attendees. The Proposed Rate would increase annually by CPI.				

NOTES:

1. Tariff E1 and E2 licences will be issued subject to PPCA’s Standard Terms and Conditions for Licences for the Public Use of Protected Sound Recordings, as set out below.
2. **Dance Use** means the use of Sound Recordings for the purpose of dancing:
 - (a) in Nightclubs; or
 - (b) at Dances or Dance Parties.
3. **Dance or Dance Party** means any one-off or occasional event charging an entry fee and playing Sound Recordings for dancing as the primary form of entertainment at the event, and which:
 - (a) is not an event regularly held at Nightclub premises;
 - (b) is not a private function, or an event which features ballroom or similar traditional dancing; and
 - (c) is not an event for underage persons (such as a “blue light” disco).
4. **Nightclub** means a licensed venue, carrying on or promoting itself as carrying on a business providing music for dancing, which:
 - (a) uses sound recordings as the primary form of music based entertainment; and
 - (b) has a dance floor/area or charges an entry fee (even if the fee is not charged to all patrons); and
 - (c) is not a private function, a Dance or Dance Party, or an event which features ballroom or similar traditional dancing; and
 - (d) is not an event for underage persons (such as a “blue light” disco).

The above definition includes a nightclub operating within a multi-purpose venue in a physically separate area of that venue, where that separate area satisfies the above criteria.
5. **Sound Recordings** means sound recordings which are protected under the Copyright Act 1968 and the Copyright (International Protection) Regulations 1969.
6. **Venue Capacity** means the number of patrons licensed by Local Government, Liquor Licensing Body, Fire Department or other similar body, as applicable to the venue.
7. These tariffs are applicable from 1 July 2005 and the rates specified are GST inclusive.
8. Fees for all licences issued under this Tariff are payable in full annually in advance.
9. A separate fee is payable in respect of each area where protected sound recordings are used, and if there is more than one room, level or area, then each room, level or area would need to be licensed.
10. This tariff does not cover background music in restaurants (Tariff “R” applicable), or jukeboxes (Tariff “J” is applicable), nor does this licence cover the public exhibition of music video clips, including DVD, or any other similar medium (Tariffs “W” and /or “W-E” are applicable).