

FEDERAL COURT OF AUSTRALIA

Fitness Australia Ltd v Copyright Tribunal [2010] FCAFC 148

Citation: Fitness Australia Ltd v Copyright Tribunal [2010] FCAFC 148

Parties: **FITNESS AUSTRALIA LTD v PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA LTD and COPYRIGHT TRIBUNAL OF AUSTRALIA**

File number(s): NSD 705 of 2010

Judges: **BENNETT, MCKERRACHER AND PERRAM JJ**

Date of judgment: 13 December 2010

Catchwords: **COPYRIGHT** – Statutory licence – Determination of licence fee – Judicial review – Denial of procedural fairness – Whether Tribunal required to give parties an opportunity to respond to all evidence which the Tribunal may use in determining the licence fee

Legislation: *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1)(a), 16
Copyright Act 1968 (Cth) ss 136, 154
Evidence Act 1995 (Cth) s 76

Cases cited: *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 5)* (1996) 64 FCR 73 applied
Hughes Aircraft Systems International v Airservices Australia (1997) 80 FCR 276 applied
Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57 cited
Re Phonographic Performance Company of Australia Ltd (ACN 000 680 704) (2010) 87 IPR 148 quashed and remitted
Reference by Phonographic Performance Company of Australia Ltd (2007) 73 IPR 162 referred to
Seltsam Pty Ltd v McNeill (2006) 4 DDCR 1 cited

Date of hearing: 26 November 2010

Date of last submissions: 26 November 2010

Place: Sydney

Division: GENERAL DIVISION

Category:	Catchwords
Number of paragraphs:	65
Counsel for the Applicant:	Mr A Robertson SC with Ms K Richardson
Solicitor for the Applicant:	Minter Ellison
Counsel for the Second Respondent:	Mr B Walker SC with Mr S Free
Solicitor for the Second Respondent:	Gilbert + Tobin

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 705 of 2010

ON APPEAL FROM THE COPYRIGHT TRIBUNAL

**BETWEEN: FITNESS AUSTRALIA LTD
 Applicant**

**AND: PHONOGRAPHIC PERFORMANCE COMPANY OF
 AUSTRALIA LTD
 First Respondent**

**COPYRIGHT TRIBUNAL OF AUSTRALIA
Second Respondent**

JUDGES: BENNETT, MCKERRACHER AND PERRAM JJ

DATE OF ORDER: 13 DECEMBER 2010

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The decision of the Tribunal of 17 May 2010 be set aside with effect from that date.
2. The matter be remitted to the Tribunal for determination according to law.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court's website.

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JUDGES: BENNETT, MCKERRACHER AND PERRAM JJ

DATE: 13 DECEMBER 2010

PLACE: SYDNEY

REASONS FOR JUDGMENT

THE COURT

INTRODUCTION

- 1 This case is concerned with the music which is played during exercise classes at fitness centres. The dispute is between Phonographic Performance Company of Australia Ltd (PPCA) which represents the interests of most of those who own the copyright in sound recordings and Fitness Australia Ltd (Fitness Australia), a body which represents the interests of the fitness industry. The question between them is how much the fitness industry should have to pay the owners of the copyright in the sound recordings for the right to play those recordings during exercise classes.
- 2 That issue can be determined by agreement or by the Copyright Tribunal of Australia either in particular cases or for whole classes of use. When the Tribunal fixes a rate it operates in practice as a ceiling on the price which is charged. The parties remain at liberty to agree on a lower charge in any particular case. On 17 May 2010, following an application to it by PPCA to which Fitness Australia was joined as a party, the Tribunal determined that an

appropriate rate was \$15 per class. Prior to that determination the rate had been 94.6 cents per class.

3 Fitness Australia is aggrieved by that decision and seeks judicial review of it in this Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The principal basis upon which review is sought is that there was a breach of the rules of natural justice in connexion with the making of the decision (s 5(1)(a)) although there are also other grounds.

4 The action being a judicial review action, this Court is not in anyway concerned with whether the \$15 figure is correct which is solely for the Tribunal to determine. This Court's role is only to assess whether Fitness Australia's challenge to the processes adopted by the Tribunal is sound. For reasons which follow, we are of the opinion that it is and that the Tribunal did conduct itself in a way which was procedurally unfair to Fitness Australia. The consequence is that its determination must be set aside and that it must be ordered to perform its function again according to law. PPCA must bear the costs in this Court.

RELEVANT PROVISIONS

5 By reason of its structure as a representative body, PPCA is authorised under the *Copyright Act 1968* (Cth) to refer a "licence scheme" to the Tribunal (s 154(1)). A licence scheme is a scheme setting out the classes of cases in which a licensor (such as PPCA) is willing to grant licences and the amount that will be charged in relation thereto (s 136). There is, to give an example, a licence scheme in place which governs how much those who operate nightclubs must pay to those who own the copyright in the sound recordings played in those clubs. That licence scheme was one ordered by the Tribunal: see *Reference by Phonographic Performance Company of Australia Ltd* (2007) 73 IPR 162.

6 In this case PPCA referred a licence scheme dealing with music played in exercise classes to the Tribunal and Fitness Australia was joined by it as the opposing party. No particular price was sought by PPCA but it was indicated that economic evidence would be placed before the Tribunal to assist in that question's determination. The Tribunal's statutory task was to confirm or vary the proposed scheme or even to substitute another scheme for it and in doing this it was to make whatever order "the Tribunal considers reasonable in the circumstances" (s 154(4)). Importantly for present purposes it was to do that only "after giving to the parties to the reference an opportunity of presenting their cases". Since Fitness Australia was a party

to the reference it followed that s 154(4) required the Tribunal to give it an opportunity to present its case.

THE COURSE OF THE HEARING IN THE TRIBUNAL

- 7 To understand the deficiency about which Fitness Australia complains it is necessary to chart the ebb and flow of the case before the Tribunal. The task at hand was the ascertainment of a price for the particular use (playing music in exercise classes) of an intangible asset (copyright in sound recordings). No direct market in that kind of use exists. To make matters even more complex, not all of the sound recordings played in fitness classes comprise sound recordings in respect of which PPCA controls the copyright (there is a market in “covers”, that is, popular tunes performed by persons other than the original artists). The determination, therefore, of what was “reasonable in the circumstances” necessarily contained within it the potential for substantial debate between the parties.
- 8 The litigation before the Tribunal was hard fought and resource intense. On PPCA’s side five economic experts were called including an economist, an emeritus professor of econometrics and a professor of management. All five witnesses were cross-examined by senior counsel for Fitness Australia over six days. Fitness Australia itself called three such witnesses including a professor of economics from the University of California, Berkeley and a professor from Stanford University. They, in turn, were cross-examined over the course of seven days. In all, more than 25 witnesses were called and there is over 1,400 pages of transcript. The documentary evidence was voluminous.
- 9 It is in the midst of that economic debate that the procedural unfairness is said to lie. Central to PPCA’s case was an item of evidence known as the “Gyms Survey”. In its opening written submissions to the Tribunal, PPCA said that it had sought to conduct an economic or value-based assessment of the music in question and that to that end it had “conducted an economically-based, rational assessment of that value, by use of a choice modelling survey (the Gyms Survey), which has yielded a derived amount of the appropriate share of a member’s value for recorded music of \$4.54 per member per month, or in the case of a casual attendee, \$0.99 per attendance for those who pay per visit”. The Gyms Survey was said in PPCA’s opening written submissions to be its “central evidence”. Unsurprisingly, those written submissions showed that the evidence of each of its experts was directed to showing the Gyms Survey’s correctness.

- 10 That evidence looked impressive at the commencement of the case. However, during the course of the case the Gyms Survey came under sustained attack from Fitness Australia. It is not presently necessary to recount in any detail the Gym Survey's tribulations during the hearing but the Tribunal ultimately concluded that "the attacks on the Gyms Survey disclosed real flaws in the design of the survey instrument, in the application of it and in manipulation and analysis of data obtained from the survey": *Re Phonographic Performance Company of Australia Ltd (ACN 000 680 704)* (2010) 87 IPR 148 at [256] ("Phonographic"). In those circumstances, the Tribunal was unable to rely upon the Gyms Survey to estimate the appropriate value.
- 11 With PPCA's "central evidence" rejected this might, at first blush, have provided succour for the notion that victory had been handed to Fitness Australia. However, that did not eventuate. It is what happened next which lies at the heart of the present dispute. The Gyms Survey was not the first survey which had been carried out by PPCA but was, in fact, preceded by a smaller pilot survey prepared in November 2005 by a Professor Harmen Opewall of Monash University entitled *Pilot Study: Initial Valuation of Music in Group Fitness Classes*. Professor Opewall provided his report through the Roberts Research Group and the survey came, therefore, to be known as the Roberts Research study. Professor Opewall was not called by PPCA as a witness in the case and, consequently, he was not cross-examined. His report came to be in evidence only as an attachment to a report of one of PPCA's witnesses, Dr Williams. In that report Dr Williams described the Roberts Research study as a "pilot using a limited sample" and said that it was "merely the first stage in what would be a two-stage project". The Gyms Survey was to be seen as the successor to the Roberts Research study which took on board criticisms which had been made of that study by the fitness industry at an earlier stage of consultation. In his opening address senior counsel for PPCA described the Roberts Research study in various ways including as "a very quick and dirty pilot survey" and as one having a "very small and unrepresentative sample".
- 12 Given the primacy which the Gyms Survey had in PPCA's case it is unsurprising that there was no reference at all to the Roberts Research study in its opening written submissions. Indeed, when senior counsel for PPCA opened to the Tribunal he indicated that the Roberts Research study was one upon "the results of which we don't rely". That was an important statement. Because it will presently be relevant, it is to be noted that PPCA did not open the case by suggesting that the Roberts Research study could be used to show that the then

current rate of 94.6 cents was too low or that the study indicated an appropriate per-class rate. No mention of such matters was made at all. The reasons for that are obvious. PPCA had no present need to call in aid the study because the Gyms Survey adequately fulfilled all of the purposes it had in mind.

13 Fitness Australia says that these matters legitimately signalled to it that it did not need to prepare for, or meet, a case based upon the figures or values in the Roberts Research study and it submits that, in fact, it made no attempt to meet such a case. Those suggestions are significant because of what the Tribunal then did. It will be recalled that the Tribunal rejected the adequacy of the Gyms Survey. Having done so, the basis upon which it could embrace directly PPCA's case had become somewhat more problematic because the central evidence upon which that case rested had lapsed. In the event, the Tribunal reasoned that, in light of its rejection of the Gyms Survey: "the survey results obtained by Roberts Research in PPCA's preliminary survey, which was simpler in its concept and more modest in its design, provides more reliable information, despite the limited size of the sample. In particular, the Tribunal considers that the preference for music by survey participants in the Roberts Research project provides a more useful guide to WTP [scil. willingness to pay] for music than the Gyms Survey": Phonographic at [257].

14 That positive attitude towards the Roberts Research study then led the Tribunal to this final conclusion at [309]:

Taking a cautious approach, the Tribunal concludes that a discount of 40 per cent should be applied to PPCA's share of the value of music in fitness classes, as found in the Roberts Research study. This produces a figure of \$19 (just below the figure of \$20 sought by PPCA in Option 2 of the further amended reference). The Tribunal regards the figure of \$19 as somewhat high, taking into account the limitations on the Roberts Research study and the other factors referred to earlier bearing upon the process of judicial estimation. The Tribunal has concluded that that a fair and reasonable per class rate would be \$15.

PROCEDURAL FAIRNESS

15 Fitness Australia says that that conclusion amounted to a breach of procedural fairness. The case had been conducted on the basis of the Gyms Survey and reliance upon the Roberts Research study was expressly disavowed in PPCA's opening submissions. Believing the correctness of the Roberts Research study not to be at issue in the case Fitness Australia says that it did not seek to challenge the correctness of that study by cross-examining any of

PPCA's witnesses about that topic; that if it had known that the Tribunal was going to use the study as it did it would have trained its fire not only at the Gyms Survey but also at the Roberts Research study; and that in the course of that process it would have considered calling expert evidence to contradict the study. Further, says Fitness Australia, the fact that the Roberts Research study was not being used by PPCA to fix a rate was expressly recognised both by PPCA and the Tribunal in closing submissions when this exchange occurred:

“THE D. PRESIDENT Nobody is, at this stage, despite all the references to the Roberts Research, putting that survey up as a basis for the fixing of a rate.

MR COBDEN SC: Not for the fixing of a rate....”

16 If matters rested there then it might be thought that Fitness Australia's claim that it had been denied procedural fairness was abundantly made good. However, the clarity of the above exposition is obscured by a tactical decision made by Fitness Australia to turn the Roberts Research study *against* PPCA by using it as a weapon to attack the validity of the methodology underpinning the Gyms Survey. It is that attack (using the study) and PPCA's counterattack (also using the study) that gives rise to the present issue.

17 To understand Fitness Australia's attack using the study – and its implications – it is necessary to grasp the distinction between the methodology of the Roberts Research study and the values derived by means of that methodology. The task for the Roberts Research study (and for that matter the Gyms Survey) was to attempt to work out how much those who attended fitness classes were willing to pay for the music at those classes (which was thought to be a proxy for how much the fitness centres themselves should pay). The Roberts Research study determined that those attending classes were each individually willing to pay \$6.62 per class for music which was “likeable but not preferred” but that they would pay \$7.14 per class for “favourite and preferred” music (that is, 52 cents more). These two numbers – \$6.62 and \$7.14 – constituted, for present purposes, the values derived by means of the study.

18 The means by which those values were derived was a series of questions which were asked of 72 interviewees at 6 different fitness centres in Melbourne and it is those questions which, for present purposes, may be taken as showing the study's methodology (the numerical processes

which also formed part of that methodology are not relevant to any argument in this case). By way of contrast, the Gyms Survey involved a much larger sample. Its methodology differed in many ways not the least of which was that the questions which were asked were not the same and it was administered by means of the internet.

- 19 Fitness Australia attacked the Gyms Survey from several directions during the course of the evidence. Four of these assaults involved pointing to deficiencies in the survey's methodology by comparison with the methodology deployed in the Roberts Research study. We are not in any way concerned with the correctness or otherwise of these attacks but only to describe what they were so that the question of procedural fairness may be assessed.

First use by Fitness Australia of the Roberts Research study

- 20 The first attack centred on the proposition that the Gyms Survey had valued the wrong music. Those completing the survey were asked to choose the method preferred for maintaining rhythm and tempo in class from a list of three possibilities: an instructor, a beat machine or recorded music. Fitness Australia contended that what was thereby valued was the value of all music played in fitness classes and not just the music the copyright of which was controlled by PPCA. Reference has already been made to the position of sound recordings which are "covers". The argument, in a nutshell, was that the Gyms Survey was not measuring solely the value of the copyright in the sound recordings for which PPCA was responsible (that is, those produced by the major record companies) but also the value of the covers and it was not right for PPCA to recover in that regard.
- 21 To make good that point two of Fitness Australia's witnesses – Professor Hanemann and Dr Bock – sought to paint the Gyms Survey in a negative light by comparison with the Roberts Research study. The respondents to the survey underpinning the Roberts Research study had been asked to nominate the kind of music preferred from a list consisting of: favourite and preferred music, likeable but not preferred music or no music. Professor Hanemann and Dr Bock took the view that the category "favourite and preferred music" corresponded with the sound recordings for which PPCA was responsible and that the category "likeable but not preferred music" corresponded with other music (i.e. covers). It followed, on their view, that the Roberts Research study had exhibited the correct methodology of seeking to value the sound recordings controlled by PPCA but that the Gyms Survey had not. Both were cross-examined by counsel for PPCA about that issue and in the course of those cross-examinations

the Roberts Research study was touched upon. We do not think, however, that this forensic use of the Roberts Research study meant that Fitness Australia was, in any way, opening up the possibility of the study being used to derive a value.

- 22 Against the possibility of that conclusion, however, PPCA submitted to this Court that the report of Dr Bock showed that Fitness Australia had sought to use the *figures* (i.e. the data) from the Roberts Research study. It is true that paragraph 30 of Dr Bock's report contains this statement:

If we assume that 'favourite and preferred' is proxy for PPCA copyrighted music – and this would seem to be the assumption of the PPCA's experts – this suggests that the WTP Music applicable to the fee being determined by the Tribunal is only 7.9% the amount that would be obtained from directly estimating WTP Music in the manner done in the current study (i.e., (\$6.62-\$6.10)/\$6.62).

- 23 This passage appears in a section of Dr Bock's report in which he was seeking to debunk the proposition that the value of the music to the fitness industry was approximately equal to the average amount consumers were willing to pay. The point being made was that the Roberts Research study supported a methodology which pointed to the need to assess not the value of music as such but rather the difference between the value of PPCA and non-PPCA music. The Gyms Survey did not do this. Dr Bock thought that the Roberts Research study did. The suggestion in the last sentence was that the Roberts Research methodology of assessing the difference between the values needed to be applied to the Gyms Survey. It is true that that passage makes reference to the actual values used in the study (in order to obtain their difference). However, we do not read this evidence as asserting the correctness of those numbers. Indeed, the fact that Dr Bock was suggesting that the 7.9% figure should be applied to the result obtained from the Gyms Survey (which was \$14.13) shows positively that the figures in the study (which he quoted as \$6.10 and \$6.62) were not being used. The point being made was, therefore, a methodological one rather than a valuation of willingness to pay. A similar observation by Professor Hanemann is of the same character.

- 24 Fitness Australia also used the study as a tool for cross-examination on the same issue. PPCA had called Professor Hensher and he was cross-examined by counsel for Fitness Australia about the Roberts Research study. However, the point of this cross-examination was to suggest that the study had attempted to measure the value of PPCA music and that that approach had not been adopted in the Gyms Survey. Counsel for Fitness Australia also cross-

examined the chief executive officer of PPCA, Mr Peach, along the same lines. In neither case was the correctness of the values underpinning the report touched upon.

25 In relation to this first use of the Roberts Research study by Fitness Australia it must, of course, be accepted that the study was “in play” and was being actively used by Fitness Australia not only through its two witnesses, Professor Hanemann and Dr Bock, but also through the cross-examination of Professor Hensher and Mr Peach. However, for the reasons we have given, none of that use related in any way to the figures derived by the study.

Second Use by Fitness Australia of the Roberts Research study

26 Fitness Australia’s witness, Dr Bock, gave evidence that the different choices offered by the Gyms Survey to respondents about their preferred method of maintaining tempo were unrealistic. It will be recalled the choice was between recorded music, a beat machine and an instructor. Dr Bock thought that if more realistic options had been administered to the respondents to the survey that this would have lowered the value arrived at. He compared the scenarios posited by the Gyms Survey unfavourably against the choices offered in the Roberts Research study (where the choices were between favourite and preferred music, likeable but not preferred music, and no music). Fitness Australia also cross-examined Professor Hensher about this so as to suggest that the selection of a beat machine in the Gyms Survey was an inferior substitute for the use of non-preferred music in the Roberts Research study. These uses by Fitness Australia did not, however, in any way mean that a debate had been opened up about the values derived from the study.

Third Use by Fitness Australia of the Roberts Research study

27 Professor Hanemann gave evidence for Fitness Australia that the Gyms Survey was deficient because the respondents to it had not been asked whether, if they attended yoga or pilates classes, those classes had used music. In a section of his report headed “The Curious Case of Yoga and Pilates” he criticised the Gyms Survey because it was said to be known that such classes sometimes did not have music. By contrast, so he said, “such a question was asked in the first choice modeling exercise conducted for PPCA by the Roberts Research Group in October 2005”.

28 We do not think that this use by Fitness Australia of the study in any way meant that the *values* in that study were in contest in the hearing. Rather, the use was strictly concerned with what was said to be its methodological superiority. For completeness, we should note that PPCA did not rely on this third use as showing that Fitness Australia had a full opportunity to meet the study.

Fourth Use by Fitness Australia of the Roberts Research study

29 Professor Hanemann also gave evidence for Fitness Australia that the Roberts Research study had revealed that the location of a fitness centre was an important factor to consumers but that location had been omitted from the Gyms Survey and that this was to be seen as a deficiency. Again, we do not think that this use of the study by Fitness Australia was such as to mean that it must be taken to have had an opportunity to meet a case based on the values in the study.

Conclusions on the course of the evidence

30 Whilst it is true that Fitness Australia engaged heavily with the Roberts Research study it is apparent, on closer examination, that the evidentiary uses to which the study was put did not relate to the correctness or otherwise of the figures which that study supported. The study was used, by way of contrast, as an example of superior methodology which was used, in turn, as the basis for a number a criticisms of the Gyms Survey. Whilst it is correct to submit, as PPCA does, that Fitness Australia made extensive use of the Roberts Research study it does not follow that this meant that Fitness Australia had been given an opportunity to meet a case based on the figures derived from that study. Neither PPCA's case nor any of Fitness Australia's attacks on the Gyms Survey based on the Roberts Research study depended on those figures. For completeness, none of PPCA's cross-examination about the study related to the correctness of the values which were derived from it.

PPCA's Closing Submissions

31 Hard fought and complex cases, such as those which were run by PPCA and Fitness Australia before the Tribunal, can have moments of tactical nuance in which new positions unfold or old ones are refined or abandoned. The manner in which such cases develop is often enough an organic reaction to the developments which take place during the course of the evidence. So much occurred in this case. By the time the evidence closed the Gyms Survey had been

held up to criticism by Fitness Australia and one of the particular instruments of that criticism was what was said to be the superior methodology revealed by its progenitor, the Roberts Research study. It is speculation now to seek to draw out why PPCA subtly shifted ground on the use to which it wished to put that study but, so it seems to us, there is little doubt but that by the time it put its closing submissions a subtle shift had occurred.

32 The shift first appeared in the closing written submissions which were dated 28 May 2009 to which we shall shortly return. The subtlety of the shift, however, is best illustrated by the oral submissions which were made on 3 July 2009 by senior counsel for PPCA. In response to a request from the Tribunal to confirm that the Roberts Research study was not being put up as a basis for fixing a rate, senior counsel for PPCA put the matter this way:

Not for the fixing of a rate. We put it up – we did the survey; we said it was a preliminary survey; Professor Williams’ own presentations about it said, and the Roberts Research material itself said, “this is dipping a toe in the water; we will come back.” **We certainly use it for one purpose, which is to say, it’s certainly a good enough indicative survey to show that 99-92 cents, I think it might have been at the time – was way undervalued, whatever the – when the final proper exploration of value takes place. And we point to it as one of a number of factors that might weigh up, if the Tribunal were doing a per-class rate. A piece of research that indicates a per-class rate.**

(our emphasis)

33 We noted at [12] that PPCA had not used the Roberts Research study in its opening and had not suggested that the study could be used to show that the present rate of 94.6 cents was too low or that it was “a piece of research that indicates a per-class rate” (that is, either of the two matters referred to in the passage just quoted). To the contrary, senior counsel’s position in opening was that the Roberts Research study was one upon “the results of which we don’t rely”.

34 There is, perhaps, a contradiction in accepting, as senior counsel seemed to do, that the study could not be used to “fix” a rate but that it could be used as an indicator that 94.6 cents was too low or as research indicating a per-class rate. There is no need, however, finally to ascertain whether that is so because in the closing written submissions which were made PPCA grasped the nettle and suggested that the Roberts Research study could be used to justify certain figures. One submission made was this:

The Roberts Research study suggested a value of music of \$7.14 per attendee per class.....that yields an amount per class for PPCA of \$2.38 per attendee per class.

PPCA accepts that that amount would need some adjustment for non-protected recordings.

Another was:

Accordingly, the Roberts Research exercise yields an indicative amount appropriate for valuing PPCA's music, of, say, \$1.66 per attendee per class (ie 70% of \$2.38). Taking an attendance rate of 15 persons (being Professor Williams' starting assumption, and subsequently borne out by the results of the final choice modelling survey), this yields a rate per class for PPCA of \$24.90.

35 The words "an indicative amount appropriate for valuing PPCA's music" are rich in contradiction. The point of the word "indicative" was – as it had been in the oral submission – to suggest that the use of the study did not involve its use for "fixing" a rate but rather, merely, as a metric against which 94.6 cents might be compared and its paucity gauged. The words "appropriate for valuing PPCA's music" suggest, however, a completely different use and one to which the description "fixing" is apposite.

36 We do not think that too much time need be spent on dissecting the delicately crafted submissions which were made on PPCA's behalf or parsing the subtleties of those submissions. Whether they were contradictory or not and whether PPCA was attempting both the possession and consumption of its cake, the fact remains that at no time prior to its closing submissions had it been suggested that the study would be used "indicatively" or as basis for fixing a rate.

37 It is easy to understand perhaps why PPCA shifted its ground. Fitness Australia had devoted some effort during the course of the hearing to showing that the Gyms Survey was deficient for reasons which included, inter alia, the perceived methodological superiority of the Roberts Research study. It was but a small step at the heel of the hunt to turn that attack back on to Fitness Australia by relying on the very study whose methodology Fitness Australia had been lauding over the Gyms Survey. If that counterattack had been limited to turning the methodology of the study back upon Fitness Australia no unfairness could have resulted. But that was not what occurred. Instead, PPCA sought to use the study as a source for values in circumstances where it had said that it was not going to do so and where no witness during the course of the evidence had dealt with that specific issue.

38 PPCA relies upon its closing submissions to rebut any notion that there had been a denial of procedural fairness. We reject that submission. To begin with, we do not think that the subtlety of the language used was adequate to put the study as the basis for the Tribunal's decision. Couched in language which in terms suggested an acceptance that what was *not* being done was the putting forward of the study as a basis for the fixing of a rate, the subsequently developed nuances of that submission were not sufficient to signal such a profound shift in PPCA's case.

39 However, even if that were not so, the die had in any event been cast. The evidence had been conducted on the basis that the Roberts Research study was not being used as a source of values. Closing submissions was far too late a time to be raising such a new case. Nor, given the relatively abstruse manner in which the proposed use was first articulated, do we think there is substance to the contention that Fitness Australia was at least afforded the opportunity to complain that it had not been given the chance to meet the study and to submit that the Tribunal should not use the study in the suggested manner. In effect PPCA was seeking to expand its case beyond the Gyms Survey and to rely upon the Roberts Research study for its results. This was not the trimming of sails or the slight adjustment of the tiller; to the contrary, it was a substantial rearrangement of PPCA's case. Such wholesale adjustments are not reasonably signalled by the subtle language deployed here. Fitness Australia was entitled to proceed on the basis that such an adjustment would be adequately indicated to it rather than, as appears to have been attempted, quietly ushered in along with statements that the study should not be used as the basis for fixing a rate.

40 PPCA's closing submissions do not resolve the procedural fairness problem.

41 PPCA also submitted that Fitness Australia had itself sought, in its own closing submissions, to use the Roberts Research study. It is to that submission that we now turn.

Fitness Australia's closing submissions

42 PPCA submits that, in fact, Fitness Australia did use the Roberts Research study in its written submissions to derive an appropriate figure for what consumers were willing to pay for music in gym classes. We accept that in its written submissions Fitness Australia did make reference to the figures in the study. The point of the submission was to attack the figures which PPCA had derived from Professor Hensher's evidence. This went beyond the use of

the study by Fitness Australia merely for methodological purposes and is capable of being seen as use by it of the figures derived by the study. The actual submission is (remembering Professor Oppewal was the author of the study):

156. If it is assumed that most gym members attend 8 classes per month (ie. twice per week) then on a per-month per-member basis their WTP as measured by Professor Oppewal is \$4.16 per month (8 x \$0.52). There are a few points to make about this figure:

- (a) First, it is less than one-sixth of Professor Hensher's WTP figure (\$26.08) which provides the starting point for PPCA's proposed WTP based tariff calculation.
- (b) Secondly, if one uses slightly more than half the WTP value calculated by Professor Hensher (ie. \$13.24 as calculated above) [see para [103] above.], the figure is still more than 3 times Professor Oppewal's figure (3.18 x \$4.16 = \$13.24).
- (c) Thirdly, if one discards the separate WTP figure for music in Yoga, Pilates etc., as recommended by Professor Hanemann, then the resulting WTP of \$7.28 is still nearly double Professor Oppewal's figure (\$1.75 x \$4.16 = \$7.28).

157. What might a WTP-based tariff be if the per-class \$7.80 WTP figure derived from Professor Oppewal's study was PPCA's starting point instead of the \$26.08 per member per month WTP mountain? That depends on how the \$7.80 is shared. The problems with Dr Williams' analysis have already been identified – however these can be put aside for the time being to simplify this illustration.

43 In some senses, this use has a similar flavour to the use by PPCA in its submission of the study as “indicating” that the present price of 94.6 cents was too low. On that view, the study was being used by Fitness Australia to show that Professor Hensher's values were too high. PPCA submitted that this showed that Fitness Australia, in its own closing submissions, had sought to use the figures derived from the Roberts Research study for its own advantage and it followed, so the argument ran, that it could hardly complain when PPCA did the same thing.

44 We reject this argument for two reasons. First, making the assumption that Fitness Australia did seek to use the study to show that Professor Hensher's values were too high, it might well follow that it could not complain if PPCA used the same study to show that the 94.6 cents figure was too low. However, the use to which the Tribunal put the matter was not to discern that the 94.6 cents figure was too low. Rather, it used the study to calculate what an appropriate value was. Secondly, when read in its full context we do not regard Fitness Australia's submission as actually seeking to rely upon the values in the study. So much

flows from the oral submissions of senior counsel for Fitness Australia who explained the written submission in these terms:

...But I do want to emphasise, we're not suggesting for a moment that that is an alternative starting point for the Tribunal. What we rely upon it for is to demonstrate just how significant the failure of the main study, the Choice survey was in terms of not measuring the next best alternative because what happened in the case of Professor Oppewal's study is that the total Willingness To Pay for music – and this is recorded in paragraph 145 of our study – was \$105 per class. Now, that \$105 Willingness To Pay for music per class, the amount which, on our interpretation of the document, could be attributed to the use of PPCA music as opposed to non-PPCA music is less than one-tenth of that amount, \$7.80.

45 That made clear the use to which Fitness Australia sought to put the study. Nevertheless, we accept that there may be some ambiguity about the position of Fitness Australia on the nature of its attack on Professor Hensher with the Roberts Research study. However, even allowing that to be so, that ambiguity is not germane to the resolution of this case because the position of both parties was that the study was not to be used to fix a rate. It was procedurally unfair for the Tribunal to use the study to fix a rate in light of that clear position and that is so even if both parties sought to use the study in other more limited fashions. Those contests have to be seen in the light of the parameters of the debate which had been set and those limits included, according to both parties, a prohibition on the use of the study to derive a rate. Even allowing for some ambiguity about that matter we cannot accept PPCA's written submission that the "basic premise of Fitness Australia's own use of the Roberts Report was that it provided a measure of WTP for music in fitness classes". This is very far from the case. The only example of Fitness Australia's use of the study which might bear that characterisation (and which does not for the reasons we have given) is the passage set out in the closing submissions above. By and large Fitness Australia's predominant use of the report had nothing to with the WTP figures but was directed to showing the methodological deficiencies in the Gyms Survey.

46 In those circumstances, the course of the hearing strongly supports Fitness Australia's claim that it was denied procedural fairness by the Tribunal's use of the Roberts Research study.

ADDITIONAL MATTERS

47 There were some additional arguments put forward by PPCA which may be dealt with shortly. It submits that because Fitness Australia had issued a summons to the Robert

Research Group Pty Ltd seeking documents relating to the Roberts Research study that it should be taken as having indicated that it was prepared to debate all aspects of that study. The summons sought the instructions which the Roberts Research Group had been given together with documents recording or referring to the reasons the study was prepared. The issue of such a summons is incapable of leading to the conclusion that the values derived by the study were therefore being debated.

48 Next it is said that the Tribunal itself had expressly indicated towards the end of the hearing that it was considering, if it were available, “the option of adopting a per-class per-member fee for the whole licence scheme”. PPCA argues that this meant that the values derived by the Roberts Research study were available to be used because “the Roberts Report provided a basis for deriving a per-class rate”. There are two difficulties with this. First, the fact that the Tribunal was contemplating adopting a per-class per-member fee provides no rational connexion to the much more sweeping notion that it was thinking of using the *fees* proposed by the study on that basis. Secondly, in any event, this exchange occurred after the close of evidence so that even if it bore the meaning which PPCA would seek to ascribe to it (and which we would not) it would not remedy any procedural unfairness.

49 PPCA also submits that there was no denial of procedural fairness because it had referred to the Roberts Research study in its written submissions in reply. An examination of those submissions reveals that they were a response to Fitness Australia’s submission that the study measured the value of music in which copyright was held by PPCA and the value of music not owned by PPCA. PPCA rejected that reading of the report. We do not think that that use by PPCA has any impact on the question of procedural fairness.

50 PPCA also relies upon a statement by the Tribunal in the following terms:

It seems to me there are two fundamental questions in relation to my survey instrument in this exercise. The first is, does the survey support the rate which is proposed to be struck. A secondary question is, does the survey provide useful information from which an alternative rate might be struck. If the answer to either of those questions is, yes, then the Tribunal can use the survey.

Senior counsel for PPCA responded this way:

Yes. We would submit the answer is, yes. ...

But that has to be seen in light of his further statement:

... If they want to embrace it [scil the Roberts Research study], we would respectfully submit **they have to embrace it including the fact that it reveals** subject to its own limitations **an amount of \$31** for the recorded music component, the Tribunal would then be in a position to discount away. **Now we don't press that figure of course in the Tribunal.**

(our emphasis)

51 PPCA submits that this exchange showed that the Tribunal had made plain that it was proposing to use the study as information from which a rate might be struck rather than as direct evidence of the rate to be used. There is no doubt that the quoted passage does suggest such a use and we are prepared to assume, for the sake of argument, that PPCA's submissions urged the Tribunal to use the study in that way. But that was not how the case was opened and we regard the difference between using the values in the study directly to fix a rate and the use of the values as an input into that process – in light of that opening – as elusive.

52 Having concluded that, in principle, a breach of procedural fairness is established we turn then PPCA's primary legal submissions.

PRINCIPAL ARGUMENTS

53 Mr Walker SC, who with Mr Free of counsel appeared for PPCA, submits that the statutory task consigned to the Tribunal was the fixing of a rate and that it could not be the case that it was constrained in the performance of that function by the various postures adopted by the parties before it. He draws an analogy between the present circumstance and the process of judicial valuation where, so he submits, the valuing body always remained free to alight upon any particular value it wished without the necessity of any of the parties to the valuation process having put that particular value.

54 Allied to that submission is the well-established principle that an administrative decision maker such as the Tribunal is not obliged to give a running commentary on its own deliberations ("fairness does not require a judicial officer to make a running commentary upon an applicant's prospects of success, so that there is a forewarning of all possible reasons for failure": *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [31] per Gleeson CJ and Hayne J).

55 In principle we accept both of these propositions. As to the first, no doubt the Tribunal at all times retained the power to fix the rate at any value it desired. However, that statement – which is about power – is silent in the face of an argument sourced in principles concerned with procedural fairness. The question is not whether the Tribunal was disabled from arriving at any particular value but rather whether, in doing what it plainly had power to do, it acted in a way which was procedurally unfair.

56 As to the second principle it may be accepted that there was no need, in a vacuum, for the Tribunal to indicate to either party that it was intending to use some item of evidence as part of its reasoning process. However, that principle is inapposite where the complaint is that the events which took place before the Tribunal generated the impression that a specific item of evidence would not be used in a particular way. It was not, therefore, a case where the Tribunal was required to give a running commentary on its own ratiocinations but rather one where the Tribunal could not fairly use the study for the purpose of striking a fee where the evidence in the case had been taken on the basis that it would not be so used.

57 It follows that Fitness Australia is entitled to succeed on this ground.

OTHER GROUNDS

58 It is not strictly necessary to deal therefore with Fitness Australia's two additional arguments. However, out of deference for the thoroughness with which they were presented we will consider these matters briefly.

59 The first argument was that the Tribunal had misconceived its function by asking itself the question of what the maximum fee it could select should be. For example, reliance was placed on a passage in the Tribunal's reasons where it stated "[i]t is important to note that a licence fee fixed by the Tribunal under an approved scheme is a maximum fee. There is nothing to prevent a collecting society charging its licensees a lower fee": Phonographic at [8]. We do not think there is any substance to this argument. What the Tribunal said was quite correct as a practical observation – the amount fixed does operate as a maximum. That is not by any means the same as saying the Tribunal had set up for itself the task of identifying the maximum fee which could be charged. Even a cursory glance of the Tribunal's reasons shows that it set about determining the question of the reasonable fee.

60 The second argument was that the Tribunal had failed to deal with a number of its submissions about the rate to be selected and, in particular, a submission that the Tribunal should take into account some other rates (such as the current rate and the rate paid to another collecting society). This argument does not, however, arise. The Tribunal decided to fix the rate using the Roberts Research study. If that had been a process which was procedurally open to it then what would have occurred would simply have involved the rejection of the process being urged upon it by Fitness Australia. In that circumstance, the necessity for a detailed account of the various elements of that rejected methodology may not have been especially pertinent. However, we do not need to decide that question. The use of the Roberts Research study was procedurally inappropriate.

RELIEF

61 The claim was pursued under the *Administrative Decisions (Judicial Review) Act 1977*. Section 5(1)(a) allows for a claim for relief under that Act where it is alleged “that a breach of the rules of natural justice occurred in connection with the making of the decision” which is what occurred here. Section 16(1)(a) permits this Court to make an order “quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies”. Fitness Australia seeks an order that the Tribunal’s decision be set aside with effect from the date of its making, that is, 17 May 2010. That is an appropriate order to make.

62 The making of that order will leave the PPCA’s referral to the Tribunal undetermined. Section 16(1)(b) empowers this Court to make an order “referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the court thinks fit”. As Fitness Australia submits it is appropriate that the Tribunal be directed to reconsider the matter according to law. No further directions were sought. Plainly enough there will be questions of procedure for the Tribunal to consider when the matter returns to it but it is the appropriate body to determine them, no doubt, in light of the submissions then made to it. Costs must follow the event.

RULINGS ON EVIDENCE

63 During the hearing, objection was taken by PPCA to Fitness Australia’s use of two affidavits to show what it would have done had it known that the Roberts Research study was to be

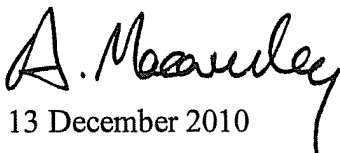
used as a basis for determining the rate. At the time of the hearing we permitted those affidavits to be read provisionally. The first affidavit, by Fitness Australia's solicitor, Mr Alexander, set out some facts about the hearing before the Tribunal; for example, he swore as to the fact that the Roberts Research study had not been served as survey evidence under this Court's practice note about the use of such evidence (which practice was applied by the Tribunal). He also deposed to the number and names of the witnesses before the Tribunal and to the Gyms Survey. He explained the steps taken by Fitness Australia in response to the Gyms Survey. We do not regard any of that evidence as objectionable and it should be admitted.

64 Mr Alexander also gave evidence that he was not aware that the Tribunal was going to use the study to assist in the setting of the fee. He swears that if he had been aware that that was going to occur he would have taken a number of preparatory steps. Another affidavit affirmed by the chief executive officer of Fitness Australia, Ms Stace, was to similar effect.

65 We would admit this evidence. As we understood the objection it was put that the evidence was speculative or, to put it another way, that it was inadmissible opinion evidence by the witnesses as to what they thought they would have done if they had known the Tribunal was proposing to use the study for the purpose of determining a rate. Two judges of this Court have concluded that this kind of evidence is not opinion evidence excluded by s 76 of the *Evidence Act 1995 (Cth)*: *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 5)* (1996) 64 FCR 73 at 75-77 per Lindgren J; *Hughes Aircraft Systems International v Airservices Australia* (1997) 80 FCR 276 at 279-280 per Finn J. Those decisions were in turn applied by the NSW Court of Appeal in *Seltsam Pty Ltd v McNeill* (2006) 4 DDCR 1 at 40 [122] per Bryson JA (Handley and Tobias JJA agreeing). We do not think that it would be appropriate to depart from that approach. The evidence should therefore be admitted in its entirety.

I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Bennett, McKerracher and Perram.

Associate:



Dated: 13 December 2010