Copyright Tribunal of Australia

Copyright Agency Limited v University of Adelaide [2022] ACopyT 2

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| File number: | CT 4 of 2018 |
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| The Tribunal: | **PERRAM J (DEPUTY PRESIDENT)** |
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| Date of decision: | 31 May 2022 |
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| Catchwords: | **COPYRIGHT** – equitable remuneration for copying and communicating works under statutory licence – where increase in digital reading lists – whether reading list is ‘communication’ under s 31(1)(a)(iv) of *Copyright Act 1968* (Cth) – rate for digital use – whether per page rate appropriate – judicial estimation of equitable remuneration – mandatory considerations under *Copyright Regulations 2017* (Cth) reg 73(2) – whether equitable remuneration expressed globally, as rate per equivalent full time student or as revenue share |
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| Legislation: | *Copyright Act 1968* (Cth) ss 10, 31(1)(a), 113P(1), 200AB, Pt IVA  *Copyright Regulations 2017* (Cth) reg 73(2) |
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| Cases cited: | *Copyright Agency Ltd v University of Adelaide* [1999] ACopyT 1; 151 FLR 142  *Phonographic Performance Company of Australia Limited under s 154(1) of the Copyright Act 1968 (Cth)* [2016] ACopyT 3; 125 IPR 1  *Telstra Corporation Limited v Australasian Performing Right Association Ltd* (1997) 191 CLR 140 at 157  *Woolworths Ltd v Olson* [2004] NSWSC 849; 184 FLR 121 |
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| Counsel for the Applicant: | Mr N Murray SC and Ms E Bathurst |
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| Solicitor for the Applicant: | Banki Haddock Fiora |
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| Counsel for the Respondents: | Mr R Cobden SC, Ms L Thomas and Ms M Evetts |
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| Solicitor for the Respondents: | Baker McKenzie |

COMMONWEALTH OF AUSTRALIA

*COPYRIGHT ACT 1968*

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| IN THE COPYRIGHT TRIBUNAL | | CT 4 of 2018 |
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| BETWEEN: | COPYRIGHT AGENCY LIMITED ABN 53 001 228 799  Applicant | |
| AND: | THE UNIVERSITY OF ADELAIDE  First Respondent  THE AUSTRALIAN NATIONAL UNIVERSITY  Second Respondent  AUSTRALIAN CATHOLIC UNIVERSITY (and others named in the Schedule)  Third Respondent | |

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| tRIBUNAL: | PERRAM J (DEPUTY PRESIDENT) |
| DATE OF ORDER: | 31 May 2022 |

THE TRIBUNAL ORDERS THAT:

1. The parties bring a short minute of order, within 21 days, giving effect to these reasons.

REASONS FOR DETERMINATION

PERRAM J (DEPUTY PRESIDENT):

# The Question

1. The question for determination is how much equitable remuneration the 39 Respondent universities (‘the Universities’) should pay to the Applicant, the Copyright Agency Ltd (‘CAL’), for licensed copying or communication of works under Pt IVA of the *Copyright Act 1968* (Cth) (‘the Act’). CAL seeks a determination for the method of ascertaining the payable amount for the period 1 January 2019 to 31 December 2024.

# Background

1. The works involved are largely works contained in university libraries that are copied or communicated for educational purposes. The range of works is extremely varied and includes literary and artistic works although it no longer includes sheet music. Some of the works by nature tend to be copied only as an extract, for example, a chapter of a book. Others, especially artistic works, are more commonly copied in their entirety. The Tribunal is required to take the nature of the works into account by reg 73(2)(a) of the *Copyright Regulations 2017* (Cth) (‘the Regulations’).
2. The Respondents are universities. As such they provide teaching services to students. They are remunerated for this by the Commonwealth but also from other sources. They are not-for-profit organisations in a general sense but some conduct substantial business operations as well. Part of the services they provide to students (and also academics) is access to library resources which includes access to the works in question. The Tribunal is required to take the nature of the Universities into account by reg 73(2)(b) of the Regulations.
3. The copying and communicating taking place under the statutory licence may be described as copy and communicating for educational purposes. Most of the copying involves digital use (by means of scanning and electronic transmission) but there is a component of hardcopy photocopying too. Much of the digital use involves the use of digital reading lists and a considerable component of the hardcopy copying concerns the use of course-packs. The Tribunal is required to take these matters into account by reg 73(2)(d) of the Regulations.
4. There is no doubt that the existence of the statutory licence exerts a downward pressure on sales of some of the works. If students were not given access to the works under Pt IVA of the Act, it is likely that at least some of them might purchase the works. So viewed, the statutory licence is likely to result in a drop in the aggregate demand for the works and hence, all things being equal, a drop in the value of the works. However, I am not certain the last step follows. A meaningful statement in this area would require close attendance to the works in question, the profile of the relevant students and more general market effects. The most that can be said is that the existence of the statutory licence is likely to result in fewer sales of works. This matter must be taken into account because of reg 73(2)(e) of the Regulations.

# The Competing Methodologies

1. The parties put forward competing methodologies for the determination of the equitable remuneration.
2. CAL sought to determine the base rate of equitable remuneration by reference to the amount which the parties had agreed for 2017-2018. This was $32.5 million and, according to CAL, it was to be used as a comparable bargain on top of which further adjustments were to be made by way of judicial estimation.
3. The Universities, by contrast, proposed the use of the page rates previously determined by the Tribunal in *Copyright Agency Ltd v University of Adelaide* [1999] ACopyT 1; 151 FLR 142 (‘the 1999 Determination’), to update those rates by reference to movements in the consumer price index (‘the CPI’) and, after factoring in the ‘actual access’ by students to the works, to determine by those means a base rate of $7.24 million (according to what the Universities called their ‘20% scenario’). The Universities accepted that a number of matters should then be brought to account by way of judicial estimation. They suggested that this could be achieved by rounding up the $7.24 million figure to $10 million.
4. The parties are therefore far apart. The Universities’ proposal results in a drop of $22.5 million from the remuneration they agreed to pay for 2017-2018. This is a drop of around 69%.
5. The Universities submitted that a substantial reduction in remuneration was warranted because reliance on the statutory licence had been declining since 2000. There were two elements to this contention.
6. First, the evidence suggested that the Universities now had commercial arrangements with publishers and encouraged their staff to use these commercial licence materials in preference to the statutory licence materials. Consequently, it was to be inferred that these practices had led to a decrease in the extent to which the statutory licence was being used. Secondly, statistical evidence collected through annual surveys showed directly that the statutory licence was being used less.
7. I do not accept either argument. As to the first, it suffers from theoretical, forensic and empirical problems. Theoretically, it involves a non-sequitur: it does not follow that an increase in the use of commercial licence materials necessitates a decrease in the use of the statutory licence. Forensically, it is deficient because whilst the evidence suggests that the Universities have in place policies which encourage their staff to use commercial licence materials in preference to statutory licence materials, the Universities did not provide persuasive evidence showing how successful these policies are in practice. Empirically, the submission is concerned with the use of commercial licence materials as part of digital reading lists. The evidence of Dr Hughes, however, shows that there has been no statistically significant decline in the use of digital materials in the period 2002-2019. It follows that I cannot accept the Universities’ submission that a 69% drop in remuneration is justified by the mere fact that they have entered into commercial licencing arrangements.
8. As to the second argument, what the statistical evidence actually shows is that there has been a statistically significant decline in hardcopy photocopying, no statistically significant decline in digital use and, overall, a statistically significant decline in all uses. Digital use now accounts for 90% of usage and hardcopy photocopying for only 10%. I do not think that one can get from this material anything concrete.
9. I do not think therefore that this material provides support for the idea that the remuneration should now be reduced by 69% or $22.5 million. A submission that the statistically significant decline in overall use might warrant a modest reduction in the remuneration might have had its attractions, but the submission that a 69% reduction was justified was not of that character.

# The Competing Methodologies: Choice

1. Turning then to the their actual methodologies, CAL’s approach involves using the 2017-2018 agreed amount of $32.5 million as a comparable bargain to determine a base rate which is then adjusted by judicial estimation to take into account various factors. The Universities’ approach treats the 1999 Determination as a valuation of the worth of the statutory licence at that time and seeks to update it for movements in the CPI and various other factors to be taken into account using judicial estimation. Curiously, although the Universities justified their proposed 69% reduction by reference to the rise of commercial licence use, this was not a matter which was reflected in the methodology they proposed. Their methodology was based on actual pages copied or communicated pursuant to the statutory licence. The design of the electronic use survey (‘the EUS’) from which that data was obtained was explicit in only capturing statutory licence materials and in excluding any copying or communicating which took place pursuant to a commercial licence.
2. This entails two matters. First, that the 69% decrease in remuneration implied by the Universities’ methodology does not come from an increase in commercial licence use since that use is not captured in the EUS. Secondly, that the 69% drop implied by their methodology comes from somewhere else. In fact, it is clear that the lion’s share of the 69% results from the Universities’ contention that the Tribunal should abandon the parties’ previous practice of treating a work on a digital reading list as having been communicated to each student in the course. Instead, the Universities submit that the Tribunal should proceed on the basis that each item on a digital reading list is communicated, according to Mr Velez’s evidence, only to an average of 11% of the students in each class that *actually* access the course materials. Acknowledging that the 11% figure should not be used for quantitative purposes, the Universities nevertheless submit that the lower ‘actual access’ rate should be taken into account by reducing the rate of digital copying and communicating by 80%.
3. In my view, as a matter of law, both methodologies are open to the Tribunal: cf. *Phonographic Performance Company of Australia Limited under s 154(1) of the Copyright Act 1968 (Cth)* [2016] ACopyT 3; 125 IPR 1. In effect, both methodologies use comparable transactions to establish a base rate which is then to be adjusted by judicial estimation. The difference between the parties’ methodologies is in the comparable transactions and the outcome of the judicial estimation. For CAL, the comparable transaction is the $32.5 million agreed by the parties for 2017-2018. For the Universities, it is the page rates determined by the Tribunal in the 1999 Determination updated to reflect movements in the CPI. Both parties then seek to rely upon judicial estimation to adjust the base rate.
4. In my view, the Tribunal’s 1999 Determination of page rates is a better comparable transaction than the $32.5 million figure agreed by the parties for 2017-2018. This is because the $32.5 million was not derived from usage rates generated by the hardcopy survey (‘the HCS’) and EUS. Indeed, the various negotiated remuneration amounts have not used usage rates since 2002. I am prepared to assume, in favour of CAL, that it might be legally permissible to seek to determine the equitable remuneration due by reference to some concept other than usage. For example, it may be possible to determine the equitable remuneration by reference to profits made from the use of the statutory licence (I express no view on this issue). But assuming it can be done, there is nothing to suggest that the $32.5 million figure agreed for 2017-2018 was an agreement about that matter. The problem is that the $32.5 million is not self-evidently linked to any metric other than the fact that it was agreed. I am disinclined to give the fact that it was agreed much weight where, apart from the role of this Tribunal, CAL and the Universities were, respectively, a monopolist and a group of monopsonists. In any case, the parties’ agreement on this figure was only reached because: (a) Pt IVA of the Act forced them to deal with each other or face expensive and unpredictable Tribunal litigation; (b) they had very different views about the remuneration to which CAL was entitled but were willing to submerge those views for a short period of time to avoid finding themselves before this Tribunal; and (c) they expressly agreed that their agreement as to the $32.5 million for 2017-2018 did not represent any agreement between them as to the actual value of the copying which was taking place.
5. On the other hand, the Tribunal’s determination of page rates in 1999 concerns the same subject matter insofar as hardcopy photocopying rates are concerned. Although it does not deal with digital copying or communicating, the hardcopy rates nevertheless provide a surer foundation from which to work. Accordingly, I prefer in principle the Universities’ proposed use of the page rates determined in the 1999 Determination.

# Adjustments

## Hardcopy Copying and Communication

1. The Tribunal set a rate of 4 cents per page in 1999. At the same time it set a course-pack rate of 5 cents per page. The Universities suggested that if one made the assumption that about 50% of all hardcopy photocopying was course-pack copying, this could be reflected in a blended copying rate of 4.5 cents per page. CAL accepted, if its own methodology were rejected, that a blended rate was appropriate. I will fix the rate for hardcopy photocopying at 4.5 cents per page. The CPI index value for 4.5 cents in 2019 was 7.6 cents per page. According to the surveys, there were 36,194,400 hardcopies done in 2019 (i.e. 10% of the total number of pages copied or communicated in 2019). This results in an equitable remuneration of $2,750,774.40.

## Digital Reading Lists

1. The Tribunal has not yet determined a rate for digital copying or communicating. The bulk of digital copying and communicating happens through digital reading lists. The previous hardcopy course-pack rate was 5 cents per page. In my view, there are a number of advantages which digital reading lists have over course-packs. First, because they are not limited in physical size, they may be much larger than course-packs. Secondly, they are portable since they are able to be used wherever a student uses a device to access them. Thirdly, where a student downloads the material, it may be permanently stored as opposed to a course-pack, which as a physical item, is likely to have a less definite future. Fourthly, the quality of the copying is superior. Fifthly, the material may be manipulated in ways which are more extensive than can be done with a course-pack. For example, detailed marginal notes may be made and, if the materials are in a searchable format, they may be searched. Sixthly, in the same situation text may be copied from such a work, perhaps for quotation in an essay. These matters persuade me that the amenity of digital reading lists substantially exceeds that of a course-pack. The decline of the latter and the rise of the former is consistent with that observation. Consequently, I will fix the rate for digital copying and communicating at 5.5 cents per page. Indexed by the CPI in 2019, this is 9.3 cents per page.
2. Until now, the EUS has treated each work on a digital reading list as having been communicated to every member of the course to whom that list relates. CAL submits that this status quo should be maintained. The Universities submit that the evidence shows that not all students access the materials on digital reading lists. They suggest that the Tribunal should proceed on the basis that 20% of students actually access the works linked in the digital reading lists.
3. Section 113P(1) of the Act provides a defence to an infringement action if the statutory licence is engaged. This directs attention to the right infringed which, relevantly, is the right to communicate a work to the public: s 31(1)(a)(iv). The ‘public’, that is ‘the copyright owner’s public’, involved is the body of students to whom a digital reading list is made available: *Telstra Corporation Limited v Australasian Performing Right Association Ltd* (1997) 191 CLR 140 at 157. A work will be communicated to the relevant public either by making it available online or by electronically transmitting it to individual members of the course: s 10 definition of ‘communicate’. The rights conferred by Pt IVA of the Act on the Universities consist of an entitlement to do these two sets of acts without being sued for infringement.
4. In assessing equitable remuneration it is appropriate to take account of both sets of rights.
5. The Universities derive considerable amenity from the use of the right to make the works available online. This amenity includes: (a) being able to communicate works to students without having to contact them directly; (b) being able to update reading lists without having to engage in fresh direct acts of electronic communication (e.g. email); and (c) being able to provide to their students the considerable facility of a digital reading list.
6. The Universities also derive amenity from the electronic transmission to students of the work after a student clicks on a link in a digital reading list. It is true that the student derives amenity from this too, but the Universities derive their amenity in being able to offer such a service to their students. However, this is, in substance, the same amenity which arises in relation to the right to make the works available online which I have considered above at (c). It should not be counted twice.
7. CAL submitted that it should be remunerated on the basis that each work on a digital reading list is treated as having been communicated to as many students as there were in each course, i.e. at a rate of 100% of the students in the course. The Universities said that CAL should be remunerated on the basis that the works were communicated to 20% of the students in each course. This was on the basis of evidence which suggested that not all students in fact accessed the works on the digital reading lists. Although I did not find Mr Velez’s evidence about this persuasive from a quantification perspective (and it was not suggested that I should), I do accept that it is likely that a good number students never do the readings for their courses. This is not a new phenomenon.
8. In any event, the two sets of rights should be valued in tandem since they are interrelated. The interrelationship is partial only, however. Where a work is downloaded from an online location, each electronic transmission of the work will necessarily be preceded by the act of making the work available online. The converse, however, is not true: electronic transmission of a work may occur without an antecedent act of making the work available online as, for example, occurs where a work is sent by one person to another by email. In such cases, however, there is less likely to be an act of communication ‘to the public’ within the meaning of s 31(1)(a)(iv): *Woolworths Ltd v Olson* [2004] NSWSC 849; 184 FLR 121 at [337]. This outcome will, of course, depend on the particular factual circumstances of each case and generalities may be dangerous. For example, an academic who emails a work to a class is likely to have communicated it to the public within the meaning of s 31(1)(a)(iv) in light of the way the concept of the relevant public has been approached (as discussed above).
9. In the case of the Universities (but perhaps not in every case), the value of both rights may be seen in some ways as being related to the number of students. I think it therefore appropriate to fix the equitable remuneration by reference to a percentage of the number of students in a class. In doing so, I accept that some of the amenities I have identified as flowing to the Universities, from the entitlement under the first limb of the communication right to use digital reading lists, are, in a sense, somewhat difficult to measure. I also accept that it is important to avoid double compensation arising from the overlap between the right to make a work available online and the subsequent electronic transmission of that work as a result of its having been made available in the first place.
10. I have concluded that an appropriate figure is 75% of the students in each class. This recognises the amenities derived by the Universities I have identified above, whilst providing for some discount to reflect the likely import of the tentative discoveries of Mr Velez. It also seeks to accord meaningful value to the right to make a work available online.
11. Consequently, the equitable remuneration in relation to digital reading lists should be calculated on the basis that the statutory licence works on them are communicated to 75% of the students in a course. CAL should therefore be remunerated at a rate of 9.3 cents per page on 244,312,200 pages (75% of 90% of the total number of pages copied and communicated in 2019) which is $22,721,034.60.
12. This results in a base remuneration of $25,471,809.00 for both hardcopy and digital use. Before passing on from this topic, the position of the individual copy which is made for uploading should be noted. Where a work exists in hardcopy, the process of placing it on an electronic reading list involves the making of an initial digital copy. This is a ‘reproduction’ of the work under s 31(1)(a)(i) of the Act and is therefore a remunerable copy. However, in many cases, where a work is placed on an electronic reading list, the copy has already been made. On the scheme of the issues in this case, the role of these individual copies is de minimis. I do not think it is appropriate to adjust these figures further to take account of them.

## Collection Costs, Non-Centralised Copying and Artistic and Whole Works

1. The Universities submitted that the Tribunal should account for collection costs, the use of artistic and whole works and the practice of non-centralised copying or communication by means of a rounding up on their base remuneration. CAL agreed that judicial estimation was appropriate for these matters although it did draw attention to some evidence of Mr Suckling that CAL’s collection costs were $4.75 million. I did not find this evidence persuasive as the annual report upon which it was based was not in evidence.
2. I propose to adopt the Universities’ methodology to account for these three matters by way of an adjustment to the base remuneration of $25,471,809. The Universities’ proposed base remuneration was $7.24 million for 2018 which they rounded up to $10 million. This rounding up may be viewed as the addition of a fixed amount – $2.76 million – to the base remuneration. Alternatively, it may be viewed as a 38% increase in the base remuneration. I reject the Universities’ submission ([341]) that it represents a 25% increase in the base remuneration for which they contend; the arithmetic is wrong.
3. It is possible that some parts of the $2.76 million reflect fixed items and some parts proportionate elements. The present question is whether the Universities’ methodology requires the Tribunal:
   1. to add $2.76 million to the base remuneration which has been determined, $25,471,809.00, which would result in a rounding up to $28,231,809.00;
   2. increase the base remuneration, $25,471,809.00, by 38% which would result in a rounding up to $35,151,096.42; or
   3. some intermediate position.
4. I propose to take the second course. There are two reasons for this. First, whilst it is possible to view the collection costs as fixed, the Universities contended that they had been included as part of the 4 cents per page determination in 1999 (see [419]) which suggests that they are a proportionate expense. Secondly, the Universities themselves referred to a percentage rate for the uplift rather than an absolute figure (see [341]).
5. I therefore determine that the global equitable remuneration for 2019 is $35,151,096.42.

# Other Matters

1. Regulation 73(2)(f) requires the Tribunal to take into account the special circumstances of external students. Neither party sought to put external students on a different footing except perhaps in relation to the issue of COVID-19, in relation to which CAL submitted that external student use had increased. Accepting that to be true, however, neither party suggested that the position of those students who were external differed in relation to the subject matter of this reference in any way which was material. Consequently, I will take this matter into account by concluding that in this case it has no discernible impact on the figure in the preceding paragraph.
2. Regulation 73(2)(g) requires the Tribunal to take into account unremunerated contributions by the Universities to the creation of the material copied under the statutory licence. The Universities contended that their staff worked for some of the journals which produced works which were then subject to the statutory licence. This appears likely to be the case. I will take it into account by reducing the figure in [37] to $35,100,000.00.
3. The Universities submitted that the Tribunal should only make a determination for the years 2019-2021. They contended that the parties would likely negotiate agreements based on the present determination and that the impact of COVID-19 on copying and communication practices would be better understood and accounted for after 2021. I do not accept this submission. Even if I did, the impact of COVID-19 on copying and communication practices to date provides little guidance on how works will be used going forward. A better approach, as I outline below, is systemically to recalculate this figure every five years based on actual copying and communication activity.
4. The topic of non-centralised use should also be noted. CAL submitted that there should be an increase in remuneration to reflect the fact that non-centralised use is not presently measured. As I have indicated above, the Universities’ methodology supported some upward adjustment for non-centralised use to be reflected by way of judicial estimation. Consistent with that concession, anecdotal evidence from some of CAL’s solicitors, as to their experiences as students with digital reading lists, suggests that non-centralised use is a real phenomenon.
5. Although I have used the Universities’ methodology to include the effects of non-centralised use in rounding up the base remuneration, I am sure that it is something which may be much more accurately measured. The difficulties which exist lie in the current form of the survey methodology which does not capture this kind of use. If the issue can be addressed by adjusting the survey method and/or by requiring the Universities to give access to a broader range of teaching materials, this would provide a superior mechanism for approaching the task of judicial estimation. This would be preferable to the approach which I have taken on the present hearing.
6. As I later explain, it is time for the survey method to be revisited and this is one of the topics which can be examined in that context.
7. I have mentioned the Universities’ contention above that a reduction is warranted because of the increase in commercial licence use. Because the methodology the Tribunal has adopted depends, for its efficacy, upon the output of the survey process which is explicit in only capturing statutory licence use, this concern does not arise. CAL sought access to the reading lists themselves and to a list of licensors so the effect of commercial licences could be measured. That concern likewise falls away under the methodology the Tribunal has adopted.
8. Finally, there was a debate between the parties as to the extent of copying which had taken place during the COVID-19 pandemic pursuant to s 200AB. The principal point of this debate appears to have been to allow the parties to trade insults. Certainly, nothing useful came from it from the Tribunal’s perspective. Whether uses should be recorded as uses under s 200AB or instead as statutory licence uses is more meaningfully considered, if it is to be considered at all, at the level of survey design.

# How should the equitable remuneration be expressed: Globally, as an EFTSU Rate or as a Share of Revenue?

1. The number of students at any one time has a direct impact on the extent of the use of the statutory license materials; twice as many students will double the likelihood of reading materials being used. This provides some reason to convert the global sum into an ‘Equivalent Full Time Student Unit’ (‘EFTSU’) rate using the number of EFTSU in 2019. On the other hand, one risk with an EFTSU rate is that it becomes decoupled from actual usage over time. Another is that if the Universities are being charged on an EFTSU basis then this removes incentives for them to keep copying to a minimum.
2. On balance, I accept that an EFTSU rate is a useful short term proxy for the use of the statutory licence provided it is initially calculated by reference to actual use and so long as it is regularly recalculated by reference to actual use.
3. The risks of using an EFTSU rate may therefore be adequately addressed by requiring the EFTSU rate to be re-determined every four years on the basis of the data emerging from the HCS and EUS for the preceding four years. The figures should continue to be prepared as they have in the past on the basis of three-year rolling averages.
4. Consequently, the sum of $35,100,000.00 for 2019 is to be converted into an EFTSU rate which is to be increased in line with the CPI for 2020, 2021 and 2022. At the end of 2022, a fresh EFTSU rate is to be calculated from the data for 2019-2022 and this new rate is to be applied in the final year, 2023, and subsequent years until the next revaluation.
5. In terms of reg 73(2)(c), I am satisfied that this base rate will provide an adequate incentive for the creation of educational works. The previous remuneration agreed by the parties for 2017-2018 was $32.5 million. This determination therefore results in a moderate increase from the previous amount. I do not think that setting the remuneration at this moderately increased level will impact deleteriously on the incentives which exist for the production of educational works.
6. I do not think it would be sensible to convert the global remuneration into a revenue proportion. There are two reasons for this. First, there may be difficulties in defining revenue in a way which is sufficiently clear. Secondly, revenue is not as good a proxy for the degree to which the statutory license is being used as is the number of students.
7. I do not accept CAL’s submission that the HCS and the EUS are no longer fit for purpose. Whilst the process is certainly clunky and expensive, its deficiencies are not such as to mean that the data it provides is inaccurate in the long term. More importantly, there is no obvious replacement. A move to a pure EFTSU rate or revenue share model, untethered to usage levels, would not respond in the long term to changes in the way the statutory licence is used. Consequently, their use will eventually give rise to disputation when one party eventually claims that the rates are no longer properly connected with usage. On the other hand, this problem of drift is not such a problem if a revaluation of the EFTSU rate is carried out every five years.
8. I do in principle accept CAL’s submission that it is time that the surveys were revisited. The Universities deny that the Tribunal has the power to vary the survey methodology as the proceeding is presently constituted. They also deny that they have been afforded an opportunity of being properly heard on any changes to the survey methodology.
9. The appropriate course therefore is this. First, the parties are to bring in a minute of order giving effect to these reasons. If there needs to be any further argument about those orders this can be arranged with my Associates. Secondly, CAL should reformulate its application so that the Universities’ procedural objection that there is presently no ‘question’ before the Tribunal, under reg 72(e), ceases to have any currency. Thirdly, both parties should flag to each other what they would like to see by way of variation to the survey methodology. To that list should be added my concern to gauge non-centralised use more precisely. Fourthly, there should be timetabling orders for the preparation of these survey methodology issues for hearing. There should be no more than 10 pages of submissions on either side.

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| I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Determination of the Tribunal constituted by the Honourable Justice Perram (Deputy President). |

Associate:

Dated: 31 May 2022

SCHEDULE OF PARTIES

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| Respondents |  |
| Fourth Respondent: | FEDERATION UNIVERSITY |
| Fifth Respondent: | BOND UNIVERSITY |
| Sixth Respondent: | UNIVERSITY OF CANBERRA |
| Seventh Respondent: | CENTRAL QUEENSLAND UNIVERSITY |
| Eighth Respondent: | CHARLES STURT UNIVERSITY |
| Ninth Respondent: | CURTIN UNIVERSITY |
| Tenth Respondent: | DEAKIN UNIVERSITY |
| Eleventh Respondent: | EDITH COWAN UNIVERSITY |
| Twelfth Respondent: | FLINDERS UNIVERSITY |
| Thirteenth Respondent: | GRIFFITH UNIVERSITY |
| Fourteenth Respondent: | JAMES COOK UNIVERSITY |
| Fifteenth Respondent: | LA TROBE UNIVERSITY |
| Sixteenth Respondent: | MACQUARIE UNIVERSITY |
| Seventeenth Respondent: | THE UNIVERSITY OF MELBOURNE |
| Eighteenth Respondent: | MONASH UNIVERSITY |
| Nineteenth Respondent: | MURDOCH UNIVERSITY |
| Twentieth Respondent: | THE UNIVERSITY OF NEW ENGLAND |
| Twenty-First Respondent: | UNIVERSITY OF NEW SOUTH WALES |
| Twenty-Second Respondent: | THE UNIVERSITY OF NEWCASTLE |
| Twenty-Third Respondent: | CHARLES DARWIN UNIVERSITY |
| Twenty-Fourth Respondent: | THE UNIVERSITY OF QUEENSLAND |
| Twenty-Fifth Respondent: | QUEENSLAND UNIVERSITY OF TECHNOLOGY |
| Twenty-Sixth Respondent: | RMIT UNIVERSITY |
| Twenty-Seventh Respondent: | SOUTHERN CROSS UNIVERSITY |
| Twenty-Eighth Respondent: | SWINBURNE UNIVERSITY OF TECHNOLOGY |
| Twenty-Ninth Respondent: | THE UNIVERSITY OF SYDNEY |
| Thirtieth Respondent: | UNIVERSITY OF TASMANIA |
| Thirty-First Respondent: | UNIVERSITY OF SOUTH AUSTRALIA |
| Thirty-Second Respondent: | UNIVERSITY OF THE SUNSHINE COAST |
| Thirty-Third Respondent: | UNIVERSITY OF TECHNOLOGY, SYDNEY |
| Thirty-Fourth Respondent: | VICTORIA UNIVERSITY |
| Thirty-Fifth Respondent: | THE UNIVERSITY OF WESTERN AUSTRALIA |
| Thirty-Sixth Respondent: | WESTERN SYDNEY UNIVERSITY |
| Thirty-Seventh Respondent: | UNIVERSITY OF WOLLONGONG |
| Thirty-Eight Respondent: | UNIVERSITY OF SOUTHERN QUEENSLAND |
| Thirty-Ninth Respondent: | THE UNIVERSITY OF NOTRE DAME AUSTRALIA |