



AUSTRALIAN HOTELS ASSOCIATION

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John Laughlin
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ACCC
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Dear John

Re: Copyright licensing and collecting societies: a guide for licensees

I am writing on behalf of the Australian Hotels Association (AHA) in response to your invitation to comment on the above guidelines.

Over the last 3 year the AHA has been involved in negotiations with both APRA and PPCA in relations to proposed changes to the licensing fees and arrangements for the public broadcasting of music in licensed venues.

This experience has given our organization practical insights into how the monopoly power of collecting societies is applied in negotiations relating to the use of copyright.

The AHA was aware of the report of the Intellectual Property and Competition Review Committee (IPCRC). We made representations to the Attorney General requesting that the Copyright Act be amended to give effect to the recommendations relating to collecting societies raised in the Committee's Report.

These recommendations envisage the ACCC assuming a role to ensure that collecting societies do not misuse their market power.

We are therefore disappointed with the contents of the Guidelines and the limited role foreshadowed for the ACCC relating to collecting societies.

The Guidelines provide a sugar coated overview of current arrangements and state that *"the ACCC will only seek to become a party to tribunal proceedings when it considers the intervention would be in the public interest. This will be addressed on a case by case basis."*

The Guidelines indicate that the ACCC is unsure of its role under the legislation. A review of the submissions available on the ACCC website suggests that there is also a limited understanding in the broader community as to what the Guidelines are suppose to achieve.

We believe the ACCC needs to go back "to square one" and engage in broader consultation with relevant parties to determine the role they should play under the revised arrangements.

Any final Guidelines should reflect feedback from stakeholders and enable the ACCC to play the “gatekeeper” role envisaged by the IPCRC.

Overview of the AHA

The Australian Hotels Association (AHA) is the pre-eminent tourism and hospitality industry organisation in Australia. It has in excess of 8000 members operating general and accommodation hotels.

The AHA is a Federally Registered Industrial Organisation of Employers. It has a National Office and branches in each State and Territory. It also has a discrete branch to represent the interests of its Accommodation members. This Branch covers four and five star properties operated by the major chains. State branches operate autonomously and manage their own finances.

AHA members are required to have a range of APRA and PPCA licences covering the public broadcasting of music.

Background to the Guidelines

A number of government inquiries have identified the need to ensure that collecting societies do not abuse their special position in representing the owners of copyright.

The Guidelines state:

“A recent article by the current President of Copyright Tribunal, Justice KE Lindgren, discusses the role of the Copyright Tribunal and the market power of collecting societies. It concludes that:

As a matter of legislative history, the Act’s provisions giving jurisdiction to quantify amounts payable can be seen to have arisen from concerns in the 1920’s to 1960’s with APRA’s monopoly.” (Page 35)

The most recent Inquiry – the Intellectual Property and Competition Review Committee also raised the market power of collecting societies in its report in 2000.

The AHA would like to highlight the following relevant observations from the Report of the Inquiry in relation to the behaviour of collecting societies:

“Concerns about alleged “super-monopoly” aspects of collecting societies have been evident from a very early stage. Competition issues raised about the operation of collecting societies include the potential abuse of market power to extract higher licence fees (as the only licensors of certain types of copyright material), and the inability of negotiating parties to derive market value for the unit cost of new services in the digital environment” (Page 120)

However collecting societies must be subject to appropriate safeguards governing any market power they may possess (Page 122)

In the Committee’s view the main issues that need to be addressed ... [include] the role of the various regulators, including the ACCC in ensuring that collecting societies properly fulfill their functions. (Page 123)

Where economies of scale or scope confer substantial market power on non-statutory societies, there is little in the way of specific regulation or guidelines to control the exercise of that power, especially in light of the protection that might currently be afforded the societies and the activities they undertake by virtue of s 51(3) of the Trade Practices Act. (Page 123)

The Committee accepts that there may be instances in which it would be desirable for the Copyright Tribunal to review the output arrangements of schemes other than those implemented under a statutory licence. However, to avoid unnecessarily increasing the burden on the Copyright Tribunal, it believes that the jurisdiction of that Tribunal should only be engaged in instances where commercial negotiation is unlikely to succeed.

As a result, the Committee recommends that the ACCC should be given power to act as a “gate keeper” in determining whether a reference should be made to the Copyright Tribunal. The determination would be based either on the application by a collecting society or from an actual or potential licensee, and the ACCC, in coming to a decision, would be required to take account of:

- Any market power than can be exercised by the collecting society*
- Whether there are alternative means of dispute resolution that could be used and that would impose less burden on the public: and*
- The public interest in balancing public access to copyright material with the legitimate commercial interests of copyright owners.*

This would ensure that the resources of the Tribunal were not diverted to adjudicating disputes which could be settled by commercial means. (Page 126)

On 28 August, 2000 the Government issued its response to this Committee's recommendations and amongst other things agreed that:

- (i) The ACCC be required by statute to issue guidelines on what matters it considers to be relevant to the determination of reasonable remuneration and other conditions of licenses that currently can or will be able to be the subject of determination by the Copyright Tribunal under VI of the Copyright Act;*
- (ii) The Copyright Act be amended to ensure that the Copyright Tribunal has the discretion to take account of the ACCC Guidelines and admit the Commission as a party to Tribunal proceedings.*

The AHA has quite reasonably assumed that the incorporation of these amendments in the new legislation is an acknowledgment that the Government accepts that the existing laws and processes need to be strengthened and endorses the recommendations of the IPCRC by empowering the ACCC to act as a “gate keeper”.

The Guidelines mentioned in the legislation are merely one element of this role.

The AHA experience relating to specific elements of the Draft Guidelines

The AHA is disappointed that the Guidelines provide what in its view constitutes a “sugar coated” summary of how the existing arrangement operates.

Our recent experience in negotiating changes to licensing arrangements with APRA and PPCA has provided first hand exposure to the inequities in the current negotiating processes when dealing with voluntary schemes.

The Guidelines State

[Collective societies] can be an effective and efficient means for copyright owners to commercialize their copyright. (Page 5)

They represent parties who would normally compete with each other in the supply of copyright material, their operation raises potential concerns regarding use of market power (Page 5)

The AHA:

- recognizes that owners of copyright have a right to payment for the public broadcast of their material;
- has found that collecting societies will often approach negotiations on a “take or leave it basis” based on their interpretation of what is a fair thing;
- understands that APRA and PCCA retain around 15-20% of fees collected to underwrite administration expenses. This provides considerable resources to pursue matters in the Copyright Tribunal;
- believes that negotiations with collecting societies, who are membership based, not for profit companies, provide greater scope for misuse of market power than negotiations with profit seeking companies. Not for profit organizations often lack the robust scrutiny of profit seeking businesses because the interests of members are not the same as the interests of shareholders. In the case of collecting societies, most members see the income as something that they would not normally be able to obtain. This means that members are not so inclined to scrutinize the amounts of money spent on legal fees. Negotiations between collecting societies and licensees are not, therefore, subject to the discipline in relation to legal fees imposed by shareholders that accompanies most commercial negotiations.
- understands that PCCA has a non exclusive right to bargain on behalf of its members. During the nightclub negotiations the AHA wrote to the four largest members of PCCA who control around 80% of broadcast music. We invited them to meet individually with the AHA to discuss possible ways we might be able to get access to their music without going through PCCA. Only one of the four members responded and indicated that, while they were happy to receive further information on possible opportunities, they would prefer to wait until after the resolution of the Copyright Tribunal hearing.
- PCCA has a long standing authorization from the ACCC that has no set review dates. The AHA has raised this matter with the ACCC.

The remuneration payable for the use of copyright material is the most frequent cause of disputes between collecting societies and licensees. (Page 5)

However, as collecting societies bring together the rights of parties who would normally compete with each other in the supply of copyright material, their operation creates scope for collecting societies to exercise market power in the setting of licence fees and conditions. In many instances parties wishing to use copyright material have limited, if any, alternative with dealing with the relevant collecting society. This may allow the collecting society to extract higher licence fees than

may otherwise have been paid and may result in inefficient use of resources, reducing the overall welfare of society. (Page 10)

The AHA:

- agrees that the primary area of conflict is in the negotiation of new or revised licence terms and conditions. Most small operators see APRA and PPCA as taxing bodies and have little understanding on why and how the fees are set;
- recognises the advantages for all parties for a fair and efficient licence scheme;
- believes that Individual venues do not have the resources to negotiate directly with collecting societies and generally rely on industry organization to represent their interests;
- notes that copyright negotiations are only one of the many issues that industry associations are dealing with. They often have other priorities or do not have the resources to underwrite the cost associated with defending a claim in the Copyright Tribunal. APRA's recent negotiation to revise rates for background music in the retail sector is a case in point. None of the industry bodies invited to participate in discussions was able to devote the necessary resources to effectively represent the interests of their members and the new arrangement was rubber stamped by Tribunal.
- believes that rate setting negotiations can become protracted and costly. There is no independent mechanism to assess the fairness and reasonableness of the rate increases proposed by collecting societies. This is why the involvement of the ACCC is required.

Most collecting societies have developed procedures for complaints handling and dispute resolution.

The Code of Conduct is intended to ensure that licensees have access to efficient, fair, low cost procedures for the handling of complaints and the resolution of disputes involving participating collecting societies. (Page 12)

Attempts by the AHA to utilize the dispute resolution processes in negotiations on recent rate changes were unsuccessful. From our experience these processes are only suitable for minor disputes relating to the obligations of individual venues. There needs to be another process to support industry wide negotiations to set terms and conditions of licence schemes.

The Code calls for Licence fees that are fair and reasonable (Page 13)

In the recent negotiations APRA achieved an increase of over 100% for background music, radio and/or TV and Juke Boxes. While the new fee structure will be phased in over several years and will be in place for the next decade we remained unconvinced that there has been a substantial change in the value of public broadcasting of music to our businesses. However it was not commercially sensible to incur the expense that would have been required to have the Copyright Tribunal resolve the areas of disagreement.

In the music for Nightclubs matter PPCA initially proposed an increase from the current rate 8 cents to \$1.00 per patron per night.

By the time this matter was heard in the Copyright Tribunal this figure had been adjusted to \$2.32. We are awaiting the decision of the Tribunal on this matter. The AHA and other affected industry bodies believed that the proposed fee increase was so outrageous that we could not do anything but challenge it in the Tribunal.

Most collecting society fee structures have been in place for some time and were determined by a fair assessment of the value of music at a certain point in time taking into account the particular circumstances in which the licence applies. These have usually been adjusted by CPI to maintain the real value.

The AHA believes that any fee increase should only occur when there is demonstrable evidence that there has been a change in the commercial value of music to the licensee.

The Copyright Tribunal was established in response to the perceived need to control the exercise of power by collecting societies or other organizations of the rights given to them by copyright owners. (Page 22)

The ACCC understands that proceedings in the Tribunal are conducted with as little formality and as quickly as possible. The Tribunal has no filing fees and is not bound by the rules of evidence. It closely monitors the preparation of cases to prevent unnecessary delay and expense (Page 22).

The recent PPCA matter was referred to the Copyright Tribunal for resolution. It involved a panel of 3 people as well as senior and junior counsel and ran for 10 sitting days. Our case was funded by several industry bodies. The overall legal cost will be approximately \$1 million. The issue of costs is particularly significant in relation to these matters in the Copyright Tribunal as costs orders are rarely awarded and the parties generally bear their own costs as they are a quasi judicial forum.

It is my understanding that the Tribunal made no attempt to refer the matter to mediation.

The Copyright Tribunal uses market rate, notional bargain rate and/or judicial estimation to determine fair and equitable remuneration. The Guideline note that the Tribunal has been cautious of relying on surveys to measure the value to users of copyright material particularly "stated preference surveys" that ask consumers to predict future action. (Page 29)

PPCA justification for the current increase in the fees charged for the public broadcast of music in nightclubs is based almost exclusively on a consumer choice survey. Despite this the Copyright Tribunal made no attempt to refer the matter to dispute resolution.

In summary the AHA experience in dealing with collecting societies is clearly different to the processes outlined in the Guidelines. The AHA experience is that the processes in place are different in substance from the processes outlined in the Guidelines. We would be concerned that the Guidelines in their current form run the risk of misleading the community.

Proposed Way Forward

- The Guidelines claim that the licence schemes confirmed by the Tribunal have, in general, been found to be reasonable in the circumstances. The AHA remains confident that its challenge to the PPCA application to increase music in nightclubs will be successful. However, it is a huge concern that nearly a million dollars has been spent on behalf of licensees to achieve what we trust will be a fair and reasonable outcome.
- The AHA is concerned that the ACCC intends to restrict its involvement in this area and assess matters on a case by case basis. This is clearly inconsistent with the intent of the legislation which creates a role for the ACCC beyond the existing arrangements.
- The ACCC role needs to define parameters that will assist the parties to negotiate a commercial arrangement that is fair and reasonable to all parties. It must challenge collecting societies to produce solid grounds to justify any proposed increases in fees or changes to existing licensing schemes. The Guidelines should contain parameters which keep potential misuses of their monopoly power in check. These parameters should identify appropriate triggers that activate the ACCC involvement in Copyright Tribunal proceedings.
- The problem with the current system is that there is no independent party who can assess the veracity of the relevant positions of each party and provide guidance on what is a fair thing. This is a key element of effective dispute resolution and the Copyright amendments foreshadow that the ACCC will play this role.

Given the resources and experience of the ACCC this should not be an onerous responsibility. The focus should be on the negotiations on major fee increases and greater effort is required to ensure that appropriate representation is available to protect the interests of licensees.

- Factors that might be considered in determine what is fair and reasonable could be:
 1. Background to the existing fee structure - when it was established and the circumstances at the time to assess if it was an appropriate market rate.
 2. Whether there have been periodic adjustments to maintain real value.
 3. Whether there is demonstrable change in the commercial value of the public broadcast of music in hotels and other relevant businesses since the current fee structure was initially introduced.
 4. Whether the commercial benefit of the public broadcast of music to the copyright owner has changed since the current fee structure was initially introduced – the public broadcasting of music is “free advertising” of the product in a practical sense and should be taken into account.
 5. The estimated value of any such change.
 6. The value of activities linked to music to the total revenue of the business and the capacity of the venue to pay.
 7. The quality of evidence to support claim for an increase.

8. The AHA believes that comparisons with overseas rates should be treated with caution. Collecting societies across the world operate from a monopoly position and reference to rates from other countries runs the risk of rates increases “piggy backing” on the weakest jurisdiction to the strongest. This leads to a ratcheting up of fees.
9. The establishment of an agreed costing model to assess fees.

The Intellectual Property and Competition Review Committee noted that it was likely that there would be an *inability of negotiating parties to derive market value for the unit cost of new services in the digital environment” (Page 120)*. Public broadcasting of music is a secondary market for copyright owners where marginal cost is negligible and the music is only one aspect of an experience that attracts people. The AHA, along with a range of other relevant industry bodies engaged NERA Economic Consulting to assess and comment on the Guidelines. I understand that a copy of the NERA report has been provided to the ACCC. This paper indicates that the current guidelines do not pay enough attention to demand issues. The AHA does not intend to comment further on the specifics of that report here but believes it further reinforces the need for a critical rethink of the draft Guidelines and where they fit in to the overall role of the ACCC in monitoring the activities of collecting societies.

Conclusion

The AHA believes that the ACCC needs to go back to square one and assess how it will effectively take on the role it has been assigned by the Parliament to ensure collecting societies do not misuse their market power.

The AHA recommends that the ACCC convene a workshop of key stakeholders to consider its new role and establish a way forward.

The AHA recognizes that there may not be universal interest by licencees in this process because there are some copyright relationships where the bargaining power of the parties is more aligned.

However, for many other industries such as ours, retail, restaurants and gyms there is an urgent need to introduce an honest broker to act as a fair and balanced gate keeper.

Recent events suggest that PPCA is attempting to revalue the fees paid for the public broadcast of music. The key PPCA members are large multinational entertainment companies with deep pockets. The AHA experience is that industry bodies representing small operators will find it very difficult to negotiate a fair outcome for all parties if the existing disparity in views about the true value of the public broadcasting of music to a business remains. These bodies will not have the resources to challenge PPCA applications in the Copyright Tribunal.

I would welcome the opportunity to discuss this AHA submission with your Office.

Yours sincerely

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