

5 July 2019

Mr Gavin Jones
Director
Australian Competition and Consumer Commission
25 Marcus Clarke Street
Canberra, ACT 2601

By email: adjudication@accc.gov.au

Dear Mr Jones

Australasian Performing Right Association Ltd application for revocation of authorisations A91367 – A91375 and substitution of new authorisation AA1000433 - submission in response to Draft Determination

1. Overview

- 1.1 Free TV thanks the ACCC for the opportunity to comment on the draft determination issued on 5 June 2019, regarding the APRA re-authorisation application (**Draft Determination**).
- 1.2 Like many other organisations that made submissions prior to the Draft Determination, Free TV is concerned about the lack of competitive constraint on APRA, which results in the setting of unfair licence fees and terms.
- 1.3 Free TV believes that in order for the benefit of the authorisation to outweigh the detriment to the public, as required by the test for authorisation under section 90 of the *Competition and Consumer Act 2010*, APRA should be required to take into account structural changes in an industry, including decline in industry revenues, when formulating industry licence schemes.
- 1.4 We note that the ACCC's 2019 Copyright Guidelines specifically provide pricing principles, including a consideration of market conditions faced by licensees, to assist the Copyright Tribunal in determining appropriate copyright licensing fees. It logically follows that similar principles should be required to be considered at the stage of development of the licence fees.
- 1.5 Free TV is supportive of additional conditions on APRA requiring increased transparency in relation to the methodology for calculating licence fees and the matters it has taken into account in increasing licence fees. However, the ACCC's proposed conditions appear to apply only to some licences, as determined by APRA. In Free TV's view:
 - (a) The transparency requirements should apply to all licensees, rather than only specific 'licence categories' – which would exclude commercial free-to-air broadcasters; and
 - (b) The requirement to be transparent in relation to the matters that APRA has taken into account should apply to any change in licence fees. In its current form, condition C1.6 would not require APRA to be transparent if it proposed to merely maintain licence fees in the context of changing industry conditions or decreasing industry revenues.

1.6 We explain these submissions in further detail below.

2. The conduct to be authorised results in APRA exercising market power

2.1 In its Draft Determination, the ACCC found (at paragraph 4.59) that:

'exclusive assignment of members' rights increases APRA's market power in acquiring and supplying performing rights in relation to musical works in Australia. It provides APRA with a near monopoly in both acquiring and supplying these rights:

- *Virtually all music owners in Australia are APRA members and as a condition of APRA membership, they are required to assign the rights in all their current and future works to APRA.*
- *APRA's opt out and licence back provisions offer only very limited opportunities for users to source performance rights to Australian works directly at source (from the APRA member)*
- *Even if APRA's input arrangements were less restrictive, by generally offering users blanket licences (albeit that users may be able to negotiate discounts off blanket licence fees), APRA reduces incentives for music owners and*
- *APRA is able to profitably exercise its increased market power under the exclusive arrangement due to the absence of a credible threat of entry by another major collecting society as a result of APRA's dominant position and high barriers to entry discussed above.*

2.2 Free TV agrees with these views. The conduct that is the subject of the authorisation will produce a significant public detriment resulting from a lessening of competition. These findings place a heavy burden on the applicant to demonstrate a countervailing public benefit, or for conditions that will adequately address the detrimental impacts of the conduct. Free TV submits that neither of these thresholds have been met.

2.3 The conditions proposed in the Draft Determination predominantly focused on APRA increasing transparency, reporting and bolstering the ADR process. While Free TV welcomes the proposed conditions and existing measures, they are insufficient to justify a decision to grant the authorisation that has been sought.

3. The commercial television market

3.1 Revenues from free to air television advertising have been steadily declining since 2012.¹ This timing correlates with the uptake of subscription streaming services, which has only increased in popularity in recent years. Declining advertising revenue has, in turn, directly impacted on the ability and willingness of free to air broadcasters to pay for the licences granted by APRA.

3.2 Despite this, it is Free TV's experience that APRA's normal approach to negotiations is to insist that fees should increase, at least by CPI, and often in real terms. Strangely, the Draft Determination appears to endorse this, proposing conditions that will only require APRA to consult on fee increases that exceed CPI.

3.3 The value of musical (and other) works broadcast over free to air television is plainly impacted by the advertising revenue that can be earned from those broadcasts. The value of such rights should be the product of negotiations between willing buyers and sellers. While there are a range

¹ PricewaterhouseCoopers report: *Outlook 2019 - Free to air television*, 2019.

of factors relevant to determining the value of such rights, the ability (and, hence, willingness) of the buyer to pay is clearly a relevant consideration in such a negotiation. In a market where free to air broadcasters are facing declining revenue, it is not realistic for APRA to insist that there can be no reduction in licence fees in real terms. The ability to insist on such a stance is a clear indicator of APRA's market power but is not addressed by the conditions proposed by the ACCC.

4. Transparency

4.1 The ACCC has proposed a series of conditions to improve 'transparency' on the part of APRA. Conditions C1.1 to C1.5 are concerned with APRA's plain English guides, which relate mostly to public performance licences (and which do not, on their face, appear to apply to free to air broadcasters as they do not presently fall within an existing 'licence category'). Free TV does not propose any amendments to Conditions C1.1 to C1.5. However, while APRA's plain English guides are useful tools for licensees with limited ability to understand or negotiate licence terms, they would not be an effective means for creating a framework for negotiations between APRA and free to air broadcasters.

4.2 Proposed condition C1.6 currently provides that:

'APRA must publish on its website, and make available to any party upon request, each time there is an increase in a licence fee in any licence category other than increases in line with CPI, an explanation of the matters taken into consideration in determining the increase in the licence fee. The provision of such information is only required to the extent that the information is not commercial-in-confidence.'

4.3 While this information is crucial in delivering transparency (if the condition was to apply to free to air broadcasters), this condition does not achieve this outcome in its present form. The obligation upon APRA to explain its proposed licence fees should apply not just when APRA wishes to increase those fees, (typically expressed as standard tariffs in the licence categories) but each time APRA enters into a licence fee negotiation even if APRA proposes no change to the licence fee or terms. Without up to date information on APRA's methodology for determining licence fees, it is difficult for prospective or current licensees to engage in meaningful negotiations with APRA.

4.4 Further, this condition assumes that APRA need not justify any proposal to hold fees level in real terms. In a market where free to air television revenue is in decline, APRA's ability to maintain such a stance is a clear indicator of its market power but is not remedied by the ACCC's condition. Free TV therefore submits that this condition should be amended as proposed below:

Proposed amendment to condition C1.6 (and new Condition C1.7)

C1.6 APRA must publish on its website, and make available to any party upon request, each time there is a change ~~an increase~~ in a licence fee in any licence category ~~other than increases in line with CPI~~, an explanation of the matters taken into consideration in determining ~~the increase in the~~ licence fee. The provision of such information is only required to the extent that the information is not commercial-in-confidence.

C1.7 Each time APRA commences negotiations with a prospective or current licensee it must provide an explanation of the matters taken into consideration in determining its proposed licence fee even if APRA proposes no change to the licence fee or terms. The provision of such information is only required to the extent that the information is not commercial-in-confidence.

4.5 Even if the proposed transparency measures are amended to make them relevant to negotiations with free to air broadcasters, it is important the ACCC appreciates that transparency alone will not be sufficient to overcome APRA's market power if APRA is not required to apply and adhere to appropriate principles for the negotiation of licence fees. Without such principles, the ACCC's conditions will not be sufficient to justify the granting of this authorisation. We discuss these concerns in further detail below.

5. Negotiating framework and pricing principles

5.1 The existing alternative dispute resolution (**ADR**) process is not an effective mechanism for addressing APRA's market power. As noted above, it is Free TV's experience that APRA is inflexible in its insistence that licence fees cannot decline in real terms. The ADR process provides no framework for negotiations and no mechanism to properly test such a stance. In practice, the vast majority of disputes handled through this process relate to disagreements between APRA and rights holders, not licensees. As a way of resolving disputes relating to licence fees, this mechanism is currently ineffective.

5.2 Binding dispute resolution is available through the Copyright Tribunal. However, a proceeding in the Copyright Tribunal involves complex regulatory litigation. The ACCC (at paragraph 4.137 of the Draft Determination) has recognised that the cost of dispute resolution in the Copyright Tribunal is currently prohibitive for most licensees.

5.3 Additional measures are required to produce a robust negotiation framework that is capable of addressing APRA's market power. Specifically, the ACCC should impose conditions that prescribe pricing principles to be taken into account by APRA in developing licence fees and applied by parties in licence negotiations.

5.4 Appropriate pricing principles already exist, in the ACCC's 2019 *Copyright Guidelines*. While these Guidelines were developed to assist the Tribunal in the determination of disputes relating to copyright remuneration, they reflect the ACCC's current thinking as to the appropriate methodology for the determination of copyright licence fees. The Guidelines' focus on the willingness of parties to interact provides a means by which market conditions faced by licensees can be taken into account in the process of determining licence fees.

5.5 Given that these Guidelines are relevant in the determination of disputes, Free TV cannot see why it would not be appropriate for the ACCC to require APRA to take these into account in setting and negotiating licence fees, together with the possibility that industry conditions may in fact justify a decrease in licence fees. A condition to this effect would ensure that, from the outset, negotiations were conducted under a framework that addresses the market power which APRA would otherwise bring to the process.

5.6 As well as facilitating more effective negotiations, such a condition, by encouraging consideration of the Guidelines at an early stage, has the potential to reduce the scope and complexity of any dispute process before the Copyright Tribunal. Free TV therefore submits that the conditions of authorisation should be amended as proposed below:

Proposed new condition

Condition C0 – ACCC 2019 Copyright Guidelines

C0.1 In determining licence fees for each type of licence, and in negotiating licence fees for individual licences, APRA must take into account:

- (i) the ACCC's 2019 Copyright Guidelines;*

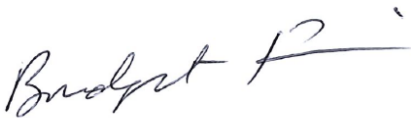
- (ii) *structural changes in the industries in which licensees operate, including changes in revenue in the industry; and*
- (iii) *the possibility that licence fees may increase or decrease over time.*

6. Conference

- 6.1 Free TV looks forward to discussing its submission at the pre-decision conference on 19 July 2019. As the ACCC is aware, Free TV represents Australia's commercial free to air broadcasters, who hold licences with APRA.
- 6.2 Free TV advises that Bridget Fair (CEO, Free TV), Sarah Waladan (Head of Legal & Regulatory Affairs, Free TV) and Stephen Peach (Advisor to Free TV) will be attending the pre-decision conference on behalf of Free TV and its members.

In the meantime, please do not hesitate to contact me if we can provide any further information to the ACCC.

Kind regards



Bridget Fair
Chief Executive Officer
Free TV Australia