

BANKI HADDOCK FIORA

LAWYERS

Level 10, 179 Elizabeth Street Sydney NSW 2000 Australia
Telephone 61 2 9266 3400 Facsimile 61 2 9266 3455 email@bhf.com.au
ABN 32 057 052 600

15 May 2019

Mr Gavin Jones
Director – Adjudication
Australian Competition and Consumer Commission
Level 17, 2 Lonsdale Street
MELBOURNE VIC 3000

BY EMAIL

Dear Mr Jones

APPLICATION BY AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED FOR REVOCATION AND SUBSTITUTION: AUTHORISATIONS A91367 – A91375

I refer to your email dated 7 May 2019.

Scope of authorisations sought

I confirm that APRA seeks authorisation in respect of other persons or classes of person who propose to engage, or become engaged, in the proposed conduct, and that such persons and classes of person are as identified in APRA's submissions.

Application for interim authorisation

APRA understands that consideration and determination of the applications may not be completed before 28 June 2019. Accordingly, the current arrangements for the collective administration of copyright may, in the absence of interim authorisation from the Commission, breach the *Competition and Consumer Act 2010* from 29 June 2019. APRA does not admit that any such breach would occur.

That non admission notwithstanding, APRA respectfully requests that the Commission, under section 91(2)(f) of the Act, suspend the operation of the existing authorisations and grant an interim authorisation in substitution for the existing authorisations, on terms identical to the existing authorisations subject to the comment below regarding OneMusic Australia.

I note that it is proposed that OneMusic Australia commence operations from 1 July 2019. To the extent that APRA has applied for authorisation of its anticipated activities trading as OneMusic Australia, APRA respectfully requests that an interim authorisation be granted for these activities also.

APRA understands that in deciding whether to grant interim authorisation the Commission may consider a variety of factors, including: the object of the Act, which includes enhancing the welfare of Australians through the promotion of competition; the extent to which the existing market will change if interim authorisation is granted; the urgency of the need for interim authorisation; the possible harm to the applicant if interim authorisation is not granted;

the possible harm that parties such as consumers and competitors may suffer if a request for interim authorisation is granted or denied; or any possible public benefits or detriments that the ACCC can assess at the time of considering the request for interim authorisation.

In light of these principles, APRA considers that the following factors are relevant to the Commission's consideration.

1. APRA has conducted its business in accordance with the existing authorisations since 2014. Nothing in APRA's existing or proposed conduct is indicated to further lessen competition in any market in which APRA operates. APRA has submitted that any changes in the markets in which it operates have only had the effect of increasing competition.
2. Accordingly, interim authorisation on the same terms as the existing authorisations will ensure that the public continues to enjoy the benefits conferred under the existing authorisations. Interim authorisation will have the effect of maintaining the status quo.
3. To the extent that APRA has applied for authorisation with respect to its activities trading as OneMusic Australia, APRA says that there is no material change to the legal basis on which it will acquire rights from its members or grant rights to licensees. Further, the launch of OneMusic Australia has been the subject of lengthy consultation in the market and is expected to occur, and the licensing activities of APRA trading as OneMusic Australia will have the benefit of the existing conditions to authorisation, including Plain English Guides and access to ADR. Most of the submissions made by affected third parties have indicated a broad acceptance of the advantages of efficiency that will be offered by OneMusic Australia.
4. The need for an interim authorisation is brought about by the complexity of the APRA business and the number of third party submissions, rather than by the delay of any party.
5. If interim authorisation is not granted, APRA's entire operations will be at risk. In the absence of an interim authorisation, APRA would be required to avoid the possibility of breach of the Act. APRA regards such possibility arguable at best and makes no admissions, however it would be required to at least consider the termination of its more than 100,000 membership arrangements, arrangements with affiliated societies, and licence agreements with more than 145,000 licensees. This would increase the likelihood of large scale infringement of copyright, and cause great confusion in a market that is very familiar with the operations of APRA. It would be highly damaging to sophisticated digital services that rely on the simplicity of the APRA blanket licence to operate their complex businesses.
6. There are in essence, four possible scenarios arising out of the application for interim authorisation:
 - (a) if the interim authorisation is granted and the application was also granted, the granting of the interim authorisation would not have any impact on any party as the status quo would continue uninterrupted;
 - (b) if the interim authorisation is granted and the application was not granted, the granting of the interim authorisation would have no net impact on any party as the end result would be the same, except that it would be delayed by the time taken to make the final determination of the application. This is

the case regardless of whether licences are granted by APRA trading in its own name or as OneMusic Australia;

- (c) if the interim authorisation is not granted but the application was granted, the adverse consequences set out in paragraph 5 would occur. In addition, following final determination, steps to rectify and reverse those adverse consequences would be required. This would cause considerable disruption and cost to the public; or
 - (d) if the interim authorisation is not granted and the application was also not granted, the granting of the interim authorisation would have no net impact on any party as the same consequences would occur, except they would occur earlier.
7. As can be seen from the above, the only fact scenarios giving rise to significant public harm arises out of the premature cessation of the currently authorised conduct.
 8. APRA respectfully submits that it is preferable to allow the existing authorisations to continue on an interim basis pending a final decision, because the application review process will enable the possible effects of a change in the authorisation to be properly, fully and more accurately assessed.
 9. As set out above, the disruption to the market and possible rectification required in returning it to a pre authorisation state would be considerable.
 10. Most of the third parties making submissions have been broadly supportive of APRA and accept that there are public benefits that flow from APRA's activities, even where they have also criticised aspects of APRA's operations.
 11. APRA submits that a person applying in good faith for consideration of, in effect, continuation of an existing authorisation should not be obliged to put its case for the continuation fully, in an application for interim authorisation. To do so would be costly and would involve considerable duplication of resources. Further, if a party failed to put its case fully and interim authorisation was denied because of that, the consequences could be extreme and difficult to reverse.

APRA acknowledges that the Commission's decision in relation to this interim authorisation is not indicative of its final decision on this matter and that, if granted, the Commission may revoke the interim authorisation at any time under section 91(2AB) of the Act.

Please do not hesitate to contact me if you have any questions about this matter.

Yours sincerely



Kate Haddock
Partner
Direct line: 9266 3412
email: haddock@bhf.com.au