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1 June 2004

Mr Tim Grimwade
General Manager, Adjudication
Australian Competition & Consumer Commission
470 Northbourne Avenue
DICKSON ACT 2602

FILE No:
DOC:
MARS/PRISM:

Dear Mr Grimwade

AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED: APPLICATION FOR REVOCATION AND SUBSTITUTION, AND APPLICATION FOR INTERIM AUTHORISATION

I refer to our meeting on 30 March 2004, and to my subsequent telephone conversations with Joanne Palisi.

We act for Australasian Performing Right Association Limited (APRA). APRA's authorisation numbers A30186, A30187, A30188, A30190, A30190, A30191 and A30193 are due to expire on 30 June 2004.

We note the terms of notification number N30751. As discussed APRA seeks to revoke the existing authorisations and substitute new authorisations on identical terms except for their duration.

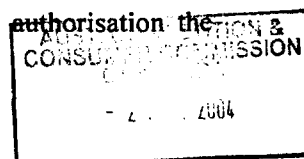
I enclose APRA's statement in support of the revocation and substitution.

APRA understands that consideration and determination of the application will not be completed before 30 June 2004. As you are aware, this means that the current arrangements for the collective administration of copyright may, in the absence of interim authorisation from the Commission, breach the *Trade Practices Act 1974* from 1 July 2004. APRA does not admit that any such breach would occur.

In order to protect the arrangements from legal action while the Commission considers the merits of APRA's application, 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.

APRA understands that in deciding whether to grant interim authorisation the Commission may consider a variety of factors, including:

- (a) the necessity of the interim authorisation;
- (b) any harm that the applicant, consumers and competitors may suffer as a result of the interim authorisation; and



- (c) the ability of the market to return to its pre-interim authorisation state should final authorisation be denied, although APRA does not admit that any such denial should follow, nor that unauthorised conduct is in breach of the Act.

APRA also understands that the ultimate concern of the Commission in deciding to grant the requested interim authorisation will be the benefit of the public.

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

1. No material change in circumstances

- 1.1 The Tribunal imposed a time limitation on the existing authorisations because it considered that technological and other developments might, over time, affect its determination that "the public benefit arising from APRA's collective administration of performing rights exceed[s] the anti-competitive detriments flowing from its operations".
- 1.2 APRA contends that there have been no such developments (and indeed that the changes that have occurred in the market highlight the public benefit offered by APRA's operation). Accordingly, APRA contends that 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.

2. Necessity

- 2.1 As stated above, interim authorisation is necessary to protect the arrangements from legal action pending full consideration and determination of APRA's application. In the absence of interim authorisation, APRA would, from 1 July 2004, seek to avoid contravention of the *Trade Practices Act 1974*, though APRA regards such possibility arguable at best and makes no admissions which may mean that it would be obliged to cease acting as a copyright licensing and collection society. APRA, being unable to fulfill its functions, would be obliged to:
- (a) revoke or suspend all assignments of copyright to it from its more than 36,000 members;
 - (b) terminate or suspend its agreements with overseas collecting societies in other jurisdictions requiring it to administer and collect royalties; and
 - (c) terminate or suspend its agreements with more than 65,000 licensees permitting them to perform or communicate APRA's repertoire of more than 2.9 million works.

If this occurred, APRA's more than 36,000 members would be obliged individually to license their performing and communication rights to, amongst others, commercial television and radio stations, cinemas, hotels and sporting venues.

2.2 That is, APRA's more than 65,000 licensees would be obliged to seek licences directly from more than 36,000 individuals, including individuals and collecting societies based overseas, to perform or communicate the more than 2.9 million works in APRA's repertoire.

3. Harm

3.1 A range of costs would flow from the circumstances set out above, including the cost of negotiation of the required agreements on such a scale, which would be borne by copyright owners and users. There would also be a significant risk of widespread copyright infringement, as even with the best will in the world copyright owners and users would be unable to manage the sheer scale of copyrights to be licensed. Ultimately the costs to the public would be substantial.

3.2 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 no 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;
- (c) if the interim authorisation is not granted but the application was granted, the adverse consequences set out in paragraph 2.1 and 2.2 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.

3.3 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.

4. Ability of the market to return to its pre-interim authorisation state

4.1 APRA contends 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.

4.2 As set out above, the disruption to the market and possible rectification required in returning it to a pre authorisation state would be considerable.

5. Agreement from affected industry

As is set out in the attached application, APRA is currently involved in litigation with the cinema industry. Representatives of the cinemas have indicated that they will not oppose the granting of interim authorisations to APRA.

6. Good faith

APRA also contends 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.

7. Acknowledgement

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



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